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[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT:—LORD OAKSEY, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Sri Raja Yarlagadda Siva Rama Prasad Bahadur .. *Appellant**

v.

Majeti Potharaju and others .. *Respondents.*

Madras Estates Land Act (I of 1908), *section* 55—*Right to claim relief under—Proof of relationship of landholder and ryot—Necessity—Plea of abandonment if sustainable when lack of cultivation was due to the Zamindar's failure to keep tank in repair—Privy Council practice—Special leave to appeal—Appellant, if can raise grounds other than those on which special leave was granted.*

Before a ryot can claim relief under section 55 of the Madras Estates Land Act he has to show that the relationship of landholder and ryot subsists when he claims the relief.

In a suit under section 55 of the Madras Estates Land Act to compel the defendant to issue a patta to them in respect of the suit lands, the plaintiffs based their claim on the ground that the land was held by their ancestors as ryoti-land, that they were occupancy tenants thereof, that over 30 years prior to suit the tank which was feeding the suit lands got silted up and was not kept in repair by the landholder with the result that there was no cultivation and that subsequently owing to the excavation of a new canal the lands became fit for cultivation and that in those circumstances, their right to cultivate the lands as ryots of defendant's estate continued and he should therefore be compelled to execute patta in their favour. But the defendant contended that the plaintiffs or their ancestors had abandoned their rights in the suit land.

Held, the question whether there had been an abandonment or not is an inference to be gathered from the facts of the case. "Abandonment" implied an intention to abandon which was clearly absent in the case. The plaintiffs allowed the land to remain uncultivated only because the defendant who was under a legal duty to repair the tank failed to keep it in good repair. The suit land was never dealt with by the Zamindar in a manner which showed that he intended to resume it or exercise control over it. The situation in which the land was allowed to lay fallow was brought about by the defendant's neglect in discharging his legal obligation and by no act on the part of the plaintiffs. When the land became fit for cultivation, the plaintiffs intended to cultivate it and applied for patta. In the circumstances, the plea of abandonment failed.

Gajapathi Krishna Chandra Deo v. *Raja of Vizianagaram*, (1930) 60 M.L.J. 662 and *Madras Railway Co.* v. *Zamindar of Carvatenagarum* (1874) L.R. 1 I.A. 364, referred to.

Where a case is brought before the Board after obtaining special leave, the appellant will not be permitted to travel beyond the specific grounds on which special leave was granted to him by the Board.

Pringle, K.C. and *Subba Row* for Appellant.

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR.—This is an appeal by special leave from a judgment and decree of the High Court of Judicature at Madras dated 12th September, 1944, which set aside the judgment and decree of the District Court of Kistna at Chilakalapudi, which affirmed the judgment and decree of the Court of the Deputy Collector, Bhandar.

* P.C. Appeal No. 1 of 1947. 18th January, 1949.

The defendant is the appellant before the Board, and the plaintiffs are the respondents The latter do not appear before the Board, but Mr Pringle, the learned Counsel for the appellant has stated all the necessary facts fully and fairly.

The appellant and the respondents will hereinafter be referred to as the defendant and the plaintiffs respectively

The appeal arises out of a suit instituted by the three plaintiffs under section 55 of the Madras Estates Land Act (I of 1908), to compel the defendant to issue a "patta" to them in respect of about 35 acres and 86 cents of land comprised in survey Nos 205 and 63 The plaintiffs belong to a village situated in the estate of the defendant, the Zamindar of Devarakota Section 55 of the Madras Estates Land Act runs as follows :

"When a landholder for three months after demand fails to grant a patta in such terms as the ryot is entitled to receive it shall be lawful for a ryot to sue for such a patta before the Collector"

Before a ryot can claim relief under section 55 of the Act he has to show that the relationship of landholder and ryot subsists when he claims the relief The question for decision in this appeal is whether the plaintiffs have been able to establish that relationship between them and the defendant that is whether they own the right of permanent occupancy in the land or not

The claim of the plaintiffs was based on the ground that the land was held by their ancestors as ryoti-land, that they were the occupancy tenants thereof, that over 30 years ago the tank which was feeding this land became breached and silted, that consequently owing to the excavation of what is known as the East Bank Canal, the lands became fit for cultivation In the circumstances, they contended that their right to cultivate the lands as ryots of the defendant's estate continues and he should therefore be compelled to execute "patta" in their favour.

In his written statement the defendant stated that "neither the plaintiffs nor their ancestors have any kind of right" to the land. He alleged that owing to collusion between an ancestor of the plaintiffs and the then "karnam" certain fraudulent entries were made in the Survey Registers of 1890, and that the entries were not binding on him He also stated that owing to the construction of the flood bank to the river Kistna, the tank feeding the land became silted and

"unfit for cultivation" and "so the said entire land being kept by the estate as pasture *beedu* was not only being used for grazing their own cattle but were also being enjoyed by leasing them out on pasture tax to others also"

The issues framed in the suit were :

(1) Whether the plaintiffs are entitled to obtain a patta for the suit lands and if so, on what terms ?

(2) To what relief?

The trial Court dismissed the suit on the ground that the relationship of landlord and tenant between the parties in respect of the suit land was not made out and that the suit land could not be localised

On appeal, the learned District Judge held that the plaintiffs' ancestors were the ryots of about 37 acres of land which the plaintiffs claimed in the suit ; but he held that the plaintiffs' ancestors must be deemed to have abandoned their right to the land, and on that ground dismissed the appeal. He found as a fact that :

"some time between 1890 and 1900 the land ceased to be cultivated on account of the breach of the tank, and consequently that the lands remained uncultivated since then"

It may be mentioned here that it is the duty of the Zamindar to keep the irrigation tanks in good repair. As regards his duty in this matter, in *Gajapathi Krishna Chandra Deo* v *Rajah of Vizianagaram*[1], Kumaraswami Sastri, J, quoted the following passage from the decision of the Privy Council in *Madras Railway Company* v. *Zamindar of Carvatenagarum*[2] —

1. (1930) 60 M.L J 662.   2. (1874) L R. 1. I.A. 364

"The public duty of maintaining existing tanks, and of constructing new ones in many places, as originally undertaken by the Government of India, and upon the settlement of the country has, ı many instances, devolved on Zamindars of whom the defendant is one The Zamindars have o power to do away with these tanks, in the maintenance of which large numbers of people are iterested, but are charged under Indian Law, by reason of their tenure, with the duty of preserving ad repairing them."

Iis Lordship also observed at page 669

"Under the Madras Estates Land Act the tenants can compel a landlord to repair a tank which the source of irrigation by a proper application to the Collector"

'he exact finding of the learned Judge in the present case was as follows ·

"The inference from these facts is that the plaintiffs' ancestors did not want to have the land. 'hen it ceased to be useful for cultivation because they did not want to pay kist to Zamindar and iat the Zamindar has been in possession of it since then, that is, since before 1900, letting it out 'r pasture and that after the excavation of the east bank canal he let out a portion of the block on attas and cultivated the remaining lands In these circumstances the proper inference is that ie plaintiffs and their ancestors abandoned the land Consequently there is no subsisting relationship ow of landlord and tenant between the Zamindar and the plaintiffs"

The learned Judge of the High Court who heard the appeal from the District udge's decision pointed out that there was no plea in the written statement that he plaintiffs or their ancestors if they had the rights claimed ever abandoned them, ıeie was no issue about it, that no witnesses spoke about it and that it was not ossible for him to uphold the finding of the District Judge that the plaintiffs' ncestors had abandoned their interest in the land The learned advocate for the efendant Zamindar pointed out that his real case was that

"the plaintiffs' rights became extinguished by adverse possession on the part of the defendant"

'he learned Judge remanded the case to the District Judge to submit findings n the questions of adverse possession and on some other questions (the nature of 'hich appears sufficiently from the questions themselves) none of which is of any ital importance (for the purposes of this appeal) having regard to the line of rgument pursued by the learned counsel for the appellant. Findings were called ɔr on the following questions —

(1) Whether the defendant has proved that the plaintiffs' right became xtinguished by reason of adverse possession on his part for over the statutory period?

(2) Whether it is not open to the plaintiffs to claim a patta for the whole xtent by reason of the fact that there were other persons shown in Exhibit A as ɔint pattadars?

(3) What is the correct extent of the land held by the four persons or their ncestors and what is the extent to which the plaintiffs would be entitled in any vent?

›n the question of adverse possession, the learned Judge observed that one question 'hich the lower Court would have to consider was :

"whether the defendant who is under the legal duty to maintain the irrigation work in good pair and who neglects his duty for whatever reason it might be, can claim a right by adverse possession against the ryot in respect of the lands which are left uncultivated owing to his default"

On all the questions findings were recorded in favour of the plaintiffs. The :arned District Judge accepted the evidence relating to the plaintiffs' title to the ınd. In the course of his discussion of the question of adverse possession, which e examined from the standpoint indicated by the High Court, he observed

"It . follows that even on the assumption that the Zamindar had in some years let out ııs land as pasture ground, it does not necessarily follow that he exercised title adverse to the owner pecially in view of the circumstance that the land was lying fallow or waste unfit either for wet or r dry cultivation"

ınally, he recorded his finding :

"that defendant has miserably failed to prove that plaintiffs' right has become extinguished / reason of adverse possession"

Objections taken to the findings were overruled by the learned Judge He accepted the findings and held that the plaintiffs were entitled to a "patta" for the land Later, the amount to be paid as rent was fixed after enquiry by the Deputy Collector and the High Court finally passed a decree

> "directing the defendant landholder to issue a patta in accordance with the findings for the area found at the rate of rupee one per acre"

Before the Board, Mr Pringle argued that (1) in view of the facts of the case the plaintiffs have failed to establish affirmatively that they have subsisting and continuing occupancy rights in the suit land because between 1890 and 1908, when the Madras Estates Land Act was passed, the land remained uncultivated and that (2) the proved facts show conclusively that they or their ancestors had abandoned the land It may be mentioned here that on the question of adverse possession on which a "finding" against the defendant was submitted by the District Judge, the learned counsel stated that he was prepared to admit that, i there was proof of a clear continuing title in the plaintiffs, acts of the defendant while the land was temporarily out of cultivation would not disturb the plaintiffs title In this connection their Lordships may also observe that the other "findings" submitted by the District Judge are plainly questions of fact and cannot be gone into before the Board

Before dealing with the arguments addressed by the learned counsel it will be advantageous to summarise the facts which appear from the evidence The defendant is the Zamindar of Devarakota. The land claimed by the plaintiffs lies within the ambit of the Zamindari—a permanently settled estate The documentary evidence shows that their ancestors were registered in public records as owners of the land and that grain used to be delivered by the plaintiffs' ancestors to the Zamindar Sometime between 1890 and 1900 the land ceased to be cultivated on account of the breach of the tank feeding the land and consequently the

> "lands remained uncultivated since then" "It is common case and it is admitted in the written statement in express terms that the lands became unfit for cultivation whether as wet or dry."

(see the judgment of the High Court) This fact is also expressly admitted by the defendant's witnesses The ryots who were cultivating the lands under the tank were unable to do so owing to the fact that the tank became breached and the defendant who was under a legal duty to keep it in good condition, would not repair it

Exhibit I series are "pattas given to the plaintiffs from 1900 onwards they contain certain dry lands" The suit lands ceased to be included in the pattas since before 1900 The plaintiffs stated that this was due to the fact that the land ceased to be cultivated. Ex II series show that 400 acres out of the mamu wet lands had been leased out for pasturage, but the suit land is not included in the lands leased out under exhibit II. There is no reliable evidence that the land was used by the Zamindar for the pasturage of his own cattle ; nor is there any evidence of any act of actual dispossession by the Zamindar During the long period that the land lay fallow and unfit for cultivation, admittedly no rent was demanded by the Zamindar, and no rent has been paid by the ryot The Courts have found that the plaintiffs' rights have not been extinguished by adverse possession by the Zamindar

Mr. Pringle's first contention that the plaintiffs have failed to establish affirmatively that they had at the relevant date rights of occupancy in the suit land has reference to the finding that :

> "between 1890 and 1900 the land ceased to be cultivated on account of the breach of the tank and consequently the land remained uncultivated since then"

The title of the plaintiffs to the suit land has been established, and it has been shown that their ancestors used to cultivate it before 1890, but that cultivation ceased between 1890 and 1900 owing to the Zamindar's default in repairing the tank Since then the land remained uncultivated It has not been proved that anyone has actually dispossessed them of the land With a view to putting an end to th

sputes between landlords and their tenants in possession of land regarding their spective rights, the Madras Legislature passed the Madras Estates Land Act of 1908) in 1908. Section 6 (1) of the Act enacts that:

> "subject to the provisions of this Act, every ryot now in possession or who shall hereafter be :mitted by a landholder to possession of ryoti land not being old waste situated in the estate of such adholder shall have a permanent right of occupancy in his holding . . ."

xplanation (1) of the section says

> "For the purposes of this sub-section, the expression 'every ryot now in possession' shall include ·ery person who, having held land as a ryot, continues in possession of such land at the commence-ent of this Act"

rima facie by virtue of the provisions of the Act the plaintiffs must be held to have cquired rights of occupancy in the suit land when the Act came into force.

The learned counsel argues that the above presumption in favour of the plaintiffs' ccupancy rights is inapplicable in the present case, because the land is not "ryoti" and inasmuch as it remained uncultivated since 1890 onwards, and in the ircumstances, the burden was on the plaintiffs to prove affirmatively that heir occupancy rights still continued to subsist

Section 3, clauses (15 and 16) define "ryot" and "ryoti land" respectively:

> "'Ryot' means a person who holds for the purpose of agriculture ryoti land in an estate on ondition of paying to the landholder the rent which is legally due upon it."

> "'Ryoti land' means cultivable land in an estate other than private land . . . . ."

hortly stated, the learned counsel's argument amounts to this, namely, that this efinition does not apply in view of the fact that the land remained uncultivated t the time when the Act was passed

Without expressing any opinion about the soundness or otherwise of this argu-nent, their Lordships think that it is not necessary to pursue it further, as in their pinion the defendant should not be permitted to raise this question now for the irst time before the Board At no stage of the case was this argument ever put orward by the defendant No reference to it is to be found in the pleadings or in he judgments of the Courts in India, nor has it been raised in the petition to the Board asking for special leave The case of the defendant so far has been that the laintiffs have no title to the land, and if they had any title they have abandoned t or lost it by adverse possession That the land has not been proved to be "ryoti and" in the sense now indicated has not been put forward as a specific ground of complaint in any of the proceedings thus far taken by the defendant. Their Lordships are of opinion that in a case brought before the Board after obtaining pecial leave the defendant should not be permitted to travel beyond the specific grounds on which special leave was granted to him by the Board Their Lordship would therefore disallow this argument

The second argument relates to the question whether the plaintiffs may be said to have abandoned their rights to the suit land As already stated this question was decided against them by the District Judge who first heard the case on appeal. Examining the facts found by the Courts in India their Lordships are not prepared to hold that the evidence shows that the plaintiffs have abandoned their rights. Whether there has been an abandonment or not is an inference to be gathered from the facts of the case "Abandonment" implies an intention to abandon which s clearly absent in the case The plaintiffs allowed the land to remain uncultivated because the defendant who was under a legal duty to repair the tank failed to keep t in good repair and for no other reason. It is true that the land was not included in the patta, because if they insisted on showing it in their pattas they would be asked to pay rent for it As the land remained fallow they naturally did not desire to pay any rent and so did not ask for its inclusion in the patta. Section 4 of the Estates Land Act says:

> "Subject to the provisions of this Act, a landholder is entitled to collect rent in respect of all ryoti land in the occupation of a ryot"

The defendant could have demanded payment of the rent, but he never made any demand It is specifically stated in the findings submitted by the District Judge.

"Admittedly, no rent was demanded during the long period by the Zamindar and no rent has been paid by the ryot"

The suit land was never dealt with by the Zamindar in a manner which showed that he intended to resume it or exercise control over it The situation in which the land was allowed to lie fallow was brought about by his neglect in discharging his legal obligation and by no act on the part of the plaintiffs When the land became fit for cultivation, they intended to cultivate it and applied for patta In the circumstances, their Lordships are unable to draw an inference from the facts that the plaintiffs have abandoned their rights to the suit land The plea for abandonment therefore fails.

For the above reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed

Solicitors for Appellant *Lambert and White*

Respondents not represented

V S. *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Fort William in Bengal)

PRESENT—LORD PORTER, LORD MACDERMOTT AND SIR JOHN BEAUMONT

Joy Chand Lal Babu . *Appellant**

v

Kamalaksha Chaudhury and others . *Respondents.*

Civil Procedure Code (V of 1908), *section* 109—*Applicability to orders made in revision by the High Court—Decision of subordinate Court that loan is a " commercial loan " within the meaning of the Bengal Money-Lenders Act—Interference by High Court under section* 115, *Civil Procedure Code—Bengal Money-Lenders Act (X of* 1940), *section* 2 (4) *and* (22)—*Commercial loan—Onus—Suit or proceeding " pending "—Meaning of*

Orders passed in revision do not fall within section 109 (*a*), Civil Procedure Code

Sub-section (*c*) of section 109 is clearly wide enough to cover an appeal from an order made in revision

Although error in a decision of a Subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (*c*), nevertheless if the erroneous decision results in the Subordinate Court exercising a jurisdiction not vested in it by law or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (*a*) or sub-section (*b*) and sub-section (*c*) can be ignored

Where an application under sections 30 and 36 (6) (*a*) (ii) of the Bengal Money-Lenders Act, is dismissed by a Subordinate Court as it was of opinion that the loan in question was a " Commercial loan " within the meaning of the Act, it is open to the High Court to interfere in revision under sub-section (*b*) of section 115, Civil Procedure Code, with such an order where the High Court takes the view that the loan was not a " Commercial loan "

The question whether a loan is a " Commercial loan " has to be regarded from the point of view of the lender, and it has to be determined for what purpose the loan was advanced, the burden of proving that the loan was a commercial one being on the lender

Where though a mortgage suit was filed long before 1st January, 1939, and possession in execution also had been given before that date, the suit would be pending within the meaning of section 2 (22) of the Bengal Money-Lenders Act, if the right to obtain a personal decree exists on 1st January, 1939

Appeal against the judgment of the High Court at Calcutta, dated the 13th August, 1943

Pringle for Appellant, *Khambatta* for the Respondents.

Their Lordships Judgment was delivered by

SIR JOHN BEAUMONT—This is an appeal from an Order of the High Court of Judicature at Fort William in Bengal passed in its Civil Revisional Jurisdiction

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* P. C. Appeal No. 70 of 1947. 17th March, 1949

dated the 13th August, 1943, which set aside an order of the Subordinate Judge of Burdwan dated the 18th July, 1942, rejecting the petition of the Respondents Nos. 1 to 10 under sections 30 and 36 (6) (*a*) (ii) of the Bengal Money-Lenders Act, 1940 (Act X of 1940) (hereinafter referred to as " the Act,") for re-opening a mortgage decree dated the 9th October, 1931, passed against the Respondents in mortgage Suit No 198 of 1930

The questions argued upon this appeal were first, a preliminary objection taken by the Respondents that this appeal is incompetent, secondly, a preliminary objection taken by the appellant that the revision application to the High Court from which this appeal is brought was incompetent Apart from these preliminary objections the only two matters urged against the Order of the High Court appealed from were first, that the loan to which the application of the Respondents related was a " commercial loan " to which the Act did not apply; and secondly, that the suit in which the application of the Respondents was made was not a " suit to which this Act applies " as defined by the Act, and consequently that the Respondents were not entitled to any relief under the Act

The material facts are these

On the 6th January, 1925, the Respondents or their predecessors-in-title executed a registered *karbarnama*, or bond for obtaining loans for business, in favour of the Appellant for securing loans up to a sum of Rs 25,000 The material provisions of this document will be referred to later The appellant on the 15th August, 1930, instituted a mortgage suit No 198 of 1930, claiming a sum of Rs. 40,600 and asking for the enforcement of the mortgage security On the 5th October, 1931, a compromise decree was passed in the said suit for a total sum of Rs 45,825-8-0 with interest payable in sixteen instalments, and it was provided that on failure to pay one instalment the whole of the outstanding sum would be due and recoverable with interest at 10½ per cent, per annum by sale of the mortgaged properties, and in case of deficiency by sale of the other properties of the mortgagors and also from the persons of the mortgagors by executing the decree

Default was made in payment of the first instalment under the compromise decree, and on the 20th August, 1932, application was made by the Appellant for execution of the decree In succeeding years further applications in execution were made, and all the properties subject to the decree were eventually sold and purchased by the appellant The last sale in execution was confirmed in July, 1938, and upon an application for possession made by the Appellant on the 20th September, 1938, possession was ordered to be delivered by the Court on the 1st November, 1938, but owing to failure on the part of the execution clerk to return the writ to the Court no order noting the fact of delivery of possession and finally disposing of the application for possession was entered on the records of the Court until the 3rd June, 1940. Meantime, namely, on the 29th November, 1938, there was an application by a third party under rule 100, Order 21, which was not disposed of until April, 1939

On the 30th August, 1941, Respondents Nos 1 to 10 filed miscellaneous application No 127 of 1941 in the Court of the Subordinate Judge at Burdwan asking for relief under sections 30 and 36 of the Act

The Act was passed on the 1st August, 1940, and the following provisions of it are relevant to this appeal

" Section 2. In this Act, unless there is anything repugnant in the subject or context—

* * * * * * *

(4) " commercial loan " means a loan advanced to any person to be used by such person solely for the purpose of any business or concern relating to trade, commerce, industry, mining, planting, insurance, transport, banking or entertainment, or to the occupation of wharfinger, warehouseman or contractor or any other venture of a mercantile nature, whether as proprietor or principal or agent or guarantor,

* * * * * * *

(22) "suit to which this Act applies" means any suit or proceeding instituted or filed on or after the 1st day of January, 1939, or pending on that date and includes a proceeding in execution—

(a) for the recovery of a loan advanced before or after the commencement of this Act,

(b) for the enforcement of any agreement entered into before or after the commencement of this Act, whether by way of settlement of account or otherwise, or of any security so taken in respect of any loan advanced whether before or after the commencement of this Act. or

(c) for the redemption of any security given before or after the commencement of this Act in respect of any loan advanced whether before or after the commencement of this Act.

Section 30 Notwithstanding anything contained in any law for the time being in force, or in any agreement

(1) no borrower shall be liable to pay after the commencement of this Act,—

(a) any sum in respect of principal and interest which together with any amount already paid or included in any decree in respect of a loan exceeds twice the principal of the original loan,

(b) on account of interest outstanding on the date up to which such liability is computed, a sum greater than the principal outstanding on such date

(c) interest at a rate *per annum* exceeding in the case of—

(i) unsecured loans, ten *per centum* simple,

(ii) secured loans, eight *per centum* simple,

whether such loan was advanced or such amount was paid, or such decree was passed or such interest accrued before or after the commencement of this Act,

(2) no borrower shall, after commencement of this Act, be deemed to have been liable to pay before the date of such commencement in respect of interest paid before such date or included in a decree passed before such date, interest at rates *per annum* exceeding those specified in sub-clause (c) of clause (1);

(3) a lender shall be entitled to institute a suit at any time after the commencement of this Act in respect of a transaction to which either or both of the preceding clauses applies or apply

Section 36 (1) Notwithstanding anything contained in any law for the time being in force, if in any suit to which this Act applies, or in any suit brought by a borrower for relief under this section whether heard *ex parte* or otherwise, the Court has reason to believe that the exercise of one or more of the powers under this section will give relief to the borrower It shall exercise all or any of the following powers as it may consider appropriate . . "

Then follow a list of powers which may be exercised by the Court, with qualifications on the execution of such powers, including a power to re-open any transaction and take account between the parties, and a power to release the borrower from all liability in excess of the limits specified in clauses 1 and 2 of section 30. For the purposes of this appeal it is not necessary to consider these powers in detail. Section 40 (5) of the Act provides that in any suit or proceeding the burden of proving that a loan is a commercial loan shall be on the money-lender who advanced the loan

The application was heard by the Subordinate Judge of Burdwan who gave judgment on the 18th July, 1942 He held that the loan made by the Appellant to the Respondents or their predecessors was a commercial loan within the meaning of the Act, and that such loan, therefore, did not come within the terms of the Act. Accordingly, he dismissed the application. However, he went on to consider the question whether the suit in which the application was made was a suit to which the Act applied within the definition contained in section 2 (22) of the Act and came to the conclusion that it was His view was that as no Order for delivery of possession was recorded till June, 1940, and as the proceeding for delivery of possession was a continuation of the application for execution it followed that a proceeding in execution was pending on the 1st January, 1939

From the Order of the learned Subordinate Judge an application was made in revision to the High Court at Calcutta, and such application was heard on the 18th November, 1942. The learned Judges held, disagreeing with the learned Subordinate Judge, that the loan was not a commercial loan. They agreed with the learned Subordinate Judge in thinking that the suit was one to which the Act applied, basing their opinion largely on the fact that the said application under Rule 100, Order 21, was outstanding on the 1st January, 1939 In the result they made the Rule absolute, set aside the Order of the Subordinate Judge and sent the

case back to him in order that the decree might be re-opened in accordance with the directions given by the Court. No objection to these directions has been raised before the Board

The preliminary objection taken by the Respondents is that leave to appeal to the Board was granted by the High Court under section 109 (*a*) of the Code of Civil Procedure and that that sub-section only relates to appeals from decrees or final orders passed on appeal. The Respondents contend that the sub-section does not apply to Orders passed in revision, and they point out that under section 115 a power of revision only arises in cases in which no appeal lies, so that there is a clear distinction between appeal and revision The view that Orders passed in revision do not fall within section 109 (*a*) has been accepted by High Courts in India other than the High Court at Calcutta, and their Lordships think it is correct. It appears from the record that the application for leave to appeal to His Majesty in Council was based on section 109 (*a*) and upon the hearing of the application the Court discussed matters relevant to that sub-section But the certificate granting leave to appeal is not in the record. The certificate may have been granted under section 109 generally without specifying any particular sub-section, and sub-section (*c*) is clearly wide enough to cover an appeal from an Order made in revision It was for the Respondents to produce the certificate on which their objection to the competence of the appeal is founded, and as they have not done so their preliminary objection must fail

The preliminary objection taken by the Appellant is that the High Court had no power to interfere in revision under section 115 of the Code of Civil Procedure with the order of the Subordinate Judge ; an objection which was not taken before the High Court Section 115 of the Code is in these terms —

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears—

(*a*) to have exercised a jurisdiction not vested in it by law or

(*b*) to have failed to exercise a jurisdiction so vested, or

(*c*) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit "

Mr Pringle for the Appellant admitted that no appeal lay from the Order passed by the Subordinate Judge, and he did not challenge the revisional jurisdiction on that ground Their Lordships accept this admission and express no opinion upon its correctness Mr Pringle based his objection on the principle laid down by this Board in *Rajah Amir Hassan Khan* v *Sheo Baksh Singh*[1] and *Balakrishna Udayar* v *Vasudeva Aiyar*[2] and now firmly established that a Subordinate Court does not act illegally or with material irregularity because it decides wrongly a matter within its competence. A Court has jurisdiction to decide a case wrongly as well as rightly. Mr. Pringle maintained that the learned Subordinate Judge had jurisdiction to decide that the loan was a commercial loan, and in so doing he did not act illegally or with material irregularity, and the High Court had no power to interfere in revision merely because it disagreed with his decision So far Mr Pringle is on safe ground, but the learned Subordinate Judge, having held that this was a commercial loan, was bound to go on to consider what effect that decision had upon the Respondents' application, and, since the Act in terms does not apply to commercial loans, the learned Judge was bound, upon his finding, to dismiss the application without determining whether or no the Respondents brought themselves within sections 30 and 36 of the Act as they claimed to do. In so doing, on the assumption that his decision that the loan was a commercial loan was erroneous, he refused to exercise a jurisdiction vested in him by law, and it was open to the High Court to act in revision under sub-section (*b*) of section 115 There have been a very

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1 (1884) L R 11 I A 237 I L R 11 Cal 6 (P.C)

2 (1917) 33 M L J 69 L R 44 I A 261 I L R. 40 Mad 793 (P C)

large number of decisions of Indian High Courts on section 115, to many of which their Lordships have referred Some of such decisions prompt the observation, that High Courts have not always appreciated that although error in a decision of a subordinate Court does not by itself involve that the Subordinate Court has acted illegally or with material irregularity so as to justify interference in revision under sub-section (*c*), nevertheless if the erroneous decision results in the subordinate Court exercising a jurisdiction not vested in it by law, or failing to exercise a jurisdiction so vested, a case for revision arises under sub-section (*a*) or sub-section (*b*), and sub-section (*c*) can be ignored The cases of *Babu Ram* v. *Munna Lal*[1] and *Hari Bhikaji* v *Naro Vishvanath*[2] may be mentioned as cases in which a subordinate Court by its own erroneous decision (erroneous that is in the view of the High Court), in the one case on a point of limitation and in the other on a question of *res judicata* invested itself with a jurisdiction which in law it did not possess and the High Court held, wrongly their Lordships think, that it had no power to interfere in revision to prevent such a result. In the present case their Lordships are of opinion that the High Court, upon the view which it took that the loan was not a commercial loan, had power to interfere in revision under sub-section (*b*) of section 115

The next question to be decided is whether the High Court was right in holding that the loan in this case was not a commercial loan Under the definition in the Act a commercial loan is one advanced to any person to be used by such person solely for the purpose of business, etc The matter, therefore, has to be regarded from the point of view of the lender, and it has to be determined for what purpose the loan was advanced, the burden of proving that the loan was a commercial one being on the lender Where, as in this case, the loan is secured by an instrument in writing, the terms of such instrument must have an important, and it may be a decisive, bearing upon the question The mortgage of the 6th January, 1925, which is Ex A, recites that the borrowers execute this deed of *karbarnama* (bond for obtaining loans for business) on mortgage of immovable properties to the following effect :

> " We are running rice business and rice mill at Katwa for the said business and for other expenses, we require large sums of money from time to time Such amounts are not being supplied from ourselves, and so the business is not running well Hence, we execute this *karbarnama* (that is, bond for loan transactions for business) on mortgage of immovable properties to carry on money-lending business to the extent of Rs 25,000 ."

The Appellant relies strongly on the description of the loan as " a bond for obtaining loans for business," but such a description is not inconsistent with a part of the loan being required for other purposes The learned Judges of the High Court considered that on the construction of the document it was clear that the loan was required for business and other purposes, and that, therefore, the money was not advanced solely for business purposes The Appellant contends that the recital that the money was required for business and other expenses and that they had not got the money was merely a recital of historical facts explaining why the business was not running well, and does not qualify the purpose for which the loan was obtained, which appears from its description as *karbarnama* Their Lordships are not able to accept this view They agree with the learned Judges of the High Court in thinking that the reference to " other expenses " cannot be explained on any hypothesis which confines the loan exclusively to business transactions In the result their Lordships are satisfied that the Appellant has not discharged the burden of proving that this was a commercial loan

There remains the further question of whether the mortgage suit in the present case is a suit to which the Act applies withins section 36 of the Act Section 2 (22) defines such a suit as being a suit or proceeding instituted or filed on or after the 1st January, 1939, or pending on that date The mortgage suit in this case was filed long before 1939, and the only question is whether there was any suit or proceeding pending on the 1st January, 1939 As already noted, the learned Subordi-

1 (1927) I L R 49 All 454. 2 (1885) I.L R 9 Bom 432.

nate Judge based his view that there was a suit or proceeding pending on the fact that the order disposing of the application for possession made by the decree-holders had not been noted on the records of the Court until after 1st January, 1939, though possession had been given before that date The High Court did not differ from this view, though they displayed for it no marked enthusiasm, and based their decision rather on the fact that the application under Rule 100, Order 21, was pending on the 1st January, 1939 Their Lordships hesitate to disagree with the opinion of the learned Subordinate Judge on a matter relating to the practice of his own Court They are, however, unaware of any provision in the Code of Civil Procedure which prevents delivery of possession given by the Court from being effective until the fact of delivery has been noted on the records of the Court Nor do they see any convincing reason for such a rule, particularly when, as in the present case, the delay in completing the record of the Court was due to default on the part of an officer of such a Court Nor do their Lordships attach much importance to the fact that the application under rule 100 of Order 21, was pending They share the difficulty felt by Mr Justice Henderson in *Jitendra Nath Bera* v. *Makham Lal Bera*,[1] in holding that the action of a third party can be regarded as a proceeding in execution within section 2 (22) of the Act Mr Khambatta, however, on behalf of the Respondents, has relied on a different ground for establishing that the suit was pending on the 1st January, 1939 He contends that at any time within three years from November, 1938, when the last application in execution was disposed of, the decree-holder could apply for a personal decree under Order 34, rule 6, and that the suit was pending so long as such right was open For this proposition he relies on a decision of the High Court at Calcutta, *Muhammad Kasim Ali* v *Ramesh Chandra Sil*[2] Mr. Pringle for the Appellant conceded, rightly as their Lordships think, that the suit was pending so long as there was a right to obtain a personal decree which was not barred under section 181 of the Limitation Act, but he contended that the compromise decree of the 5th October, 1931, itself contained a personal decree, and there could, therefore, be no right to obtain such a decree in the future For some unexplained reason the compromise decree has not been printed in the record, but an office copy with an English translation has been lodged with the Registrar, and their Lordships have referred to it The decree was passed in terms of the compromise between the parties The compromise states that the decree shall be considered to be the final decree in the suit and provides that on failure to pay an instalment the plaintiff shall be competent to realise the amount due by auction-sale of the property attached in execution of the decree and if the entire amount is not realised thereby, to realise the balance by attachment and sale of the other properties belonging to the Defendants and "from their persons by executing the decree" Mr Pringle's contention is that these last words amount to a personal decree for payment

Suits for the sale of mortgaged property are dealt with in Order 34 of the Code of Civil Procedure The scheme of the Code is that a preliminary decree is passed under Rule 4 by which the amount due is ascertained and in default of payment the plaintiff is given liberty to apply for a final decree directing sale of the mortgaged property or a sufficient part thereof *See* Form 5 in Appendix D. A final decree is passed under rule 5 and directs that if the amount due has not been paid the mortgaged property or a sufficient part thereof shall be sold and the proceeds brought into Court and dealt with as directed in the preliminary decree *See* Form 6 in Appendix D The final decree does not contain an order for payment, but Rule 6, provides that where the proceeds of sale are insufficient to pay the amount to the plaintiff the Court on application by him may if the balance is legally recoverable from the defendant otherwise than out of the property sold pass a decree for such balance Form 8 in Appendix D contains the form of a personal decree and orders payment of a specific sum.

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1. I L R (1942) 2 Cal 148. 2 A I.R 1947 Cal 270

The argument of Mr Pringle is that in this case the compromise decree embodies the terms of a preliminary decree, a final decree, and a decree for personal payment, and that this could be done by agreement. The decree no doubt embodies the terms of a preliminary decree and a final decree, and goes beyond a final decree in directing sale of the property of the mortgagors not included in the mortgaged property which in the absence of agreement could have been reached only in execution of a personal decree. But at the date of the compromise decree, the Court was not in a position to determine whether any balance would be legally recoverable after the sales It could only have passed a decree for payment of such balance, if any, as might ultimately be found due A decree for payment of a balance, unascertained and unascertainable till a large number of sales have been completed, and possibly then found to be non-existent, would be, to say the least of it, an unusual form of decree, and one which could hardly fail to cause serious embarrassment to a Court asked to execute such a decree against future property of the judgment-debtor not included in the compromise decree. Their Lordships are not prepared to hold that the Court which passed the compromise decree intended to make, or did make, any such order They think that the words on which Mr Pringle relies amount to no more than a submission by the mortgagors to consent to a personal decree for payment of the ultimate balance if and when any such balance should be found to be due, and legally recoverable In their Lordships' view all the points urged by the Appellant against the judgment of the High Court fail

Their Lordships will, therefore, humbly advise His Majesty that this appeal be dismissed The Appellant must pay the Costs

V S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE MACK

Gudimetla China Varahalu *Petitioner**

v.

Gudimetla Reddayya .. *Respondent.*

Civil Procedure Code (V of 1908), section 151—Inherent power to order refund of Court-fee even where there are no specific provisions for the purpose.

The petitioner filed a suit against his own father for recovery of about Rs 3,000 He paid a court-fee of Re 0-12-0 on his plaint and was given on 13th September, 1946, seven days' time for payment of deficit court-fee He re-presented the plaint only on 7th November, 1946, accompanied by an application for condonation of the delay in re-presentation and also with deficit court-fee of Rs 276-11-0 The application for condonation of delay was dimsissed and on an application for refund of court-fee under section 151 of the Code of Civil Procedure,

Held, in a case of this kind where no specific provision is made for the refund of court-fee, section 151 of the Code of Civil Procedure can be invoked to meet the ends of justice The petitioner tendered the court-fee only on the basis that his application for condonation of the delay would be admitted. As such application however was rejected, the Court-fee tendered should be refunded on equitable principles

Narayana Reddiar, In re, (1942) 1 M L J. 226, relied on

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Kakinada, dated 10th April, 1947, in I A No 418 of 1947, in unregistered O S Plaint S. R. No 7656 of 1946

K B Krishnamurthi for Petitioner

Respondent not represented

The Court delivered the following

JUDGMENT —The petitioner is a plaintiff whose application for a refund of court-fee of Rs 277-7-0, the learned Subordinate Judge rejected in a rather cryptic order which reads as follows

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* C R P No. 1677 of 1947 21st March, 1949.

"The ruling does not apply to this case Hence rejected"

He does not say what the facts are or what the ruling relied on is The facts as placed before me are briefly these :—

The petitioner filed a suit against his own father for recovery of about Rs 3,000 He paid a Court-fee of Re 0-12-0 on his plaint and was on 13-9-1946 given seven days' time for payment of deficit court-fee. He re-presented the plaint only on 7-11-1946 accompanied by an application for condonation of the delay in re-presentation and also with deficit court-fee of Rs 276-11-0 The application for condonation of delay was dismissed and on application to refund the court-fee under section 151, Civil Procedure Code, the learned Subordinate Judge passed this order which is now sought to be revised

Sections 13, 14 and 15 of the Court-Fees Act which make specific provision for refund of court-fees do not apply to the case It appears to be on all fours with the decision in *Narayana Reddiar, In re*[1] In that case the facts were very similar. A plaint was filed with insufficient court-fee. An application for review against an order rejecting it was made accompanied by the balance of the court-fee due. That application was rejected and the lower Court declined to grant a refund of the Court-fee. It was held that the Court-fee was not meant to be utilised until the petition for review presented on behalf of the petitioner was accepted by the Court. That principle, I think, is applicable to the present case, for the plaintiff tendered the deficit court-fee only on the basis that his application for condonation of delay would be admitted. With respect I am in agreement with the decision of Abdur Rahman, J , in *Narayana Reddi, In re*[1], that in a case of this kind where no specific provision is made for the refund of court-fee, section 151, Civil Procedure Code, can be invoked to meet the ends of justice There appears to have been no impediment in the way of plaintiff filing a fresh suit altogether ; nor did the rejection of the plaint prevent him from doing so This is clearly an equitable case in which the deficit court-fee tendered on re-presentation, *viz*, Rs. 276-11-0 should be refunded, and I direct accordingly

K S *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE MACK.

Swarna Rajamma .. *Petitioner**

v.

Thota Venkiah .. *Respondent.*

Civil Procedure Code (V of 1908), Order 41, rule 5—Appellate Court ordering stay on security being furnished by a prescribed date—Tender of security with draft bond within the time—Sufficiency and effect—Testing the security also need not be within that time

When stay is ordered by an appellate Court on security being furnished within a particular period what the Court contemplated was the tender of security within that time

Ganapathi Naicker v Govindarajulu Naicker, (1946) 2 M L J 217 and *Rangaswami Nadar v Pichaimani Nadar*, (1941) 2 M L J 291, followed , *Chettiyalan Kanakurup v Raman Nair*, (1942) 2 M L J 425 and *Balakrishna Aiyar v Pichamuthu Pillai*, (1921) 15 L W 186, distinguished

It would be manifestly inequitable if for no fault of his, a petitioner obtaining such stay is penalised by time being taken for objections to a draft security bond and then finding himself in the position of not being able to file a fair security bond within the time prescribed It is sufficient if the security is tendered with a draft security bond within the time prescribed by the Court This does not mean that in the event of the security tendered being found insufficient it is open to the petitioner to file fresh security He must take his stand on the security that he furnishes and if this is found to be insufficient then his petition for stay fails It is upto him to see that sufficient and acceptable security is tendered by him in the first instance

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Bapatla, dated 18th October, 1948 in E A No 224 of 1948 in O S No 55 of 1946

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1 (1942) 1 M L J 226

* C R P No. 1793 of 1948 28th February, 1949

A Raghavayya for Petitioner.

K Umamaheswaram for Respondent

The Court delivered the following

JUDGMENT —The petitioner obtained an order for stay in the High Court on 3rd September, 1948, which was made absolute on her furnishing security in Rs 3,000 to the satisfaction of the Sub-Court, Bapatla, within six weeks from that date and also depositing some costs and mesne profits within the same period. The petitioner tendered a draft security bond on 17th September, 1948 Her application was returned with some objections She re-presented it on 4th October, 1948 It was then posted on 7th October, 1948, to 18th October, 1948 for objections. On that date the Subordinate Judge held that the time allowed by the High Court order had expired on 15th October, 1948 and dismissed the petitioner's application and also disallowed time for filing objections to the draft security bond This point has already been considered and decided by Yahya Ali, J , in *Ganapathi Naicker* v *Govindarajulu Naidu*[1] He held following the view taken by Happell, J. in *Rangaswami Nadar* v *Pichaimani Nadar*[2] that it was sufficient compliance with such an order if the security had been tendered in time and that it was not necessary that the testing of the security itself and the filing of the fair security bond should be made within the time prescribed

Mr Alladi Kuppuswami has relied on the decision of Ramesam, J , in *Balakrishna Aiyar* v *Pichamuthu Pillai*[3], followed by King, J , in *Chettiyalan Kanakurup* v. *Raman Nair*[4]. That was a decision under section 17 of the Provincial Small Cause Courts Act where a defendant against whom an *ex parte* decree was passed on 26th January, 1920, filed a draft security bond on 6th February, 1920, which was ultimately accepted on 9th March, 1920, and he only filed his fair bond on the 1st April, 1920 It was held that the filing of the draft bond was not sufficient compliance with the requirements of section 17 of the Provincial Small Cause Courts Act King, J , following this decision referred to the decision of Happell, J , in *Rangaswami Nadar* v *Pichaimani Nadar*[2], but felt that the decision of Ramesam, J , was logically correct because in section 17 of the Act an alternative was given, namely, deposit or security which had to be complied within 30 days, and the statute contemplated something effectually being done within this period I prefer in cases of this kind to follow the view taken by Happell, J , and Yahya Ali, J , that when stay is ordered by an appellate Court on security being furnished within a particular period what the Court contemplated was the tender of security within that time It would be manifestly inequitable if for no fault of his, a petitioner obtaining such stay is penalised by time being taken for objections to a draft security bond and then finding himself in the position of not being able to file a fair security bond within the time prescribed

Mr Alladi Kuppuswami has urged that the correct procedure contemplated in the decisions under section 17 of the Provincial Small Cause Courts Act which should be followed in these cases also is that a fair security bond should be filed in the first instance , but at the same time he concedes that it is always open to the other side to object to the sufficiency of security, I am unable to see any difference, so far as finality is concerned, between a draft security bond and a fair security bond, if the latter can be objected to for want of sufficiency or on any other ground. This is a type of case of common occurrence, in which I think it is sufficient if the security is tendered with a draft security bond within the time prescribed by the Court. This does not mean that in the event of the security tendered being found insufficient it is open to the petitioner to file fresh security He must take his stand on the security that he furnishes, and if this is found to be insufficient then his petition for stay fails It is up to him to see that sufficient and acceptable security is tendered by him in the first instance.

1. (1946) 2 M L J 217.
2. (1941) 2 M L J 291.
3 (1921) 15 L W 186
4 (1942) 2 M L J 425

In this view this petition is allowed, but there will be no order as to costs in view of the legal position taken by the Subordinate Judge. The lower Court will give time to the respondent to furnish objections, and dispose of the application tendering security in due course on the lines indicated.

K S *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—MR. JUSTICE RAJAGOPALAN

The Public Prosecutor . *Appellant**

v

Sannidhi Sriranganayakulu . *Respondent*

Madras Prevention of Adulteration Act (III of 1918), *section* 5—*Sale or offer for sale of honey mixed with cane sugar—Offence—Absence of rules under section* 20 (1) (e)—*Effect*

Cane sugar might be innocuous material but 36 per cent of it mixed with honey offered for sale did certainly increase the bulk, weight or measure of the honey within the meaning of the proviso to section 5 (1) of the Prevention of Adulteration Act and the fraudulent intent would be obvious The fact that the purchaser had not paid the price as the sanitary inspector took away the honey from the buyer for analysis did not make the transaction any the less a sale In any event it will be an offer for sale which is punishable under section 5 (1) (*b*) of Madras Act III of 1918

Where no rules have been prescribed under section 20 (1) (*e*) of the Act by the Government the only reasonable inference could be that honey of an absolute purity had to be sold unless what was sold or offered to be sold was represented to the purchaser to be not honey but honey with an admixture of cane sugar The absence of rules in no way affects the liability of the accused for punishment under section 5 (1) (*d*) of Madras Act III of 1918

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (Accused) by the Sub-Divisional First Class Magistrate, of Bheemavaram in C A No 36 of 1947 on his file preferred against the order of the Court of the Stationary Sub-Magistrate of Bheemavaram and made in C S Nos. 173 and 310 of 1947

The Public Prosecutor (*V L Ethiraj*) Appellant in person

Kasturi Seshagiri Rao for Respondent.

The Court delivered the following

JUDGMENT —The charge against the accused was that he contravened the provisions of section 5 (1) (*b*) of the Prevention of Adulteration Act, Act III of 1918, and thereby rendered himself liable to be punished under section 5 (1) (*d*) of that Act

P. W 1 was the Sanitary Inspector of Akkiveedu When he called at the shop of the accused, P W 1, found the accused selling honey to P. W 2 After the honey had been handed over to P W. 2, P W 1 in his turn asked for some honey to be sold to him as a sample The accused refused to sell any honey to P W 1 P. W. 2 had not in the meanwhile, paid for the honey that had been sold to him P W 1 obtained that honey and when it was analysed it was found to contain 36 per cent of cane sugar.

The learned Subordinate Judge convicted the accused under section 5 (1) (*d*) of the Act and sentenced him to pay a fine of Rs 25 On appeal, the learned Sub-Divisional Magistrate, set aside the conviction and acquitted the accused. The learned Magistrate held that the transfer of honey to P W 2 did not constitute a sale Of course, unless there was a sale to P. W. 2, the accused would not come within the scope of section 5 (1) (*b*) or 5 (1) (*d*) as the case was laid against him. The learned Sub-Divisional Magistrate, however, appears, to have taken an erroneous view of what constituted a sale It was not the specific case of the accused at any stage that it was as a gift that he handed over the honey to P. W. 2. The accused denied that there had been any transfer of honey from him to P W. 2

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* Crl Appeal No 348 of 1948 26th November, 1948.

The evidence on record could leave one in no doubt on the question, that the accused did deliver honey to P W 2 who had come to the shop to buy that honey That the purchase price was not paid before P W 2 left the shop did not make it any the less a sale, though the liability of P. W. 2 to pay the purchase price remained. P.W 2 admitted that he had not paid the money, but that in no way affected the nature of the transaction which was a sale. Besides even the offer for sale is punishable under section 5 (1) (*b*) Certainly when the accused handed over the honey to P W. 2 it was in the least an offer for sale

The learned advocate for the accused contended that no rules had been prescribed under section 20 (1) (*e*) by the Government . If no such rules were framed, the only reasonable inference could be that honey of an absolute purity had to be sold, unless what was sold or offered to be sold was represented to the purchaser to be not honey, but honey with an admixture of cane sugar. P W. 2 asked for honey and it was honey as such that the accused was bound to supply. The absence of rules in no way affects the liability of the accused for punishment under section 5 (1) (*d*),

The proviso to section 5 (1) cannot apply either Cane sugar might be innocuous material but 36 per cent. of it did certainly increase the bulk, weight, or measure of the honey within the meaning of the proviso to section 5 (1), and from the circumstances of this case the fraudulent intention of the accused should be obvious

The order of the acquittal is set aside The accused will be convicted under section 5 (1) (*d*) read with section 5 (1) (*b*) of Madras Act III of 1918 and he will be sentenced to pay a fine of Rs 25, the fine originally imposed by the learned Sub-Magistrate The accused is a first offender. All the same the fine was by no means excessive In default of payment of fine, the accused will undergo simple imprisonment for ten days Time for payment of fine—15 days from the date of the receipt of records in the lower Court

K S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR. JUSTICE SOMASUNDARAM.

The Public Prosecutor . . *Appellant**

v

R. Desigan . *Respondent.*

Criminal Procedure Code (V of 1898), section 414—Scope—Sentence of Rs 100 fine in summary trial under section 260, Criminal Procedure Code for offence under Madras Rationing Order—No appeal lies.

In section 414, Criminal Procedure Code, the words " in which a magistrate empowered to act " indicate that the section applies not only to cases in which the Magistrate has got power to act under section 260 of the Code for the offences mentioned in that section but also where he is otherwise empowered to act under that section The words " empowered to act " refer not merely to implied power contained in section 260, but also refer to express powers conferred on the Magistrate by other provisions in other enactments, like Central Act XXV of 1946, empowering summary trial of offences under that Act

Accordingly, under section 414 of the Criminal Procedure Code no appeal lies against a sentence of fine of hundred rupees in a case where the accused is tried summarily under section 260 of the Code for an offence under the Madras Rationing Orde

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (Accused) by the Sessions Judge of Ramnad at Madura in Cr Appeal No 160 of 1947 on his file, (preferred against the judgment passed on the accused in C C No 275 of 1947 on the file of the Additional First Class Magistrate of Devakottai)

* Crl Appeal No 347 of 1948 26th November, 1948.

The Public Prosecutor (*V. L Ethiraj*) in person.

G. N. Chari for Respondent.

The Court delivered the following

JUDGMENT —The accused in this case was convicted by the Additional First Class Magistrate of Devakottai in C C No. 275 of 1947 and sentenced to a fine of Rs. 100 for an offence under clause 4 (2) of the Madras Rationing Preparatory Measures Order, 1945, and regulation 14 of the regulations framed under clause 12 of the Madras Rationing Order, 1945, and under rule 81 (2) of the Defence of India Rules read with section 7 (1) of Act XXIV of 1946 The accused preferred an appeal to the Sessions Judge of Ramnad who acquitted him. The Public Prosecutor has preferred this appeal against the order of acquittal.

The main ground on which the order of acquittal is attacked is that under section 414, Criminal Procedure Code, no appeal lies against this judgment of the First Class Magistrate as the case was tried summarily under section 260, Criminal Procedure Code. That section mentions what offences and classes of offences may be tried summarily under that section. It does not in terms provide for the trial of offences under the Rationing Order, but section 12 of Act XXIV of 1946, says :

"Any Magistrate or Bench of Magistrates empowered for the time being to try in a summary way the offences specified in sub-section (1) of section 260 of the Code of Criminal Procedure, 1898, may, on application in this behalf being made by the prosecution try in accordance with the provisions contained in sections 262 to 265 of the said Code any offence punishable under this Act."

It is not disputed in the case that this case was tried summarily on an application made in this behalf by the prosecution. The Magistrate was therefore well within his power in trying this case summarily under section 260, Criminal Procedure Code. Under section 414, Criminal Procedure Code, no appeal lies against a sentence of Rs. 100 when an accused is convicted summarily under section 260.

It is contended by the learned counsel for the accused that section 414 applies only to cases of conviction of offences mentioned in section 260 and not for offences under a special Act as in this case Section 414, Criminal Procedure Code, runs as follows .

"Notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily in which a Magistrate empowered to act under section 260 passes a sentence of fine not exceeding two hundred rupees only"

The words "in which a Magistrate empowered to act" indicate that the section applies not only to cases in which the Magistrate has got power to act under section 260 for the offences mentioned in the section but also where he is otherwise empowered to act under that section. The words "empowered to act" refer not merely to implied power contained in section 260 but also refer to express powers conferred on the Magistrate by other provisions in other enactments. No appeal therefore lies against the sentence of Rs 100 to the Sessions Judge and the appeal was therefore incompetent. The order of the appellate Court is set aside. This does not in any way prevent the accused from filing a revision to this Court under sections 435 and 439, Criminal Procedure Code.

K.S. *Order set aside.*

[THE FEDERAL COURT OF INDIA.]

PRESENT :—H. J. KANIA, *Chief Justice*, S. FAZL ALI, M PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B K. MUKHERJEA, JJ.

[Appeal under the Federal Court (Enlargement of Jurisdiction) Act, 1947, from the High Court of Judicature at Bombay]

Tatya Shantappa Gadeyannavar . *Appellant**

v.

Ratnabai Bhratar Dada Gadeyappa Gadeyannavar and others *Respondents.*

Hindu Law—Adoption—Adoption by a predeceased coparcener's widow after extinction of coparcenary by partition—Right of adopted son to claim a share in the original family properties

If, notwithstanding the extinction of the coparcenary by the death of the last surviving coparcener, the adoption by the widow of a predeceased coparcener could effectively divest the property vested by inheritance in the heir of the last surviving coparcener as held in *Anant Bhikappa Patil* v. *Shanker Ramachandra Patil*, there is no reason why such adoption should not equally operate to entitle the adopted son to claim a share in the family properties in spite of the extinction of the coparcenary by virtue of a partition. There is no distinction in principle between extinction of a coparcenary by the death of the last surviving coparcener and its extinction by partition so far as the right of the widow of a predeceased coparcener to make a valid and effectual adoption is concerned The principle of their Lordships' decision must apply *a fortiori* to cases where the coparcenary became extinct by partition, for, the family properties would still be in the hands of the members of the family though divided and there would be no question of divesting property vested in a stranger to the family.

Anant Bhikappa Patil v *Shanker Ramachandra Patil*, (1943) 2 M L J. 599 L R. 70 I A 232 (P.C), followed.

C. S. Saran and *S. R. Parulekar*, Advocates, Federal Court, instructed by *S. P. Varma*, Agent, for Appellant.

K. G. Datar, Advocate, Federal Court, instructed by *K. J Kale*, Agent, for Respondents 1 and 2.

The Judgment of the Court was delivered by

Patanjali Sastri, J.—This is an appeal from a judgment and decree of the High Court of Judicature at Bombay dated 27th November, 1942, affirming a judgment of the Joint First Class Subordinate Judge at Belgaum whereby the appellant's suit for partition of certain immoveable property was dismissed

The appellant claimed one half share in the properties belonging to the family of one Gadeppa who had three sons Antappa, Shantappa and Dada Antappa ceased to be a member of Gadeppa's branch having been adopted to Bharmappa, the undivided elder brother of Gadeppa. The appellant claimed to be the adopted son of Shantappa. He alleged that he was adopted by Shantappa's widow, Gangabai, on 16th October, 1936, at a place called Nandani in Kolhapur State and that the adoption was confirmed by her on 9th July, 1937, at Balgaum to obviate possible objections on the ground that the prior adoption had been made in the Kolhapur State. Dada and his son Anna, who were defendants 1 and 2 in the suit, denied both the adoptions put forward by the appellant and averred that they had divided the family properties between them on 15th November, 1936, and that, after such partition, Anna was adopted by Antappa's widow Krishnabai of Bharmappa's branch They further pleaded that, even if the second adoption of the plaintiff alleged to have taken place at Belgaum was proved, it could not entitle the plaintiff to claim a share of the family properties as the coparcenary in Gadeppa's branch had previously come to an end by virtue of the partition aforesaid

The learned trial Judge held that the appellant failed to establish that he was adopted by Shantappa's widow at Nandani on 16th October, 1936, as alleged by him but the later adoption said to have taken place on 9th July, 1937, at Belgaum was true and valid. He further found that there was a partition of the family

* Civil Appeal No. XXVI of 1948. 3rd March, 1949.

properties between defendants 1 and 2 on 15th November, 1936, as alleged by them and he held, following the decision of a Full Bench of the Bombay High Court in *Balu Sakharam Powar* v *Lahoo Sambhaji Tetgura*[1] and certain other decisions based thereon, that the appellant's adoption was ineffectual to re-open the prior partition between defendants 1 and 2 He accordingly dismissed the suit.

On appeal to the High Court, a Division Bench of that Court (Beaumont, C J. and Sen, J) confirmed the findings of the trial Court on all the issues of fact and law and dismissed the appeal. Thereupon the appellant preferred this appeal to His Majesty in Council, having obtained the necessary leave under section 110 of the Code of Civil Procedure, but by virtue by the Federal Court (Enlargement of Jurisdiction) Act (No. I of 1948), the appeal has to be decided by this Court.

After the case was disposed of by the High Court, it appears that the decisions of the Full Bench in *Balu Sakharam Powar* v *Lahoo Sambhaji Tetgura*[1] on which the Courts below relied was overruled by the Privy Council in *Anant Bhikappa Patil* v *Shanker Ramachandra Patil*[2] and the appellant herein therefore claims that the decisions of the Courts below should be set aside and his claim for one half share of the properties in suit should be decreed.

It was not disputed by Mr Datar appearing for the respondents that the decisions followed by the High Court were no longer good law in view of the later decision of the Privy Council referred to above But he sought to distinguish the present case on the ground that, the coparcenary consisting of the only male members of the family at the time having been put an end to by the partition of November, 1936, the plaintiff's adoption could not revive the coparcenary so as to entitle the plaintiff to re-open the partition and claim a share in the family properties. It was pointed out that *Anant Bhikappa Patil* v. *Shanker Ramachandra Patil*[2] was a case where there was no disruption of the coparcenary by a partition among all the members then living and all that was held was that an adoption by the widow of a predeceased coparcener was effectual to divest the properties vested by inheritance in the heir of the last surviving coparcener We are unable to appreciate this distinction. It is true that no question as to the effect of partition by the members of a family in relation to the power of adoption of the widow of a predeceased coparcener arose in that case. But the principle on which their Lordships based their decision, namely, that the rights of the adopted son relate back to the date of the adoptive father's death must equally apply to the facts of the present case and the plaintiff must be deemed, by a fiction of Hindu Law, to have been in existence as the son of Shantappa at the time of the latter's death in 1921 so as to entitle him to a share in the family properties It is clear that their Lordships considered the question also from the point of view of the extinction of the coparcenary in such cases, for they observed :

> " If, then, the appellant's adoption was valid, can it be held that it does not take effect on the property which had belonged to the joint family because there was no coparcenary in existence at the date of the adoption " (*Anant Bhikappa Patil* v *Shanker Ramachandra Patil*[2].)

If, notwithstanding the extinction of the coparcenary by the death of the last surviving coparcener, the adoption by the widow of a predeceased coparcener could effectively divest the property vested by inheritance in the heir of the last surviving coparcener, we are unable to see why such adoption should not equally operate to entitle the adopted son to claim a share in the family properties in spite of the extinction of the coparcenary by virtue of a partition There cannot exist on principle any distinction between extinction of a coparcenary by the death of the last surviving coparcener and its extinction by partition so far as the right of the widow of a predeceased coparcener to make a valid and effectual adoption is concerned. Indeed, the principle of their Lordships' decision must apply *a fortiori*

1. I.L R. (1937) Bom 508 (F.B). (P C.).
2. (1943) 2 M L.J. 599 . L R. 70 I.A. 232

to cases where the coparcenary became extinct by partition, for, the family properties would still be in the hands of the members of the family though divided, and there would be no question of divesting property vested in a stranger to the family. It is worthy of note that their Lordships expressly referred to and approved the decision of the Nagpur High Court in *Bajirao* v *Ramkrishna*[1] and of the Madras High Court in *Sankaralingam Pillai* v. *Veluchami Pillai*[2], both of which are cases of adoption made after a partition in the family We are therefore of opinion that the principles laid down by their Lordships in *Anant Bhikappa Patil* v *Shanker Ramachandra Patil*[3] and since reaffirmed in *Neelangouda Limbangouda* v. *Ujjangouda Shankargouda*[4] are applicable in full force to the facts of this case.

In this view the appellant will be entitled to one-fourth share in the family properties as the second defendant's adoption into Bharmappa's branch has been held established. We accordingly allow the appeal and remit the case to the High Court with the direction that a preliminary decree for partition and delivery of possession of the appellant's one-fourth share in the properties in suit together with mesne profits from the date of suit pertaining to such share be substituted for the decree dismissing the appellant's suit. The appellant shall have the costs in this Court but in the peculiar circumstances of the case we make no order as to costs in the Courts below.

V. S.

Appeal allowed.

[THE FEDERAL COURT OF INDIA.]

PRESENT :—H. J. KANIA, *Chief Justice*, S FAZL ALI, M PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B K MUKHERJEA, JJ

[Appeal under the Federal Court (Enlargement of Jurisdiction) Act, 1947, from the High Court of Judicature at Fort William in Bengal]

Sir Hari Sankar Pal and another .. *Appellants**

v.

Anath Nath Mitter and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 41, *rule* 33 *and Order* 47, *rule* 1—*Powers under Order* 41, *rule* 33 *not exercised by the appellate Court at the time of judgment—If could be exercised on an application for review of that judgment—Deed—Construction—Provision in lease for apportionment between lessor and lessee of compensation money in case of acquisition of the leased properties—Calcutta Improvement (Appeals) Act—Further appeal from the decision of the High Court—Competency*

Order 41, rule 33, Civil Procedure Code, is a purely enabling provision which enables the appellate Court to exercise certain powers in favour of a party who has not filed the appeal if the circumstances of the case and the interests of justice so require The powers being discretionary, no Court can be compelled to make an order under this rule , but if the appellate Court, while it allows the appeal, refuses to make an order in favour of a non-appealing party, whose position is identically the same as that of the successful appellant, without applying its mind to the provisions of Order 41, rule 33, Civil Procedure Code and without considering whether it should or should not exercise its powers under that rule, the Court is not incompetent to rectify its omission and reconsider the matter if and when it is brought to its notice by way of an application for review Where in fact there is an omission on the part of the Court to consider the clear provision of Order 41, rule 33, when the original judgment was passed, such omission would constitute a sufficient ground analogous to those mentioned in Order 47, rule 1, and the Court would not be incompetent to reconsider the matter, if it so desired.

A lease deed, among other things provided that the compensation money in respect of any future statutory acquisition of the lands leased shall be apportioned, between the lessor and lessee in the following manner " that is to say, the lessor shall be entitled to such portion of the compensation as will represent twenty-five times of the said respective rent payable under these presents " The document contained provision for payment of monthly rents On a question whether " rent " referred to in the above clause is monthly or annual rent,

Held: It is a well-established rule of construction that in construing any written instrument, absurdity and repugnancy are always to be avoided One of the accepted methods of valuing property is to capitalise the annual rental of the land at so many years' purchase Though the number of years' purchase would vary in each case, it is the annual rent that is capitalised and

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1 I L R. (1941) Nag 707.

2 (1942) 2 M.L.J. 678 . I.L R. 1943 Mad. 309 (F.B.).

3 (1943) 2 M L J. 599 . L R. 70 I A 232 at 238 (P C).

4. (1948) 50 Bom. L.R. 682.

* Civil Appeal No. XVII of 1948. 24th January, 1940.

not the monthly rent The idea of valuing property by capitalising the monthly rental is something opposed to common sense and is unheard of in business transactions Though the words "annual rent" is not actually used in the lease deed, the language is sufficiently flexible to admit of that construction and the "rent" in the lease means only annual rent.

The question whether under the provisions of the Calcutta Improvement (Appeals) Act a further appeal against the decision of the High Court would lie or not left open

Atul Chandra Gupta, Senior Advocate, Federal Court (*Bankim Chandra Banerjee*, Advocate, Federal Court and *K. P Chatterjee*, Advocate, Calcutta High Court, with him), instructed by *P. K. Chatterjee*, Agent, for Appellants

Panchanan Ghosh, Senior Advocate, Federal Court (*Samarendra Nath Mukherjee* and *Asoke Chandra Sen*, Advocates, Federal Court, and *Satyendra Nath Mitter*, Advocate, Calcutta High Court, with him), instructed by *R. R. Biswas*, Agent, for Respondents 1 to 5.

M. N. Ghosh and *H. K. Mitter*, Advocates, Federal Court, instructed by *P. K. Bose*, Agent, for Respondents 8 to 10.

The Court delivered the following

JUDGMENTS : *Kania, C J*—I have read the judgment prepared by Mukherjea, J. I agree with the reasoning and conclusion of the judgment and have nothing to add.

Mukherjea, J.—This appeal arises out of a reference made by the First Land Acquisition Collector, Calcutta, to the Calcutta Improvement Tribunal, under section 30 of the Land Acquisition Act and the controversy relates primarily to apportionment, as between the lessors and the lessees, of a certain amount of compensation money awarded in respect of premises No. 73, Clive Street, Calcutta, which was the subject-matter of compulsory acquisition under the provisions of the Calcutta Improvement Act

The premises acquired, which comprises an area of 2 cottas and 8 chattacks of land together with buildings standing thereon, is situated in the business quarter of the city and at all material times it was the property of one Sm Krishna Adarini Dasi, who held it in the restricted rights of a Hindu female heir, the reversioners being her three sons, *to wit*, Nripendra Lal Mitter, Jatindra Lal Mitter and Manindra Lal Mitter. On December 15, 1905, Krishna Adarini, along with her three sons, executed an indenture of lease in respect of the said premises in favour of one I. M Solomon on certain terms and conditions set out therein The lease was to be for a term of 40 years expiring on 31st December, 1945 ; and these 40 years were divided into four decennial periods, the rent payable by the lessee being fixed at a progressively increasing rate for each succeeding decennial period For the first period of 10 years, the rent was payable at the rate of Rs 145 a month ; for the second it was Rs 165 ; during the third decennial period the rent was fixed at Rs. 180 per month and the maximum rent of Rs. 195 a month was fixed for the fourth and last of these decennial periods.

The only other provision in the lease that is material for our present purpose is the one relating to apportionment of the compensation money in case the premises were acquired under the provisions of the Land Acquisition Act or any other legislative enactment of a like character and the provision is worded as follows :

"It is hereby agreed and declared between and by the parties hereto that if the demised premises or any portion thereof are acquired for public purposes under the Land Acquisition Act or any other Act which may be passed by the Local or Imperial Legislative Council the compensation payable in respect of such acquisition shall be apportioned, between the lessor and the lessee in the manner following, that is to say that the lessor shall be entitled to such portion of the compensation as will represent twenty-five times of the said respective rent payable under these presents or a proportionate part thereof according to the portion of the demised premises which will be acquired and the lessee shall get the residue of such compensation"

It appears that on 5th of February, 1907, Solomon transferred his leasehold interest in premises No. 73, Clive Street to one Mr. P. C. Kar and the latter in his turn assigned the same to the present appellants Sir Hari Sankar Paul and Hari

Narayan Paul by a deed of assignment dated the 18th of February, 1927. In the year 1939, a proceeding was started by the First Land Acquisition Collector, Calcutta, for acquisition of these premises at the instance of the Trustees for the Improvement of Calcutta, acting under the Calcutta Improvement Act, and the requisite declaration was published in the official Gazette on 10th of August, 1939 The Collector made his award on 2nd September, 1940, and a total sum of Rs 76,400 was allowed as compensation for the land and the building Krishna Adarini was dead at that time and so also were her three sons ; and the sons of these sons, who are the respondents before us in this appeal, had the lessor's interest vested in them As there was dispute between the lessors and the lessees regarding the apportionment of the compensation money, the Collector made a joint award in favour of both the lessors and the lessees and referred the dispute regarding apportionment to the Calcutta Improvement Tribunal under the provision of section 30 of the Land Acquisition Act.

This reference gave rise to Apportionment Case No 156 of 1940 of the Calcutta Improvement Tribunal and it was heard by the President himself without the aid of Assessors The main controversy between the parties centred round the interpretation to be put upon the clause mentioned above by which the parties agreed that in case of compulsory acquisition of the premises, the proprietors would be entitled to twenty-five times "the said respective rents" as mentioned in the lease and the residue was to go to the lessee. The contention of the lessees was that the words mentioned above referred to the monthly rents which the lessees were to pay under the terms of the document, whereas the lessors argued that they could not but mean the rents payable for the whole year upon the capitalised value of which the compensation payable to the proprietors would depend. The learned President of the Tribunal accepted the contention of the lessees and held that the proprietors were entitled to twenty-five times the monthly rent that was payable at the date of the declaration and the result was that they were given a sum of Rs 4,875 only as their share of the total compensation money and the lessees were held entitled to the remainder amounting to more than Rs 70,000.

Against this decision, an appeal was taken to the Calcutta High Court by some of the proprietors, who are respondents Nos 1 to 4 in this appeal and who represent one-third share in the proprietary interest The other co-sharer proprietors were made respondents to the appeal The appeal was heard by a Division Bench consisting of Mitter and Khundkar, JJ, and by their judgment dated the 12th of December, 1944, the learned Judges allowed the appeal and reversed the decision of the Improvement Tribunal On a construction of the relevant clause in the indenture of lease mentioned above, it was held by the High Court that the expression 'rent' as used in that clause meant and referred to yearly rent and not to monthly rent ; and the lessors were consequently entitled to twenty-five times the annual rent which would amount to Rs 58,500 As, however, the appeal was filed not by all the proprietors but by some of them who had an one-third share in the proprietary right, the appellants were declared entitled to a sum of Rs. 19,500 only which was one-third of the total sum of Rs 58,500, and no relief was given to the non-appealing proprietors with regard to whom the decision of the Improvement Tribunal was left intact. The result was that though the decision of the High Court was against the lessees, they indirectly got two-thirds of the increased amount, which according to the judgment of the High Court, the lessors were entitled to under the terms of the lease

It appears that on or about the 10th of January, 1945, the other proprietors, who did not join in filing the appeal but figured merely as respondents therein, presented an application for review of the judgment, on the ground that even though they did not file any appeal, relief could and should have been given to them under the provisions of Order 41, rule 33, Civil Procedure Code, inasmuch as the case of the applicants rested entirely on the same footing as that of the appealing proprietors and the entire decision of the Improvement Tribunal was

pronounced to be wrong. This application was allowed by the High Court, and purporting to act under Order 41, rule 33, Civil Procedure Code, the learned Judges declared that the entire sum of Rs 58,500 should be paid as lessors' share of the compensation money to all the heirs of Nripendra Lal, Manindra Lal and Jatindra Lal This subsequent judgment is dated the 27th of August, 1945.

Against these two judgments, the lessees filed two applications for leave to appeal to the Privy Council which were consolidated by an order of the High Court and leave to appeal was granted on 6th May, 1946 Before the records were transmitted to England, the powers of this Court were enlarged under Act I of 1948 and in accordance with the provisions of this Act, the records came to this Court and the appellants lodged their petition of appeal on 9th of August, 1948.

On the case being called on for hearing, a preliminary objection was raised on behalf of the respondents challenging the competency of the appeal It is argued by Mr. Ghosh for the respondents that section 71 of the Calcutta Improvement Act (Bengal Act V of 1911) makes an award of the Tribunal, final, subject to the restricted right of appeal to the High Court that is given by the Calcutta Improvement (Appeals) Act. Not only no right of appeal to the Privy Council is given by the express words of the Calcutta Improvement Act, but the Act being a self-contained statute which expressly excludes the operation of section 54 of the Land Acquisition Act, the provisions of appeal to the Privy Council which have been introduced into the general Act by subsequent amendments could not be incorporated by reference into the Calcutta Improvement Act. In this connection, reliance has been placed by the learned Advocate upon the decision of the Judicial Committee in *Secretary of State for India in Council* v *Hindustan Co-operative Insurance Society, Ltd*[1], which *prima facie* seems to support his contention. Mr Gupta appearing in support of the appeal has, on the other hand, contended that the decision referred to above, which purports to be based on an earlier pronouncement of the Judicial Committee in *Rangoon Botatoung Co.* v *Collector of Rangoon*[2], is confined in its operation to cases where the award relates to the amount of compensation money allowed to the claimants and not where there is a dispute as to title between the claimants *inter se* in regard to the acquired property This, it is said, is the view expressed by the Judicial Committee itself in the subsequent case of *Secretary of State for India* v. *Chelikani Rama Rao*[3] It is true that the Calcutta Improvement (Appeals) Act does not provide for an appeal to the Privy Council; but what is said is, that as soon as the matter reaches the High Court under the right of appeal given by the Calcutta Improvement (Appeals) Act, the procedure, orders and decrees of the High Court including the incident of further appeal from its judgments to the Privy Council would be determined by the ordinary rules of the Civil Procedure Code.

The point is certainly not free from doubt and it may be necessary for us at some time or other to decide it finally after a careful examination of the different decisions of the Judicial Committee bearing upon it For our present purpose, having regard to the decision we have arrived at on the merits of the case, a decision on this preliminary point would not be essential and we prefer to keep it open.

On the merits of the case, the contentions put forward on behalf of the appellants are of a two-fold character It is contended, in the first place, that the High Court placed a wrong interpretation upon the clause in the lease relating to apportionment of compensation money in case of compulsory acquisition of the premises and that the expression "the said respective rent" occurring in the clause could not mean the annual rent as has been held by the learned Judges It is pointed out that the same words used in the clause immediately following the clause in question, unmistakably refer to monthly rents and in no part of the document has yearly rent been mentioned at all

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1 (1931) 61 M L J 864. L.R. 58 I A 259: I L R 40 Cal 21 (P C) I.L.R. 59 Cal 55 (P C).
2. (1912) 23 M L J 276; L.R. 39 I A. 197. I.L.R. 39 M 617 (P.C.).
3 (1916) 31 M L J 324 L.R. 43 I.A. 92:

The second argument advanced is that even if the High Court was right in the interpretation it put upon the clause mentioned above, the learned Judges acted illegally and in excess of their jurisdiction in giving relief to the non-appealing proprietors under Order 41, rule 33, Civil Procedure Code, on an application for review presented subsequently to the delivery and signing of the judgment which expressly refused this relief.

As regards the first point raised by the appellants, the primary rule of construction undoubtedly is that the words and sentences used in a document must receive their plain and natural meaning. The Court would certainly have to look to the instrument as a whole, for if there is any inaccuracy or inconsistency in it, attempt should be made to ascertain and give effect, if possible, to the intention of the framers of it as could be gathered from the entire document. It is argued by Mr. Gupta that we cannot assume any intention on the part of the executants of a document apart from the language used in it; nor can we, when there is no ambiguity in the words used, refuse to interpret them in their ordinary sense simply because such construction may lead to hardship or an apparent injustice. These propositions, as general rules of construction, need not be disputed but they are not of much assistance for our present purpose. The whole controversy in this case centres round the point as to whether on a proper construction of the words used in the disputed clause, the lessors' share of the compensation money in case of compulsory acquisition of the property, is to be computed at twenty-five times the monthly rent or the rents that would be payable for the whole year. The clause relating to apportionment of compensation money, in case the premises is compulsorily acquired, comes as one of the covenants in the lease and it appears just above the clause which lays down the condition under which the lessors would have the right of re-entry in case of default in the payment of rent. The appellants lay stress on the fact that the expression "the said respective rents" occur in both the clauses and the argument is that it must have the same meaning in both of them. In the latter clause the words obviously refer to the monthly rents payable for particular decennial periods under the terms of the lease, for the clause itself relates to the time of payment and it gives the landlord a right of re-entry in case the rents remain unpaid for a period of one month after they become due. The earlier clause which concerns us in the present case is, however, not one which regulates either the mode or time of payment of the rents reserved by the lease. It has no relation to payment of rent, nor is it one of the usual covenants that occur in a lease. It is intended to provide for a future contingency which might or might not happen. The question of rent is material here solely for the purpose of determining the value of the lessors' interest if and when the land is compulsorily acquired, and the object is not, as in the clause that follows, to ensure due payment of rent at particular dates. Thus though the same words are used in both the clauses, they would not necessarily have the same meaning.

It is true, as the appellants point out, that in several parts of the document the expression "monthly rent" has been used; but that is because the rent has to be paid monthly under the terms of the lease. It is significant, however, to note that the words "monthly rent" do not occur in the disputed clause at all. It cannot be said, therefore, that the words being unambiguous, no question of interpretation, strictly speaking, arises.

The intention of the parties in introducing a clause of this character in the lease was undoubtedly to lay down beforehand how the lessors' interest was to be valued in case the property became the subject-matter of a land acquisition proceeding while the lease was still subsisting. One of the accepted methods of valuing property is to capitalise the annual rental of the land at so many years' purchase. The number of years' purchase would undoubtedly vary with the nature of the property and the character of investment; but whatever figure might be taken for the purpose of capitalising the rent, it is the annual rent that is capitalised and not the monthly rent. The idea of valuing property by capitalising the monthly rental is something

opposed to common sense and is unheard of in business transactions It is a well-established rule of construction that in construing a will, statute, or any written instrument, absurdity and repugnancy are always to be avoided The intention of the parties in the present case, as appears from the language of the document, is that they wanted to fix the value of the proprietors' interest by capitalising the rent reserved by the lease at twenty-five years' purchase , and this is quite a normal thing in the city of Calcutta, particularly where the property is of commercial importance The rent in such cases invariably means the annual rent and it should be taken in that sense unless there are express words in the clause which would exclude such construction In our opinion, though the words "annual rent" have not actually been used, the language is sufficiently flexible to admit of that construction The view taken by the Calcutta High Court, therefore, seems to us to be right and the first contention of the appellants must fail

As regards the second point raised by the appellants, it cannot be disputed that in a proper case the appellate Court can, under the provision of Order 41, rule 33, Civil Procedure Code, vary or reverse a decree or order of the Court below even in favour of a party who has not preferred any appeal or cross-objection. These powers indeed should be cautiously used with due regard to the circumstances of each individual case, but no rigid rule can be laid down fettering the discretion of the Court in such matters which the legislature has, for best of reasons, left unfettered In the case before us, although the appeal was by some of the proprietors and was in respect of that portion of the Tribunal's award which affected them, the ground urged in support of the appeal was common to all the proprietors and it challenged the propriety of the entire decision of the Improvement Tribunal. The High Court accepted the appellants' contention and reversed the decision of the Tribunal and in allowing the appeal, it was certainly within its powers to reverse the decree with regard to the non-appealing proprietors as well who figured as respondents in the appeal, if it considered such order or decree to be necessary for doing complete justice between the parties and to avoid inconsistent decisions in the same proceeding We cannot say that the interference by the learned Judges has not been in this case in exercise of a sound judicial discretion The question, however, still arises as to whether the High Court could exercise these powers under Order 41, rule 33, Civil Procedure Code, subsequent to the disposal of the appeal on an application for review of judgment when in the judgment itself these powers were not exercised Mr Gupta argues that no such powers could be exercised by the High Court on an application for review, and he relies upon the decision of the Privy Council in *Chhajju Ram* v *Neki*[1], where it was held by Viscount Haldane that the expression "any other sufficient reason" in Order 47, rule 1, Civil Procedure Code, should be interpreted to mean "a reason sufficient on grounds at least analogous to those specified immediately previously" In this case, the Punjab Chief Court had granted an application for review on the ground that the judgment proceeded on an incorrect exposition of law This, it was held, was not a sufficient ground within the meaning of Order 47, rule 1, Civil Procedure Code, and the Court had no jurisdiction to order a review because it was of opinion that a different conclusion of law should have been arrived at

That a decision is erroneous in law is certainly no ground for ordering review If the Court has decided a point and decided it erroneously, the error could not be one apparent on the face of the record or even analogous to it When, however, the Court disposes of a case without adverting to or applying its mind to a provision of law which gives it jurisdiction to act in a particular way, that may amount to an error analogous to one apparent on the face of the record sufficient to bring the case within the purview of Order 47, rule 1, Civil Procedure Code No reference to the provisions of Order 41, rule 33, Civil Procedure Code, occurs in the judgment of the High Court which was delivered on 12th December, 1944 After holding that the landlords were entitled to twenty-five times the yearly rent as their share

1 (1922) 43 M L J 332 L.R. 49 I A 144 I L R 3 Lah 127 (P.C.).

of the compensation money, the judgment of the High Court goes on to say, that the appellants, who had one-third share of the proprietary right vested in them, would be entitled to one-third of the total amount which the lessors would get on that computation. It is said then that the proprietors to the extent of the remaining two-thirds share, as they have preferred no appeal, were not entitled to claim the benefit of this decision

Order 41, rule 33, of the Civil Procedure Code, is a purely enabling provision. which enables the appellate Court to exercise certain powers in favour of a party who has not filed the appeal if the circumstances of the case and the interests of justice so require The powers being discretionary, no Court can be compelled to make an order under this rule, but if the appellate Court, while it allows the appeal, refuses to make any order in favour of a non-appealing party, whose position is identically the same as that of the successful appellant, without applying its mind to the provisions of Order 41, rule 33, Civil Procedure Code and without considering whether it should or should not exercise its powers under that rule, we do not think that the Court is incompetent to rectify its omission and reconsider the matter if and when it is brought to its notice by way of an application for review

There are no materials in the record to show that any point under Order 41, rule 33 of the Civil Procedure Code was raised before the learned Judges when they heard the appeal The judgment, at any rate, does not throw any light on that point The application for review has not been printed in the Paper Book and we cannot ascertain what exactly were the grounds put forward in support of the same The subsequent order made on the application for review is of a summary character and gives no indication of the reasons which induced the learned Judges to reconsider their previous decision From such materials as we have got, we are bound to say that in fact there was an omission on the part of the Court to consider the clear provision of Order 41, rule 33 of the Civil Procedure Code when the original judgment was passed, and such omission, which appears on the face of the judgment, would constitute a sufficient ground analogous to those mentioned in Order 47, rule 1 of the Civil Procedure Code and the Court was not incompetent to reconsider the matter if it so desired The result, therefore, is that we do not feel justified in interfering with the decision of the High Court. The appeal will stand dismissed with costs

S Fazl Ali, J—I agree

M. Patanjali Sastri, J—I agree

Mehrchand Mahajan, J—I agree.

V.S. — *Appeal dismissed*

[THE FEDERAL COURT OF INDIA.]

PRESENT.—H J KANIA, *Chief Justice*, S. FAZL ALI, M PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B K MUKHERJEA, JJ

[An appeal under section 205 (1) of the Government of India Act, 1935, from the High Court of Judicature at Allahabad]

Rex . *Appellant**

v.

Abdul Majid .. *Respondent*

The Governor-General of India . *Intervenor*

Government of India Act (1935), *section* 205 (1) *and U P Maintenance of Public Order* (*Temporary*) *Act* (*IV of* 1947)—*Question as to whether the U P Maintenance of Public Order* (*Temporary*) *Act has been properly applied to the case of a detenu—Granting of a certificate under section* 205 (1)—*Propriety—Ground covered by the certificate found unsustainable—Hearing of appeal on other grounds—Permissibility—F C Rules, Order* 11, *rule* 5 *and Order* 17, *rule* 8 *and Order* 40, *rule* 1—*Activities covered by the U P Act IV of* 1947

The terms of an order granting the certificate under section 205 (1) of the Government of India Act for preferring an appeal to the Federal Court were

*Case No VI of 1948. 24th January, 1949

"The case involves a substantial question of law as to the interpretation of the Government of India Act, 1935 The question is whether or not the first three grounds of detention supplied to the applicant fall within the scope of the U P Maintenance of Public Order (Temporary) Act, 1947, made under Entry No 1 of List II of the Seventh Schedule of the Government of India Act, 1935"

On a question whether the certificate was properly granted,

Held The question as worded is whether the grounds of detention furnished to the appellant fall within the four corners of the U P Act IV of 1947 (*i e*), the question is whether the Act has or has not been correctly applied to the particular case On the face of such a certificate no substantial question or any question at all of the interpretation of the Government of India Act arises U P Act IV of 1947 does not deal with preventive detention in British India for reasons of State connected with defence, external affairs, etc It concerns itself with preventive detentions for reasons connected with the maintenance of public order That being so, it cannot be said that in making this law the U P Legislature was not minding its own business but was encroaching on the powers of the Federal Legislature In these circumstances, the High Court should have clearly refused to grant any certificate

Though under sub-section (2) of section 205 of the Government of India Act, any ground not covered by the certificate can be urged with the leave of the Court once an appeal has been admitted on a certificate, the Federal Court has laid down in rule 5 of Order 11 and rule 8 of Order 17 the rules regulating the procedure in such matters When those rules are not complied with (though the Court has power under Order 40, rule 1 to excuse such non-compliances in exceptional cases), the Federal Court is ordinarily reluctant in criminal matters, where the question concerns the liberty of a person, to waive the procedure prescribed by the Rules, and particularly when entry to the Federal Court has been obtained on a certificate which should not have been granted

If the activities of any person in respect of matters connected with defence or external affairs lead to communal disharmony or breach of peace, his case would come within the purview of the U P Act IV of 1947

A particular ground of detention may have reference to or connection with public safety or maintenance of order in the Province and may at the same time have reference to consequences or repurcussions outside the Province but that effect cannot necessarily oust the jurisdiction of the Provincial Government to pass an order under the Act provided the grounds alleged or the prejudicial act has connection with or reference to the public safety or maintenance of public order in that Province

P L Bannerjee, Advocate-General of the United Provinces (*Shri Ram*, Advocate, Federal Court, with him), instructed by *Tarachand Brijmohanlal*, Agent, for Appellant

Sardar Pritam Singh, Advocate, Federal Court, instructed by *Ranjit Singh Narula*, Agent, for Respondent

Sir Noshirwan P Engineer, Advocate-General of India (*Jindra Lal*, Advocate, Federal Court, with him), instructed by *P A Mehta*, Agent, for Intervenor

The Court delivered the following

JUDGMENTS *Kania, C J*—I have read the judgment prepared by Mahajan, J. I agree with the reasoning and conclusion of the judgment and have nothing to add

Mahajan, J—This is an appeal under section 205 (1) of the Government of India Act, 1935, against an order of the Allahabad High Court releasing one Abdul Majid of Ghaziabad under section 491 of the Code of Criminal Procedure

The facts are these. On the 11th August, 1948, the District Magistrate of Meerut ordered the detention of Abdul Majid of Ghaziabad, for a period of fifteen days under section 3 (2) of the United Provinces Maintenance of Public Order Act, 1947 He was arrested on the 12th The Governor of the United Provinces then on the 21st August, directed that he be detained in custody for a period of six months The grounds of detention furnished to the detenu under section 5 of the Act were in these terms —

"1 That on return from Pakistan you have been indulging in false and malicious propaganda against the Indian Union Government to the effect that (*a*) the Indian Union want to annex the Hyderabad State, (*b*) the accession of Kashmir State to the Indian Union was an act of injustice on the part of the Indian Union, and (*c*) the living conditions in Pakistan are much better than in the Indian Union ,

2 That you are exhorting the Muslims to leave the Indian Union for Pakistan to lead prosperous and happy life there ,

3 That the above malicious propaganda is responsible for creating panic in the town , and

4 That it is considered absolutely essential to prevent you from carrying on the malicious propaganda which may result in a breach of the peace and prove prejudicial to the life and property of the law abiding citizens Hence you are detained "

On the 13th September, 1948, Abdul Majid moved the High Court of Judicature at Allahabad under section 491 of the Code of Criminal Procedure in Criminal Miscellaneous Application No 1854 of 1948 He prayed that he be brought before the Court and ordered to be released after proper enquiry It was contended that his arrest was due to some malicious persons' information about his activities . This application was granted by Bind Basni Prasad, J , on the 20th September, 1948, and it was directed that Abdul Majid be set at liberty at once as his detention was illegal. A certificate was also granted under section 205 (1) of the Government of India Act for preferring an appeal to this Court The terms of the order granting the certificate are these

" The case involves a substantial question of law as to the interpretation of the Government of India Act, 1935 The question is whether or not the first three grounds of detention supplied to the applicant fall within the scope of the United Provinces Maintenance of Public Order (Temporary) Act, 1947, made under entry No 1 of List II of the Seventh Schedule of the Government of India Act, 1935 "

The question formulated by the certificate is not that on a proper construction of the Constitution Act, the Provincial Legislature in enacting the United Provinces Act IV of 1947, has acted outside the ambit of its legislative powers and has trespassed on the powers possessed by the Central Legislature, *i e* , that it has legislated under cover of Entry 1 of List II on a subject covered by Entry 1 of List I of the Seventh Schedule The question as worded is whether the grounds of detention furnished to Abdul Majid fall within the four corners of U P Act IV of 1947, *i e* , the question is whether the Act has or has not been correctly applied to this particular case In this situation it is apparent that on the face of the certificate no substantial question or any question at all of the interpretation of the Government of India Act arises U P Act IV of 1947 does not deal with preventive detention in British India for reasons of State connected with defence, external affairs, etc It concerns itself with preventive detentions for reasons connected with the maintenance of Public Order That being so, it cannot be said that in making this law, the United Provinces Legislature was not minding its own business but was encroaching on the powers of the Federal Legislature

Mr Banerjee, the learned Advocate-General of the Government of the United Provinces, when faced with the situation, frankly conceded that the real question to decide in the case was whether the local Act had been rightly applied to the case of Abdul Majid and whether the grounds given for his detention fell within the ambit of that Act, and that no question really arose as to the interpretation of the Government of India Act, 1935 In these circumstances, the High Court should have clearly refused to grant any certificate

The learned Advocate-General of India, who also appeared in the case, pointed out (though not without some hesitation) that a question of the interpretation of the Constitution Act may be considered to arise in this case inasmuch as the High Court has held that the grounds of detention fall within Entry 1 of List I and not within Entry 1 of List II of the Seventh Schedule In my opinion, the fallacy of the argument is that the Lists in the Seventh Schedule to the Constitution Act mark the field of legislation for the Provincial and the Federal Legislatures, they do not concern themselves with the validity of the grounds of detention of a particular person Mr Banerjee therefore rightly conceded that in truth no question as to the construction of the Constitution Act could be argued before us

It was rightly observed by the learned Judge below that if the activities of any person in respect of matters connected with defence or external affairs lead to communal disharmony or breach of peace, his case would come within the purview of the United Provinces Maintenance of Public Order Act, 1947 , he, however, was in error when he proceeded to find that the detention of Abdul Majid in this

case was illegal because the grounds given for it fell outside the scope of the Act. The matters stated in paragraphs 1 and 2 of the statement furnished to Abdul Majid under section 5 relating to his activities were merely the particulars of the propaganda carried on by him, the ground of his detention, however, was the likelihood of a breach of public peace in the United Provinces as a result of such propaganda The learned Judge fell into this error as the statement given to Abdul Majid under section 5 was not properly worded inasmuch what was stated in the earlier paragraphs was really subsidiary to the concluding portion of the statement. That being so, the detention of Abdul Majid was stated to be for reasons connected with the maintenance of public order and was not for reasons of State connected with defence, external affairs, etc It may be observed in passing that a particular ground may have reference to or connection with public safety or maintenance of order in the Province and may at the same time have reference to consequences or repercussions outside the Province but that effect cannot necessarily oust the jurisdiction of the Provincial Government to pass an order under the Act provided the grounds alleged or the prejudicial act has connection with or reference to the public safety or maintenance of order in that Province.

It was next argued that once a certificate had been issued, under section 205 (1) of the Constitution Act, the appeal should be taken to have been properly lodged in this Court, and that in that event, even if the ground covered by the certificate is not sustainable, the appeal may be heard on other grounds It is true that under sub-section (2) of section 205 with the leave of the Federal Court any other ground can be urged once an appeal has been admitted on a certificate, but this Court has laid down rules regulating the procedure in that respect Rule 5 of Order 11, of the Rules of this Court which relates to civil appeals and has been extended to criminal Appeals by rule 8 of Order 17, runs thus

"When a party desires to appeal on grounds which can be raised only with the leave of the Federal Court, the petition of appeal shall be accompanied by a separate petition indicating the grounds so proposed to be raised and praying for special leave to appeal on those grounds"

No such separate petition was made along with the petition of appeal in the present case When the learned counsel felt that he could not argue the so-called constitutional question, he verbally asked for leave to argue the appeal on the ground that the decision of the High Court that the case fell outside the purview of the local Act was erroneous and should be set aside It was said that this Court under Order 40, rule 1 of the Rules could, for sufficient cause, excuse the appellant from non-compliance with any of the requirements of the Rules and could allow other grounds to be urged It is unquestionable that this Court has such a power, but it can only be exercised in exceptional cases and for sufficient cause shown for non-compliance with the Rules Mr Banerjee could not suggest any valid grounds for excusing non-compliance with the Rules in this particular case, and the Court is ordinarily reluctant in criminal matters, where the question concerns the liberty of a person, to waive the procedure prescribed by the Rules, and particularly when entry to this Court has been obtained on a certificate which should not have been granted All that Mr Banerjee said on this part of the case was that a separate application for special leave was not made along with the petition of appeal, because the certificate under section 205 (1) declared that the ground which was the basis of the decision was one which concerned the interpretation of the Constitution Act and that itself was the only other ground which could be urged in this case independently of the certificate In my opinion, this is not a sufficient cause for relaxing the Rules A separate application should have been made in the alternative in the very first instance It could have been clearly discerned that the real question to be urged in the appeal was the one that fell within the scope of sub-section (2) of section 205 of the Act Moreover, relaxation of the rule would prejudicially affect the respondent and in the circumstances we are not prepared to waive the procedure laid down under rule 5 for invoking the jurisdiction of this Court.

The oral prayer of the appellant's learned counsel under sub-section (2) of section 205 having been refused and it being apparent that no question of the interpretation of the Government of India Act, 1935, falls for decision, this appeal is bound to fail and has to be dismissed, even though it seems to me that the respondent was released under a misconception of the scope and application of the local Act.

The result therefore is that the appeal fails and is dismissed

S. Fazl Ali, J—I agree.

M. Patanjali Sastri, J—I agree

B. K. Mukherjea, J.—I agree

V. S. *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Bombay)

PRESENT —Lord UTHWATT, LORD MORTON OF HENRYTON, LORD REID, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

The Hubli Electricity Co, Ltd . *Appellant**

v

The Province of Bombay *Respondent*

Indian Electricity Act (IX of 1910), *section* 4 (1) (a)—*Construction—Government's opinion in what matters conclusive and in what matters not conclusive*

There is nothing in the language of section 4 (1) (*a*) of the Indian Electricity Act (IX of 1910) or in the subject-matter to which it relates upon which to found the suggestion that the opinion of the Government is to be subject to objective tests In terms, the relevant matter is the opinion of the Government—not the grounds on which the opinion is based The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion

Further the question on which the opinion of the Government is relevant is not whether a default has been wilful and unreasonably prolonged but whether there has been a wilful and unreasonably prolonged default Upon that point the opinion is the determining matter and—if it is not for good cause displaced as a relevant opinion—it is conclusive But there the area of opinion ends

The question what obligations are imposed on licensees by or under the Act is a question of law. The view of the Government on law is not decisive If in arriving at a conclusion it appeared that the Government had given effect to a wrong apprehension of the obligations imposed on the licensee by or under the Act the result would be that the Government had not expressed such an opinion as is referred to in the section

Performance of the scheduled conditions may not on a strict reading be required of the licensee "by" the Act it is clearly required "under" the Act

Sir Valentine Holmes, K C, and *Phineas Quass* for Appellant

J. Millard Tucker, K C and *R K Handoo* for Respondent

Their Lordships' Judgment was delivered by

LORD UTHWATT —In the proceedings out of which this appeal arises the appellants sought a declaration that the purported revocation by the respondent Government on January 28, 1944, of a licence to supply electricity to the town of Hubli was invalid and asked for consequential relief on the footing of that declaration Their suit was dismissed by the High Court of Judicature at Bombay acting in its original jurisdiction and that decision was affirmed by that Court in its appellate jurisdiction (Stone, C J, dissenting). Many matters at issue in the suit are not now in controversy. The substantial questions before their Lordships are confined to questions of construction arising under the Indian Electricity Act (IX of 1910)

Under that Act the Government was empowered to grant to persons to be selected by the Government licences to supply electrical energy in areas to be specified in the licences and to lay down electric supply lines for the transmission of such energy.

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* P. C Appeal No 100 of 1947 20th December, 1948.

Sections 3 (2) and 4 (1) and (2) of the Act so far as relevant provided as follows.

"3 (2) In respect of every such licence and the grant thereof the following provisions shall have effect, namely —

(a)

(b)

(c) • •

(d) a licence under this Part—

(i) may prescribe such terms as to the limits within which, and the conditions under which, the supply of energy is to be compulsory or permissive, and as to the limits of price to be charged in respect of the supply of energy, and generally as to such matters as the Provincial Government may think fit

* * * * * *

(e) the grant of a licence under this Part for any purpose shall not in any way hinder or restrict the grant of a licence to another person within the same area of supply for like purpose,

(f) the provisions contained in the Schedule shall be deemed to be incorporated with, and to form part of, every licence granted under this Part, save in so far as they are expressly added to, varied or excepted by the licence, and shall, subject to any such additions, variations or exceptions which the Provincial Government is hereby empowered to make, apply to the undertaking authorised by the licence,

Provided that, where a licence is granted in accordance with the provisions of Clause IX of the Schedule for the supply of energy to other licensees for distribution by them, then, in so far as such licence relates to such supply, the provisions of clauses IV, V, VI, VII, VIII and XII of the Schedule shall not be deemed to be incorporated with the licence

4 (1) The Provincial Government may, if in its opinion the public interest so requires, revoke a licence in any of the following cases, namely —

(a) where the licensee in the opinion of the Provincial Government makes wilful and unreasonably prolonged default in doing anything required of him by or under this Act,

(b) where the licensee breaks any of the terms or conditions of his licence the breach of which is expressly declared by such licence to render it liable to revocation,

(c) where the licensee fails, within the period fixed in this behalf by this licence or any longer period which the Provincial Government may substitute therefor by order under sub-section (3), clause (b), and before exercising any of the powers conferred on him thereby in relation to the execution of works—

(i) to show to the satisfaction of the Provincial Government that he is in a position fully and efficiently to discharge the duties and obligations imposed on him by his licence, or

(ii) to make the deposit or furnish the security required by his licence,

(d) where the licensee is, in the opinion of the Provincial Government, unable, by reason of his insolvency, fully and efficiently to discharge the duties and obligations imposed on him by his licence

(2) Where the Provincial Government might, under sub-section (1), revoke a licence, it may, instead of revoking the licence, permit it to remain in force subject to such further terms and conditions as it thinks fit to impose, and any further terms or conditions so imposed shall be binding upon, and be observed by, the licensee, and shall be of like force and effect as if they were contained in the licence

Section 5 of the Act provided that where the Government revokes a licence under section 4 (1) the Government should serve a notice of revocation upon the licensee.

The only other section to which it is necessary to refer is section 47 which provides that where a licensee makes default in any of the conditions of a licence the licensee should be liable to the fines therein set out

The Schedule referred to in section 3 (2) (f) contained many provisions relating to the conduct of the undertaking under the licence It is necessary only to refer to sub-clause (1) of VI which runs as follows

"VI (1) Where after distributing mains have been laid down under the provisions of clause IV or Clause V and the supply of energy through those mains or any of them has commenced, a requisition is made by the owner or occupier of any premises situate within the area of supply requiring the licensee to supply energy for such premises, the licensee shall, within one month from the making of the requisition, or within such longer period as the Electric Inspector may allow supply, and, save in so far as he is prevented from doing so by cyclones, floods, storms or other occurrences beyond his control, continue to supply energy in accordance with the requisition"

On June 26, 1924, the Government granted a licence —The Hubli Electric Licence, 1924—to Amti and Co, Hubli, and such licence was on January 28, 1925, duly transferred to the appellants with the consent of the Government The result of this transfer was that for all the purposes of the Act and the licence the appellants stood in the shoes of the original licensee

It is unnecessary to refer in detail to the provisions of the licence The area of supply and compulsory area of supply were set out No condition of the licence (save one which was shortly after the grant of the licence complied with) was expressed to be a condition the breach of which was declared to render the licence liable to revocation No material variation was made in any of the conditions set forth in the Schedule to the Act

The distributing mains referred to in clause VI (1) of the Schedule were duly laid down shortly after the grant of the licence and thereupon the appellants began to supply electricity under the licence

It appears that the appellants were during the war faced with difficulties in the conduct of their undertaking It is not necessary to consider their difficulties at length Suffice it to say that at the end of 1941, the Government demanded and received explanations as to an interruption in the supply, but there is nothing to show whether or not the Government was satisfied with the explanations which were given In December, 1942, the appellants informed their customers and the Government that they proposed to shut down their works altogether on the 18th December, for the purpose of a thorough overhaul and stated that they anticipated resuming supply by January 1, 1943

On February 10, 1943, the Government's Electrical Inspector paid a visit of inspection to the appellants' works and made a report to the Government Following on that report the following letter was on April 3, 1943, sent by the Government to the appellants

APRIL 3, 1943

From

The Deputy Secretary to the Government of Bombay,

Public Works Department

To

Messrs The Hubli Electricity Company, Limited

Subject —Hubli Electric Licence, 1924

DEAR SIRS,

The Electric Inspector, Bombay Province, who recently visited your Company reports as under:

'There is no qualified Engineer or other person in charge of the Supply Company's station and works, either electrical or mechanical There are six generating sets in the power house

	Description of the Sets	*Condition of the Sets*
1	750 B H P engine 600 KVA with generator	Unserviceable owing to broken crankshaft.
2	480 B H P engine 296 K W with generator	Unserviceable owing to broken crankshaft
3	350 B H P engine 275 KVA with generator	Unserviceable, cylinder heads and piston heads cracked
4	150 B H P engine 130 KVA with generator	Has been dismantled and new parts are being fitted from Railway workshop
5	150 B H P engine 130 K V A with generator	The engine is in such bad condition that not more than 60 K W load can be put on the generator
6	115 B H P engine 82 KVA with generator	The set is in a very bad condition and repairs are badly needed

'It will be seen from the above that only set No (5) can be used for obtaining power, the maximum being 60 KW against the Company's average peak load of 180 K W'

2 Government is satisfied that there are sufficient grounds for revoking your licence under section 4 (1) of the Indian Electricity Act but it is pleased to permit the licence to remain in force under section 4 (2) of the Act subject to the following conditions

(a) that within a period of six months from the date of this letter you recondition your plant and put the same in proper working order for the purpose of ensuring a continuous and efficient supply to all consumers connected to the system and in order to fulfil the obligation imposed on you by virtue of the contract with consumers as laid down in Clause VI of the Schedule to the I E Act, 1910, subject to the limitations imposed by the orders issued under the Defence of India Rules, and

(b) that you make proper arrangements for the maintenance of the plant immediately

3 Should you fail to take necessary steps to fulfil the above conditions your licence will be revoked

Yours faithfuly,

(Sd) C G Kale

3—4—1943

Deputy Secretary to the Government of Bombay, Public Works Department

The new conditions contained in that letter were not, it was held in the suit, complied with and on January 28, 1944, the Government wrote to the appellants informing them that their licence was revoked as at May 1, 1944

The matter at issue before their Lordships centres on the validity of the imposition of the new conditions If, when the letter of April 3, 1943, was written, the Government was not entitled to revoke the appellants' licence, the condition precedent to the right of the Government to introduce new conditions under section 4 (2) of the Act was not fulfilled, and a revocation based on a breach of the new conditions would be a nullity On the other hand, if the Government was at the date of the letter entitled to revoke the appellants' licence then the Government was entitled to introduce the new conditions, and, on the facts found in the suit, the revocation of the licence on January 28, 1944, was effective

In the proceedings the Government pleaded that on April 3, 1943, it was of opinion that the appellants had made a wilful and unreasonably prolonged default in doing what was required of them under the Act and that the public interest required the revocation of the licence The Government contended that on the true construction of the Act the Court was not entitled to go behind that opinion.

The appellants disputed his contention, their point being that the opinion of the Government referred to in section 4 (1) was not the subjective opinion of the Government but an opinion subject to objective tests They further contended that in exercising its functions under section 4 (1) (a) the Government was bound to act in a judicial manner and not contravene the rules of natural justice and that in fact the Government failed so to act

The first raises only a question of construction, the second raises also a question of fact

The second contention, on which Stone, C J, rested his dissenting judgment, may be shortly disposed of Their Lordships share the opinion of Chagla, J, and Coyajee, J, that this point was not open to the appellants upon the pleadings. There was no averment directed to the matter of fact upon which the contention rests, the only matter alleged being that in April, 1943, the Government had no sufficient grounds for revoking the licence It is unnecessary, therefore, for their Lordships to decide whether in forming an opinion the Government had to act judicially or whether the formation of an opinion was a pure ministerial or administrative act

Before dealing with the question of construction raised by the first contention reference should be made to two matters

First, it will be observed that the letter of April 3, 1943, does not in terms refer to head (a) of section 4 (1) of the Act nor does it state that the Government had formed the opinion referred to in that head But the terms of the letter, which begins by specifying the deficiencies in the appellants' machinery and the disparity between the average peak load and the maximum capacity of the machinery and ends by imposing conditions as to the reconditioning of the plant so as to ensure

a continuous and efficient supply to all consumers, make it clear that the Government had and was in no uncertain terms expressing, an opinion as to past failure of the appellants to give a supply The requirements of clause VI of the Schedule were obviously in the mind of the Government and the recipients of the letter could not have any doubt but that the Government was founding itself on section 4 (1) (*a*) of the Act and entertained the opinion as to the public interest and the default of the appellants referred to in that sub-section

Second, as has been stated, the Government in the pleadings alleged that it had formed the opinion referred to in section 4 (1) (*a*) At the trial the Judge ruled that in view of the production by the appellants of the letter of April 3, 1943, it was not necessary for the Government to call evidence to prove—as the Government stated it was prepared to do, that the Government had formed the opinion required by section 4 (1) (*a*) and the trial Judge thereupon found as a fact that the Government entertained the relevant opinion This ruling was acquiesced in by the appellants at the trial, and in the Memorandum of Appeal to the High Court in its Appellate jurisdiction the appellants did not take specific objection to this ruling It is clear that the substantial dispute at the trial was not that the Government did not entertain the opinion referred to in section 4 (1) (*a*) but that it had no grounds for entertaining that opinion In the circumstances their Lordships do not think it is open to the appellants to question before their Lordships the trial Judge's finding that the Government entertained the opinion mentioned in section 4 (1) (*a*)

Their Lordships now turn to the question of construction of section 4 (1) (*a*). Their Lordships are unable to see that there is anything in the language of the sub-section or in the subject-matter to which it relates upon which to found the suggestion that the opinion of the Government is to be subject to objective test. In terms the relevant matter is the opinion of the Government—not the grounds on which the opinion is based The language leaves no room for the relevance of a judicial examination as to the sufficiency of the grounds on which the Government acted in forming an opinion

Further the question on which the opinion of the Government is relevant is not whether a default has been wilful and unreasonably prolonged but whether there has been a wilful and unreasonably prolonged default Upon that point the opinion is the determining matter and—if it is not for good cause displaced as a relevant opinion—it is conclusive But there the area of opinion ceases The phrase " anything required under the Act " means " anything which is required under the Act " The question what obligations are imposed on licensees by or under the Act is a question of law Their Lordships do not read the section as making the Government the arbiter upon the construction of the Act or as to the obligations it imposes Doubtless the Government must in expressing an opinion for the purpose of the section also entertain a view as to the question of law But its view on law is not decisive If in arriving at a conclusion it appeared that the Government had given effect to a wrong apprehension of the obligations imposed on the licensee by or under the Act the result would be that the Government had not expressed such an opinion as is referred to in the section

The question that then emerges is whether the performance of condition VI of the Schedule incorporated in the licence by section 3 (2) (*f*) is required by the licensee by or under the Act In their Lordships' view it is The scheduled conditions, unless excluded or modified, necessarily form part of the licence to be granted under the Act the licence is required to be operated in accordance with these conditions and not otherwise and the authority to operate the licence is derived from the Act To this it may be added that the latter part of section 3 (2) (*f*) expressly provides that the scheduled conditions are to apply to the undertaking and that section 47 provides for penalties judicially exigible on breach of the conditions Performance of the scheduled conditions may not on a strict reading be required of the licensee " by " the Act it is clearly required " under " the Act.

The appellants' contention, therefore, fails The Government held and sufficiently expressed the opinion required by section 4 (1) (*a*) and was, therefore, entitled to impose the conditions specified in the letter of April 3, 1943 The licence was effectually revoked by the letter of January 28, 1944

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants will pay the costs of the appeal

T L Wilson & Co Solicitors for Appellant

Solicitor, High Commissioner for India Solicitor for Respondent

V S *Appeal dismissed.*

[PRIVY COUNCIL]

[On appeal from the High Court of Judicature at Fort William in Bengal].

PRESENT —LORD PORTER, LORD DU PARCQ, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

Aniruddha Mitra *Appellant**

v

The Administrator-General of Bengal and others *Respondents*

Hindu Law—Wills—Bequest of residuary estate to son or sons of testator's son whether natural born adopted when such persons are unborn at the time of testator's death—Validity—Succession Act (XXXIX o 1925), sections 114 and 115—Scope

A Hindu testator died on 7th February, 1933, leaving him surviving his widow *X*, his only son *Y* and that son's wife *Z* On 4th July, 1934, *Y* took in adoption as his son *A* who was born on 19th October, 1932 On 5th July, 1931 the testator executed a will which provided *inter alia* as follows "I further will and direct that the legitimate son or sons of my son *Y* whether natural born or validly adopted shall become entitled to all the rest and residue of my property If there is only one son such residue shall be made over to such son of my son on his completing the age of twenty one years and if there are more sons of my son than one then to such sons of my son *Y* in equal shares on the youngest of the said sons completing the age of twenty-one years Until the youngest of such son or sons of my son attains the age of twenty-one years the executor or trustee shall pay the sum of Rupees Seven Hundred per month to each of such son or sons of my son *Y* for maintenance and education" On a construction of the will as a whole,

Held, there was a valid bequest to the son or sons of *Y* and the residuary estate became vested the moment a son was born to or adopted by the testator's son, and the completion of 21 years by the only or youngest son is not a contingency, but is only a postponement of possession and does not affect the actual vesting of the estate By reason of the amendment by Act XXI of 1929 of section 115 of the Succession Act, where a bequest to a class is inoperative with respect to some members of the class by reason of the provisions of section 113 and section 114 the bequest is void only with respect to those members of the class whose interest was void by reason of the provisions of sections 113 and 114 The words of section 115 are sufficiently wide and do not in any manner limit its application to members of a class who are in existence at the date of the testator's death Illustration (i) to section 115 does not restrict the meaning of the section

The question, whether the doctrine of relation back of the adopted son's existence to the date of the adoptive father's death irrespective of the period intervening between such death and the adoption by his widow, to avoid the applicability of section 114 of the Succession Act, was left open

S P Khambatta, K C & *H J Umrigar* for Appellant

Sir Walter Moncton, K C, *T Cunliffe, W W K Page, K C & S C Isaccs* for Respondents

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR —This is an appeal from a judgment and decree of the High Court at Calcutta in its appellate jurisdiction dated 5th April, 1946, which affirmed a judgment and decree of that Court in its original jurisdiction dated 28th March, 1945

5th April, 1949.

The appeal arises out of a suit by way of originating summons instituted by the appellant for the construction of the will of his father the late Rai Bihari Lal Mitra

The facts are not in dispute The testator was a wealthy Hindu governed by the Dayabhaga School of Hindu Law He died on 7th February, 1933, leaving him surviving his widow Sreemutty Nayani Mitra, his only son the appellant Aniruddha Mitra, and the wife of the appellant, Sreemutty Nivanani Mitra

At the time of the testator's death the appellant and his wife had no children. On 4th July, 1934, the appellant took the 2nd respondent Arabinda Mitra in adoption as his son He was born on 19th October, 1932

On 5th July, 1931, the testator executed his last will whereby he appointed the 1st respondent, the Administrator of Bengal, his sole executor with liberty to make over the property to the official trustee for carrying out the trusts

On 24th August, 1936, the appellant was adjudicated an insolvent and his estate vested in the 3rd respondent On 7th May, 1943, he was granted a conditional discharge

The question for determination in the appeal is whether the residuary bequest in clause 9 of the will in favour of "the legitimate son or sons of the testator's son Aniruddha Mitra, whether natural born or validly adopted" is as held by both Courts in India valid, or whether as contended by the appellant it is invalid by reason of the provisions of sections 113 and 114 of the Indian Succession Act, and the appellant is entitled to the property as on an intestacy

The relevant provisions of the testator's will are as follows —

* * * * * *

"5 I will and direct that after my death my wife Sreemutty Nayani Mitra, my son Aniruddha Mitra and his wife shall be entitled to reside for the respective terms of their natural lives in my family dwelling house and use the furniture therein, but they shall not be at liberty to remove or dispose of the said furniture on any way

* * * * * *

7 I further will and direct that my executor or trustee shall pay the sum of Rupees Seven Hundred per month to my wife Sreemutty Nayani Mitra, the sum of Rupees Seven Hundred per month to my son Aniruddha Mitra and the sum of Rupees Seven Hundred per month to Sreemutty Nivanani Mitra the wife of my son Aniruddha Mitra for their maintenance respectively during the respective terms of their natural lives In the event of the death of any one of the said three persons the monthly allowance so payable to the person so dying shall be paid to the survivors in equal shares for life On the death of one of such two survivors, the last survivor of the said three persons shall be paid the said monthly allowances payable as aforesaid to the two that are dead in addition to his or her own monthly allowance of Rupees Seven Hundred

8 I further will and direct that my executor and trustee shall pay the sum of Rupees four thousand per month out of the income of my estate to the University of Calcutta for the advancement of female education among Hindu females of Bengal

9 I further will and direct that the legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted shall become entitled to all the rest and residue of my property. If there is only one son of my son such residue shall be made over to such son of my son on his completing the age of twenty-one years and if there are more sons of my son than one, then to such sons of my son Aniruddha Mitra in equal shares on the youngest of the said sons completing the age of twenty-one years Until the youngest of such son or sons of my son attains the age of twenty-one years the executor or trustee shall pay the sum of Rupees Seven Hundred per month to each of such son or sons of my son Aniruddha Mitra for maintenance and education

10 I further will and direct that until the youngest of the son or sons of my son Aniruddha Mitra shall complete the age of twenty-one years all surplus income of my property after the expenses aforesaid shall be accumulated and invested by my executor or trustee in Government securities or in immovable property yielding income and the accumulation and or the property so acquired shall be made over by my executor or trustee to the son or sons of my son Aniruddha Mitra on the youngest of them (if more than one) completing the age of twenty-one years

11 I further will and direct that if a son is not born to or is not adopted by my son Aniruddha Mitra during my lifetime then the income of my property moveable and immoveable after the expenses aforesaid shall be paid to the University of Calcutta for the advancement of education in such manner as the said University shall think fit amongst Hindu females of Bengal until such time as a son shall be born to or shall be adopted by my son Aniruddha Mitra or his wife

12 I further will and direct that if no son shall be born to or is at all adopted by my son Aniruddha Mitra or his wife then the whole of my property moveable or immoveable shall subject to the bequests, annuities and directions aforesaid be made over to the University of Calcutta for being applied by the said University in such manner as it shall think proper for the advancement of education amongst Hindu females of Bengal"

Before proceeding further, it will be convenient to refer to some of the provisions of the Indian Succession Act, 1925 That Act consists of 11 parts Part VI relates to testamentary succession and comprises sections 57 to 191 Of these only some apply to Hindu Wills, being those mentioned in Schedule III to the Act.

"Section 57 The provisions of this part (*i e*, Part VI) which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply—

(*a*) to all wills and codicils made by any Hindu on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant Governor of Bengal.

. .

Schedule III Provisions of Part VI applicable to certain wills and codicils described in section 57

Ss . 87, 111, 112, 113, 114, 115, 116, 119

Clause 2 Nothing therein contained shall authorise any Hindu to create in property any interest which he could not have created before the first day of September, 1870

Clause 3 Nothing therein contained shall affect any law of adoption

Clause 5 In applying any of the following sections, namely 112, 113, 114, 115 and 116 to such wills the words 'son,' 'sons' shall be deemed to include an adopted child

Section 87 The intention of the Testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible

Section 111 Where a bequest is made simply to a described class of persons, the thing bequeathed shall go only to such as are alive at the Testator's death

Exception—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual but their possession of it is deferred until a time later than the death of the Testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are alive, and to the representatives of any of them who have died since the death of the Testator

Section 112 Where a bequest is made to a person by a particular description, and there is no person in existence at the Testator's death who answers the description, the bequest is void

Exception—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the Testator, by reason of a prior bequest or otherwise, and if a person answering the description is alive at the death of the Testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives

Section 113 Where a bequest is made to a person not in existence at the time of the Testator's death, subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the Testator in the thing bequeathed

Section 114 No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons living at the Testator's death and the minority of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong

Section 115 If a bequest is made to a class of persons with regard to some of whom it is inoperative by reason of the provisions of section 113 and section 114, such bequest shall be (*void in regard to those persons only and not in regard to the whole class*)

(The words in italics were substituted for words 'wholly void' by the Transfer of Property (Amendment) Supplementary Act, 1929)

Illustration (i) to section 115 reads as follows —

"A Fund is bequeathed to *A* for life, and after his death to all his children who shall attain the age of 25 *A* survives the Testator, and has some children living at the Testator's death Each child of *A's* living at the Testator's death must attain the age of 25 (if at all) within the limits allowed for a bequest But *A* may have children after the Testator's decease, some of whom may not attain the age of 25 until more than 18 years have elapsed after the decease of *A* The bequest to *A's* children, therefore, is inoperative as to any child born after the Testator's death (*and in regard to those who do not attain the age of* 25 *within* 18 *years after A's death, but is operative in regard to the other children of* A)."

The words in italics were substituted, by Act XXI of 1929, for the words "as it is given to all his children as a class, it is not good as to any division of that class,

but is wholly void" This amendment was made at the same time as the section was amended and in order to make the illustration conform with the section

"Section 116 Where by reason of any rules contained in sections 113 and 114, any bequest in favour of a person or of a class of persons is void in regard to such person or the whole of such class, any bequest contained in the same will and intended to take effect after or upon failure of such prior bequest is also void

Section 119 Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the Testator's death, and shall pass to the legatee's representatives if he dies, before that time and without having received the legacy, and in such cases the legacy is from the Testator's death said to be vested in interest

Explanation—An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives, or from a provision that, if a particular event shall happen, the legacy shall go over to another person"

Prior to the passing of certain special Acts, the rule of Hindu Law was that a Hindu cannot make a bequest in favour of a person who was not born at the date of the testator's death This rule of law has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1914 (Madras Act I of 1914), the Hindu Disposition of Property Act, 1916 (Act XV of 1916), and the Hindu Transfers and Bequests (City of Madras) Act, 1921 (Madras Act VIII of 1921) The Madras Act I of 1914 applies to the Madras Presidency except the town of Madras The Madras Act VIII of 1921 applies to the Town of Madras, and the Hindu Disposition of Property Act extends to the whole of British India except the Province of Madras. The rule as altered by these Acts may be stated as follows

"Subject to the limitations and provisions contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925, no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death" (*See* Mulla's Hindu Law, 9th Edition, page 439, section 373, also page 457, section 383)

It may be mentioned here that prior to 1929, section 115 of the Act rendered a bequest to a class wholly void if it was inoperative with regard to some members of the class by reason of the provisions of sections 113 and 114 Section 115 has been amended in 1929 by Act XXI of 1929, and as a result of the amendment the bequest is now void only with respect to those members, and it is valid with respect to the remaining members of the class

The learned trial Judge, Das, J, first dealt with the question whether the bequest in clause 9 of the will in favour of "the legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted " is hit by section 114 of the Succession Act That section enacts the rule of perpetuity (or remoteness) as prevailing in India According to the rule enunciated in that section a bequest in favour of an unborn person to be valid must vest within a period covered by the lifetime of one or more persons existing at the time of the testator's death and the minority of the person who shall be in existence at the expiration of that period and to whom if he attains full age the thing bequeathed is to belong By the ordinary law a Hindu attains majority at the age of 18. It follows therefore that the longest period within which the bequest must vest in order to be valid is a life or lives in being plus 18 years thereafter

The bequest in clause 9 of the will is in favour of the "legitimate son or sons of my son Aniruddha Mitra whether natural born or validly adopted" After carefully considering the scope and meaning of the term "validly adopted" the learned Judge held that the bequest extended to any son who might be adopted by the appellant's wife Nivanani, or by another wife whom he might marry in future; that inasmuch as such wife might be a person born after the death of the testator, the vesting in such an adopted son might be delayed beyond the prescribed period and that the bequest might be invalid, but he held, that an adopted son was in the eye of the law deemed to have been begotten by the person

by whom or for whom he was adopted and was therefore in existence at the death of such person, and that therefore if (as in the present case) the adoptive father was alive at the time of the testator's death the adopted son must be deemed to be in existence within the period fixed by section 114 and the clause does not offend against the rule against perpetuities contained in section 114 He further fortified his conclusion on this point by referring to clause 5 of Schedule III of the Succession Act and held that for the purpose of the Indian Succession Act at any rate, the interest of the adopted son relates back to the death of the person for whom the son is adopted and the adopted son must be deemed to be in existence at that date and capable of taking the legacy as if he were a natural born son

The learned Judge next dealt with the argument raised on behalf of the contesting respondent that in any event the bequest so far as it enures for the benefit of the natural born sons or the son to be adopted by Aniruddha himself should be held to be good by virtue of sections 87 and 115 of the Succession Act On this point the learned Judge held that in view of the illustrations to section 115, "the members of the class, the bequest in whose favour is saved by section 115, must be in existence at the date of the testator's death" and that since the respondent had not been adopted at the date of testator's death he could not claim the benefit of that section and that section came into play only when a bequest to a class is void by reason of the provisions of section 113 and section 114 In support of this view, he relied on illustration (i) to section 115

The learned Judge next dealt with the objection based on section 113 He held that the gift in clause 9 comprised the whole of the remaining interests of the testator in the property bequeathed, and that such interest vested in the legatees although their possession was postponed and that therefore the gift did not offend against the provisions of that section

In accordance with the above conclusions he gave appropriate answers to the questions raised in the summons

In appeal against the judgment of Das, J, the principal judgment was delivered by Gentle, J After construing the material clauses of the will the learned Judge summarised his conclusions as follows

"1 A bequest in favour of an unborn person is valid subject to the limitations contained in the Hindu Disposition of Property Act, 1916

2 The rules in sections 113 and 114 have to be applied as at the Testator's death but are subject to the provisions of section 115 and the Hindu Disposition of Property Act

3 A son or sons of the Testator's son become immediately entitled to the bequest in clause 9—

(*a*) if born to or adopted by the Testator's son at the death of the Testator,

(*b*) upon subsequent birth to or adoption by the Testator's son

4. That bequest is subject to the prior bequests in clauses 5 and 7

5 That bequest is not contingent upon the attainment of twenty-one years by the only or youngest son

6 The provision as to payment is merely a postponement of possession of the thing bequeathed"

Dealing with the question whether section 115 affected the rights of the legatees under clause 9 of the will, the learned Judge dissented from the view of Das, J, that the section was limited in its application only to a class of persons in existence at the date of the testator's death and expressed the view that the section applies to all members in whose favour a bequest is made

The learned Judge next considered the application of section 114 and held that upon his adoption by the appellant the respondent became a member of a class in whose favour the gift was made and his interest became vested in him, such vesting taking place within the statutory period

As regards section 113 of the Act the learned Judge held that the bequest in clause 9 did not offend against that section as the testator by that clause had bequeathed the whole of his remaining interest subject to the prior interest created

by clauses 5 and 7 In this connection he also stated that postponement of possession is not repugnant to law when a bequest is made to a person who is either alive or who is unborn at the testator's death.

For the above reasons, the learned Judge held that the respondent Arabinda became entitled to the bequest upon his adoption by the appellant when his interest in it vested and that therefore there was no intestacy of the residuary estate and the appellant does not succeed to that residue

The learned Judge then discussed the question regarding the validity of the bequest with reference to the position of a son adopted to Aniruddha after his death, especially by a widow other than Navanani who was not alive at the testator's death In the light of the opinion expressed that Arabinda has a vested interest in the bequest it was really not necessary to consider the position of an after-adopted son (as pointed out by the learned Judge himself) but he thought it was desirable to express his view in case his expressed opinion regarding Arabinda's right was wrong and out of respect to the able arguments upon the question advanced by the learned counsel After a detailed discussion of the entire case-law on the subject the learned Judge came to the following conclusion —

"It follows that a son adopted by any widow of Aniruddha, properly authorised, no matter how long it may take place after Aniruddha's death and even when such widow was not alive at the testator's death, the adopted son became one of the legatees of the bequest and his interest will vest within the statutory period prescribed in section 114 since he will be 'in existence' as the section requires, at the date of Aniruddha's death"

Ormand, J, agreed with the opinion of Gentle, J, on all the points arising in the case

The main dispute in the case relates to the construction of the bequest in clause 9 of the will It was argued as in the Courts in India that the bequest in clause 9 is a conditional or contingent bequest, that the interest of the testator in the thing bequeathed does not immediately west in the legatee, that the completion of 21 years by the only or youngest son before getting possession is a contingency which makes the gift invalid and has the effect of the bequest not comprising the whole of the testator's interest, that it is in consequence hit by section 113 of the Succession Act, and is also opposed to the rule contained in section 114 of the Act as the vesting in the case of a son adopted by a wife of the testator's son other than Navanani may take place beyond the period mentioned in section 114 of the Act It was also pointed out that the "doctrine of relation back" does not apply to the Hindu law of adoption and that section 115 of the Succession Act has been rightly construed by Das, J To state shortly, the arguments proceeded on the lines indicated in the judgments of the Courts in India which their Lordships have already referred to, in summarising their conclusions

As already explained, a Hindu can now make a valid bequest in favour of an unborn person subject to the limitation contained in sections 113 and 114 of the Succession Act It is not disputed that in scrutinising the validity of the bequest the rules in sections 113 and 114 have to be applied as at the testator's death

The material clauses of the will may now be summarised By clause 5, the testator has given the right of residence in the family house and the use of the furniture therein to his wife, his son (the appellant) and his wife (unnamed) for their respective lives By clause 7, he has allowed maintenance of Rs 700 per mensem for his wife, to his son and his son's wife Navanani during their lives The clause also provides how the allowance is to be distributed in the event of the death of one or the other of them By clause 8, an annuity of Rs 4,000 per mensem is granted to the Calcutta University By clause 11 if a son is not born to, or adopted by, the appellant during the testator's lifetime the income of the estate after meeting the "expenses aforesaid" was directed to be paid to the Calcutta University until such time as a son shall be born or shall be adopted by the appellant or his wife (not named)

By clause 9 the testator proceeds to make the bequest in favour of person or persons, unborn, these persons being a class designated as "the legitimate son or sons" of the appellant, "whether natural born or validly adopted" The clause says they "*shall become entitled to all the rest and residue of my property*" (the italics are by their Lordships), *i e*, the residuary estates Then it says that if there is only one son the residue "shall be made over" to him on his completing the age of 21 years if there are more sons than one the residue is to be made over to them in equal shares, on the youngest son attaining the age of 21 years The clause ends with the statement that until the youngest son of such son or sons attains the age of 21 years the executor shall pay Rs 700 to each son for maintenance and expenses

The first question arising on the construction of this clause is, when does the residuary estate mentioned in the clause vest in the legatee? Does it vest the moment a son is born to or adopted by the testator's son (Aniruddha), or does the fact that the estate is to be "made over" on the completion of 21 years by the only or youngest son make the vesting contingent, *i e*, in other words does the postponement delay or affect the vesting of the residuary estate? All the Judges who have considered this question have come to the conclusion that the residuary estate in clause 9 became vested the moment a son was born to or adopted by the testator's son, and the completion of 21 years by the only or youngest son is not a contingency, but is only a postponement of possession. The arguments advanced by Mr Khambatta, the learned counsel for the appellant, have not convinced their Lordships that the view taken by the Courts in India is wrong The words "shall become entitled to" used in the first sentence in clause 9 show that there is a transfer of ownership with a vesting as soon as a testator's son (or sons) is born or adopted, *i e*, at the date of the birth or adoption The expression that the residue shall be "made over" to the person concerned supports the above view. Further, that the legatee when he comes into existence becomes immediately entitled to the estate appears to be clear from clause 11 of the will On the death of the testator, unless there is a legatee in existence entitled to the estate, the Calcutta University is entitled to the surplus, but the University's interest immediately comes to an end upon the birth of a son to the appellant or the adoption of a son by him or by his wife This view is borne out also by clause 10 of the will The completion of 21 years by the only son or the youngest son before the estate is handed over, relied on by Mr Khambatta to show there is a contingency, is in their Lordships' opinion not a contingency but amounts only to a postponement of possession and does not affect the actual vesting of the estate

Coming to section 113 of the Act, it was held by Gentle and Ormand, JJ, that the interests created by clauses 5 and 7 of the will, *viz*, the bequests with respect to the house and furniture to which rights were given to the testator's wife, his son and his wife, and the life annuities, constituted prior bequests contained in the will within the meaning of section 113 Their Lordships are not satisfied that section 113 would apply where the prior bequest referred to can be regarded as bequest prior to the disposition of the residue, if so, their Lordships think the interests cannot be regarded as prior interests of residue, since the property allocated to meet such bequests does not fall into residue until the interests under clauses 5 and 7 have determined, but even if the bequests do amount to prior bequests of the residue, their Lordships are satisfied that the whole remaining interests of the residue have been bequeathed under clause 9, and the provisions of section 113 have no operation on clause 9 of the will In passing it may be mentioned that Das, J, appears to have taken a slightly different view as to what he considered as the prior bequests under the will The learned Judge stated that "in my opinion the provisions of clauses 5 and 11 constitute prior bequests to which the later bequest in clause 9 is subject" The learned Judges, Gentle and Ormond, JJ, did not agree with the view that the bequest in clause 11 is a prior bequest to which the bequest in clause 9 is subject Their Lordships do not think any further discussion of the question with reference to clause 11 is necessary

The next question is whether the bequest in clause 9 offends the rule contained in section 114 of the Succession Act. Since the terms of the bequest in clause 9 would extend to a son adopted by a wife of the appellant who might be a person born after the death of the testator it was said that the vesting might be delayed beyond the period prescribed in section 114 of the Act The respondent met the objection by the plea that the adoption would relate to the death of the adoptive father, and the section did not therefore apply, but assuming that the section would apply, section 115 of the Act applied and therefore the gift was not bad in so far as it affected respondent No 2 As already stated, the trial Court held that the doctrine of relation back applied and that section 114 did not therefore apply It rejected the contention that section 115 of the Act would apply The Appellate Court held that the doctrine of relation back applied and that section 114 did not apply and that the bequest was saved by section 115 also

In the view that their Lordships take of section 115 of the Act they think it is not necessary to consider whether the doctrine of relation back would apply to save the bequest from being invalid under section 114 Assuming that that section would apply, they think, as will be explained below, that the bequest to the 2nd respondent would be saved by force of section 115 On this question their Lordships disagree with the view of Das, J, and accept the views of Gentle and Ormand, JJ.

Attention has already been drawn to section 115, and illustration (1) to that section, and the amendments that were introduced in them by Act XXI of 1929 (*supra*) Under the section before the amendment, if a bequest was made to a class, and it was inoperative with respect to some members of the class by reason of the provisions of section 113 and section 114, the bequest to a class was wholly void, after the amendment the bequest to a class was void only with respect to those members of the class whose interest was void by reason of the provisions of sections 113 and 114

Relying on the amended section, it was argued before Das, J —

" that reading clauses 9, 11 and 12 (of the will) it is apparent that the testator contemplated two kinds of adoption, namely, (*a*) adoption by Aniruddha which must be during his lifetime and (*b*) adoption after the death of Aniruddha by his wife who may or may not be born at testator's death. Even assuming that the adoption after the death of Aniruddha be hit by section 114, there is no reason why the adoption by Aniruddha should also be hit by that section "

The learned Judge rejected the argument for the following reason

" The illustrations to section 115, however, clearly indicate that the members of the class the bequest in whose favour is saved by section 115 must be in existence at the date of the testator's death It has been recently held by the Judicial Committee in *Sopher's case*[1], that the sections of the Indian Succession Act should be construed in the light of the illustrations Reading section 115 in the light of the illustrations thereto it appears to me that in the case of a bequest to a class, the validity or otherwise of the bequest in respect of any member of that class has to be decided with reference to the date of the testator's death I therefore agree with learned Advocate-General that the defendant Arabinda, not having been adopted at the testator's death, he cannot claim the benefit of section 115 "

From the reasoning of the learned Judge, it is clear that the application of section 115 is limited to members of a class who are in existence at the date of the testator's death, and that the bequest is inoperative in this case with respect to all the children born after the testator's death

It may be mentioned that what was actually observed by Lord Maugham, who delivered the judgment of the Judicial Committee in *Sopher's case*[1], *supra*, was that

" the section must of course be read and construed in connexion with the illustrations to be found in the Act "

The section therein referred to is section 113 of the Act

Gentle, J, with whom Ormond, J, agreed, did not accept the interpretation put upon the section by the learned Judge, for the reason that the words of

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1 (1944) 2 M L J 20 L R 71 I A 93 (P C)

section 115 of the Act are general, that though the illustrations may be looked into, in order to understand the meaning of the section, they do not exhaust its meaning, and that illustration (i) referred to by the learned Judge, when correctly understood, does not support his view

Their Lordships agree with the above view It is perfectly clear that the words of section 115 of the Act are sufficiently wide and do not in any manner limit its application to members of a class who are in existence at the date of the testator's death The learned Judge, Das, J, would have certainly accepted this view of the section, but for what he considered the light thrown upon its meaning by the illustrations The words of the section are not ambiguous ; as pointed out by the Board in *Mahomed Syedol Ariffin* v *Yeoh Ooi Gark*[1], the decision referred to by Lord Maugham in *Sopher's case*[2], *supra* ·

"Illustrations appended to sections of a statute should be accepted, if that can be done as being of relevance and value in construing the text . . ."

It is well settled that just as illustrations should not be read as extending the meaning of a section, they should also not be read as restricting its operation, especially so, when the effect would be to curtail a right which the plain words of the section would confer In the present case, there is no difficulty The illustration relied on by the learned Judge [apparently illustration (i)] does not restrict the meaning of section 115 It is the last sentence in the illustration that has given trouble to Das, J As already pointed out, the clause in italics in the last sentence was substituted for the words

"as it is given to all his children as a class it is not-good as to any division of that class, but is wholly void"

by Act XXI of 1929. This amendment was made at the same time as the section was amended, in order to make it harmonise with the section In their Lordships' view, the last sentence in the illustration means that the bequest is inoperative in regard to children of *A* born after the testator's death, who do not attain the age of 25, within 18 years after *A's* death, but it is operative in regard to such children who do attain the age of 25 within 18 years—though born after the testator's death The learned Judges of the High Court who heard the appeal have interpreted the sentence in the above sense, and their Lordships think they have correctly interpreted it The illustration thus understood does not in any manner restrict the operation of the section It just illustrates its meaning and does nothing more. Their Lordships may in this connection draw attention also to section 87 of the Act, which says that

"The intention of the testator shall not be set aside because it cannot take effect to the full extent, but effect is to be given to it, as far as possible"

The principle underlying this section is thus stated in "Williams on Executors" (12th edn, Vol II, p 692) :

"The intention of the testator is not to be set aside because it cannot take effect to the full extent but it is to work as far as it can"

It may be noted that the provisions of this section apply to wills of Hindus (*see* Schedule III)

In the above view the application of the doctrine of "relation back" as stated by the High Court (*viz.*, "that an after-adopted son, for all purposes, including succession to and inheritance of property, is deemed to be in existence at the time of his adoptive father's death, irrespective of the period intervening between the death of the father and the adoption by his widow "), in connection with section 114 of the Act does not necessarily arise for consideration in this appeal, and their Lordships do not express any view about it

For the above reasons, their Lordships will humbly advise His Majesty that this appeal should be dismissed The appellant must pay the costs of the respondents The Administrator-General will be entitled take his costs from the estate to the extent to which they are not otherwise satisfied

K S ——— *Appeal dismissed.*

1. (1916) 2 A C 575
2. (1944) 2 M L J 20 L.R. 71 I A. 93 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE GOVINDA MENON

Major F K Mistry *Petitioner* *

Criminal Procedure Code (V of 1898), sections 549 and 561-A—Inherent jurisdiction to quash proceedings—Scope—When to be exercised—Non-compliance with the provisions of section 549 and rule 105 of the Criminal Rules of Practice—Effect of—Indian Army Act (VIII of 1911), section 69—Scope of—Offence of criminal breach of trust—Triable by ordinary Criminal Courts as well as by Courts Martial

In an application to quash a charge under S 561-A, Criminal Procedure Code, all that the High Court is concerned with is whether the Court which has framed the charge had jurisdiction on the materials placed before it to act as it did

Apart from the specific instance provided for in section 215, Criminal Procedure Code, every other instance of quashing a charge framed must be brought within the ambit of the residuary powers not specifically dealt with in the Code In the interests of the speedy administration of justice, the High Court ought to exercise its inherent powers if it finds that the lower Court has acted without jurisdiction in framing a charge and not for any other reason An application for quashing the proceedings on the ground of want of jurisdiction ought to be moved at the earliest possible opportunity

The language of section 549 of the Code and rule 105 of the Criminal Rules of Practice is clear and mandatory When a person subject to the military law is brought before a Magistrate charged with an offence for which he is triable under the Army Act, the Magistrate is bound to follow the procedure prescribed by those provisions This would be so even if the prescribed military authority under S 69 of the Army Act had come to the decision that the proceeding should be instituted in an ordinary Criminal Court Where the Court fails in its duty to give notice to the commanding officer of the accused, the proceedings before the Magistrate relating to the recording of evidence, etc , would be illegal and without jurisdiction , and acquiescence on the part of the accused in an irregular or illegal proceeding would not regularise or legalise the proceedings A charge so framed would be without jurisdiction and has to be quashed

Under section 69 of the Army Act a discretion is given to the prescribed military authority and it may decide before which Court the proceedings shall be instituted It may not as well decide anything There is no compulsory duty cast upon the prescribed military authority in all cases where a Criminal Court and a Court Martial have concurrent jurisdiction in respect of an offence, to direct in which Court a proceeding shall be instituted

After the passing of the Indian Army Act of 1911 an offence like criminal breach of trust committed by a person subject to military law is triable both by an ordinary Criminal Court as well as by a Court Martial

Petition praying that in the circumstances stated therein, the High Court will be pleased to quash the charge framed against the petitioner in C C No 531 of 1947 on the file of the Additional First Class Magistrate of Chingleput

K S Jayarama Aiyar, *P Basi Reddi* and *V. V Radhakrishnan* for Petitioner

The Advocate-General (*K Rajah Aiyar*) and The Public Prosecutor (*V L. Ethiraj*) for the Crown

The Court made the following

ORDER —The petitioner Major F K Mistry who was an Ordinance Officer, in charge of the Returned Stores Depot, Almadi, Avadi Sub-Area, along with two others was prosecuted firstly for having conspired to remove and continually misappropriate, tentage from the Returned Stores Depot , and secondly in pursuance to that conspiracy for having with his two associates managed, in their capacity as officers belonging to the Ordinance Department in the Indian Army, to remove quantities of tentage from the Returned Stores Depot , and in compensation for which act, the petitioner was paid Rs 800 out of the sale proceeds of these articles on or about the 31st August, 1946 The charge-sheet was filed on the 24th July, 1947, alleging that the offences were committed on 28th August, 1946, and the petitioner received his share of the proceeds of misappropriation on the 31st August, 1946 Fourteen witnesses were examined for the prosecution and thereafter charges were framed on the 1st of November, 1947, the charge against the petitioner being one under section 409 of the Indian Penal Code which is in the following terms

"That you on or about the 28th day of August, 1946, at Avadi being a Government servant as Ordinance Officer-in-charge of the Returned Stores Depot, Almadi, Avadi Sub-Area, and in such capacity entrusted with the dominion over certain property to wit, 2 tons, 10 cwts of tentage

* Cr M P No 2092 of 1947. 21st April, 1948

in weight, committed breach of trust with respect to the said property and disposed of the said property for Rs 800 and misappropriated the sale proceeds for yourself, and thereby committed an offence punishable under section 409 of the Indian Penal Code and within my cognizance, and I hereby direct that you be tried by the said Court on the said charge "

Subsequently, the prosecution witnesses were recalled and further cross-examined; and on the 5th December, 1947, Exhibit P-23, was filed on behalf of the prosecution. Thereafter, on the 18th December, 1947, the petitioner filed the above application for quashing the charge framed against him by the additional First Class Magistrate of Chingleput

It is unnecessary to dwell at any length on the facts and circumstances which have led up to the prosecution or the details of the evidence adduced, for in an application to quash a charge under section 561-A of the Criminal Procedure Code, all that this Court is concerned with, is whether the Court which has framed the charge had jurisdiction on the materials placed before it to act as it did. The specific provision of the Criminal Procedure Code dealing with the quashing of the charge is that contained in section 215 which empowers the High Court to quash a commitment made by a competent Magistrate, or a civil, or revenue Court, under section 478, *only* on a point of law. Therefore, every instance of quashing a charge framed, must be brought within the ambit of the residuary powers not specifically dealt with under the Code In the interests of the speedy administration of justice, the High Court ought to exercise its inherent powers if it finds that the lower Court has acted without jurisdiction in framing a charge and not for any other reason It is not the function of this Court to examine the evidence on which the charge has been framed in any detail to find out how far the charge is justifiable The proper time for doing that is in an appeal against the conviction if the proceedings result in a conviction Such being the case, in the present application under section 561-A of the Criminal Procedure Code, I am only concerned with the circumstance whether the lower Court had jurisdiction to entertain the complaint or proceed with the enquiry.

I may also say that any application for quashing the proceedings on the ground of want of jurisdiction ought to be moved at the earliest possible opportunity. In this case, the petitioner has waited till the charge was framed against him before moving this Court The points raised by him which go to the very root of the jurisdiction of the Court holding the enquiry are such as should have been raised before that Court at the commencement of the proceedings. But I do not want to dispose of this application on that technical point especially since the matter has been argued at a very great length both by the learned Advocate-General who appeared on behalf of the Crown and by Mr K S Jayarama Aiyar appearing for the petitioner Both of them have expressed the wish that the points raised should be considered and decided in view of the importance of the questions involved.

It is undisputed that the petitioner who holds the rank of a Major in the Indian Army is governed by the provisions of the Indian Army Act (Act VIII of 1911), which consolidated and amended the law relating to the Government of His Majesty's Indian forces, such as Indian Commissioned Officers, Viceroy's Commissioned Officers, soldiers and other persons in His Majesty's Indian forces. This Act came into force on the 1st of January, 1912 Section 31 of this Act is contained in Chapter V and it comes under a separate heading designated "Disgraceful Conduct" It states that any person subject to the Indian Army Act who commits any one of the following offences, that is to say —(*a*) dishonestly misappropriates or converts to his own use any money, provisions, forage, arms, clothing, ammunition, tools, instruments, equipments, or military stores of any kind, the property of the Crown, entrusted to him, shall, on conviction by court-martial, be punished with imprisonment, or with such less punishment, as is in this Act mentioned It is admitted that if the prosecution story is accepted, the offence mentioned above has been committed Section 41 is also contained in the same Chapter V and is under the heading "Civil Offences." It lays down that every person subject to this Act who, either within British India or at any place beyond British India,

commits any civil offence shall be deemed to be guilty of an offence against military law, and, if charged therewith under this section, shall, subject to the provisions of this Act, be liable to be tried for the same by court-martial, and on conviction to be punished as prescribed thereunder The term "civil offence" is defined in section 7, sub-section (18) as meaning an offence which, if committed in British India, would be triable by a criminal Court, and this is followed by the definition of the word "offence" as meaning any Act or omission punishable under this Act, and includes a "civil offence" as hereinbefore defined It is contended on behalf of the petitioner that the Acts complained against him constitute an offence under section 31 of the Indian Army Act, and such an offence is triable only by a court-martial. Any offence other than that contemplated by section 31 will come within the residuary section 41 and may be tried either by a court-martial or by the ordinary criminal Court; but if the offence is one which comes directly within section 31, the ordinary criminal Courts of the land have no jurisdiction Therefore, Mr Jayarama Aiyar argues that the offence of having committed breach of trust in relation to the materials of tentage can, when the person accused is one to whom the Indian Army Act applies, only be tried by a court-martial, and for this purpose, he has devoted much time and energy on an intensive study of the history and development of the various Army Regulations which existed in India during the time of the East India Company subsequent to the thirties of the last century. According to him, criminal breach of trust by a person in the employ of the Army of the East India Company, was made an offence punishable by a court-martial even prior to the enactment of the Indian Penal Code in 1861, previous to which year there existed no codified penal law in India, so that an Army Officer committing the offence of criminal breach of trust was liable to be dealt with only by a court-martial before the enactment of the Indian Penal Code The present section 31 had its predecessors in the various Army Acts and Regulations from 1845 onwards; and a study of those Acts will reveal that from the early times to the enactment of Act VIII of 1911 by which many offences committed by Army personnel were made triable by the ordinary criminal Courts, such offences as criminal breach of trust were triable by a court-martial

It is necessary for a proper understanding and disposal of this argument to go back and find out what exactly was the state of the law both relating to offences committed by Army personnel as well as by civilians about a hundred years ago During the reign of the Moghul Emperors in India, the Mohammadan law was used in the administration of criminal justice even to persons governed by the Hindu law and Koran was the source from which the principles of Criminal law were obtained. But after the conquest of portions of India by the East India Company and prior to 1860, the English Criminal Law as modified by various statutory enactments was administered in the Presidency Towns of Calcutta, Bombay and Madras In the mofussil, the administration of criminal justice was mainly based on the rules of Mohammadan Criminal Law, though some of the patent incompatibilities and unsuitabilities of the provisions of that law when applied to people not governed by the tenets of the holy Koran were removed by regulations of the local governments But, mainly, prior to 1861, the Mohammadan Criminal Law with such amendments and alterations as were deemed necessary to suit the conditions of the people and the country, was administered in the mofussil of the Madras Presidency The Indian Penal Code came into force on the 1st of January, 1862, and from that day onwards there can be no doubt or dispute as to what the prevalent penal law of the country was Section 409 as we see at present was in the Penal Code from its very inception We have therefore to see whether the introduction of section 409 in the Penal Code altered or abrogated the provisions in the Army Regulation regarding kindred offences mentioned there

The earliest legislative enactment relating to the Army with which we are concerned is Act No XXIX of 1861 "Articles of War for Native Army" (*see* the Legislative Acts of the Governor-General in Council, edited by W. Theobald,

Volume III, page 938) which received the assent of the Governor-General on the 7th September, 1861 and therefore became law prior to the enactment of the Indian Penal Code. This Act repealed various prior Acts. Article 22 of this enactment deals with embezzlement, etc., of money entrusted for public account, or of provisions, or of Military stores, the property of Government, or of conniving at any such offence, and on conviction for any of these offences by a General court-martial, the delinquent was to be punished with dismissal from service, fine to the extent of the arrears of pay and allowances, and imprisonment for a period not exceeding three years. So far as non-military personnel were concerned whether "criminal breach of trust" came within the offences for which a punishment has been definitely fixed in what is called "Hadd" according to the Islamic law is not a profitable subject for discussion at present. But it can be taken as settled that there was no statute law which made such an offence punishable when Act XXIX of 1861 came into force. Articles 124 and 125 of the same Act provide that where any officer or soldier in any place within the jurisdiction of any Criminal Court established by Her Majesty or the Government of India or any Local Government is accused of any offence triable by such Court, he shall be delivered over to a Magistrate to be proceeded against according to law. The combined effect of these articles is that where offences such as those mentioned in Article 22 are committed, they will be tried by a general court-martial and for other offences, the accused person will be delivered over to an ordinary Magistrate. This Act which underwent amendments by Act V of 1863 and Act XXVI of 1865, in certain other matters, was repealed by the enactment of Act V of 1869 called "The Indian Articles of War" which came into operation on the 1st day of June, 1869. Article 54 contained in Chapter III deals with an offence by a person subject to those articles, of dishonest misappropriation or conversion to his own use of money, provisions, forage, arms, etc., the property of Government entrusted to his charge on the public account, or for any military purpose. It also provides for punishment for dishonestly using or disposing of such property in violation of any direction of a proper authority, or dishonestly receiving or retaining any such property knowing or having reason to believe the same to have been dishonestly misappropriated or converted. Such offences were triable by a General court-martial according to the provisions of the Articles. For the first time we see in this enactment Article 170 styled "non-military offences" dealing with offences committed within the territorial jurisdiction of Criminal Courts. It is necessary to extract this Article *in extenso* (See page 121, Legislative Acts of the Governor-General of India in Council, 1869, Volume VI, by W. Theobold).

"Any person subject to these Articles, who, at any place in British India within the jurisdiction of any Court of Criminal Justice established by Her Majesty, or by the Government of India, or by the Local Government, is accused of any offence against the Indian Penal Code, and not included in the foregoing Articles, *shall be* delivered over to the nearest Magistrate to be proceeded against according to law."

A reading of these two articles shows that during the time when this enactment was in force, such offences under the Indian Penal Code as were not included in that enactment were alone triable by the ordinary Magistrates and the accused persons should be delivered over to the nearest Magistrate to be proceeded against according to law. Moreover Article 54 occurs in that part of the Act designated "Title II—Military offences" and Article 170 occurs in "Title V—Non-military offences". This aspect of Mr. Jayarama Ayyar's contention has to be accepted that even after the enactment of the Indian Penal Code an offence of criminal breach of trust of Government property by a person subject to the Articles of War can only be tried by a general court-martial and not by the ordinary criminal Courts. The natural inference or conclusion on a parity of reasoning, deducible from the Articles mentioned above is that where the offence is one designated as a Military offence and is contained among those mentioned as "Military offences" it is triable exclusively by a general court-martial and in the case of all other offences, the ordinary criminal Courts have the right to try the offender for which purpose he should be delivered over to the nearest Magistrate. By Act XII of 1894, called

"The Indian Articles of War Amendment Act" certain provisions of Act V of 1869 were repealed and other provisions substituted There were also amendments and modifications, of other articles with the result that the Act V of 1869 was appreciably amended by the Act of 1894 Article 70 of Act XII of 1894, repealed the second and third paragraphs of Article 170 of Act V of 1869 retaining the first part intact By Article 71 of Act XII of 1894, for Articles 171 to 175 (both inclusive) of the earlier Act, new articles were substituted It is interesting to notice that Article 171 newly inserted is a forerunner of the present section 41 of Act VIII of 1911 The result of these alterations, amendments and substitutions is that even after 1894, any person subject to the Articles of War who is accused of any offence under the Indian Penal Code not included specifically in these Articles should be delivered over to the nearest Magistrate to be proceeded with according to law. The New Articles 174 and 175 for the first time inserted in the year 1894 corresponded to the present sections 69 and 70 of the Indian Army Act which give a discretion to the Military Authorities to decide whether the ordinary criminal Court or a Military Court should try an offender subject to the Army regulations. In my opinion the retention of the first part of Article 170 after the second and third parts were deleted makes it clear that the offences contemplated by Article 174 are such offences under the Indian Penal Code as were not otherwise specifically mentioned in the Regulations, so that the pre-existing state of the distinction between Military and non-Military offences is retained and for non-Military offences alone a discretion is given to the authorities to decide whether an ordinary criminal Court or a court-martial should try the offender. It cannot be said that by the amendments in 1894, the scope and import of the trial by the ordinary criminal Courts are in any way widened On the other-hand such non-Military offences which prior to 1894 could be only tried by the ordinary criminal Courts were made triable by a Military Court also if the authorities in their discretion decided to act in that manner under Article 174 so that if the offence of criminal breach of trust of Military or Government property was committed by an Army Officer, during the time when Act V of 1869 as amended by Act XII of 1894 was in force, it is only a general court-martial that could try the offence.

Now we come to the Indian Army Act in force at the present day, *i e*, Act VIII of 1911. This Act in very many essentials resembles the English Act which is cited for all purposes as the Army Act, 44 and 45 Victoria, Chapter 58 A comparison of the various provisions of the Army Act hereinafter known as the English Act with the Indian Army Act is instructive and interesting The scope of the two Acts, the arrangement of sections, the manner of the enforcement of discipline, the infliction of punishment and the method of conducting courts-martial, are very similar in both the Acts and most of the sections dealing with these subjects in the respective Acts are to a large extent *in pari materia* though not exactly *ad idem* Section 31 of the Indian Army Act has its counter-part in the sister Act in sections 17 and 18 and in particular reference may be made to sub-section (4) of section 18 which is in the following items —(Page 444, Manual of Military Law, 1929).

"18 Every person subject to Military law who commits any of the following offences; that is to say . . . (4) steals, embezzles, or fraudulently misapplies or receives, knowing them to be stolen or embezzled, any money or goods the property of a person subject to Military law, or any money or goods belonging to any regimental mess or band, or to any regimental institution or to the Navy, Army and Air Force Institutes, or any public money or goods"

This sub-section deals with the Military offences of stealing, embezzlement and fraudulent misapplication of Army properties Corresponding to section 41 of the Indian Act, we have section 41 of the English Act dealing with offences punishable under the ordinary law which is as follows

"Subject to such regulations for the purpose of preventing interference with the jurisdiction of the civil courts as are in this Act after mentioned, every person who, whilst he is subject to military law, shall commit any of the offences in this section mentioned shall be deemed to be guilty of an offence against military law, and if charged under this section with any such offence (in this Act referred to as a civil offence), shall be liable to be tried by court-martial, and on conviction to be punished as follows;—that is to say,

We have next to consider the second part of the petitioner's contention based upon sections 69 and 70 of the Indian Army Act, which run as follows :

(1) If he is convicted of treason, be liable to suffer death, or such less punishment as is in this Act mentioned,

Provided as follows —

(*a*) A person subject to military law shall not be tried by court-martial for treason, murder, manslaughter, treason-felony or rape committed in the United Kingdom, and shall not be tried by court-martial for treason, murder, manslaughter, treason-felony, or rape committed in any place within His Majesty's dominions, other than the United Kingdom and Gibralter, unless such person at the time he committed the offence was on active service or such place is more than one hundred miles as measured in a straight line from any city or town in which the offender can be tried for such offence by a competent civil Court,

(*b*) A person subject to military law when in His Majesty's dominions may be tried by any competent Civil Court for any offence for which he would be triable if he were not subject to military law (*Vide* pages 459-460, Manual of Military Law issued by the Army Council, 1929, 7th edition)

It is seen that subject to proviso (A) this section in effect gives jurisdiction to a court-martial to try a person subject to military law for any offence In this respect a reference may be made to Chapter III of the Manual of Military Law above mentioned which at page 21 contains the following passage

" Ordinary thefts from civilians may be dealt with by the civil Courts or they may be tried by court-martial under section 41 as civil offences , but to steal, embezzle or fraudulently misapply public or regimental money or goods or property belonging to a person subject to military law or to various military institutions has, in *accordance with long established practice*, been singled out for punishment as a military offence "

It is therefore clear that in England, under the corresponding Act the trial of an offence of criminal breach of trust of property belonging to the Army or to the Government was by Military institutions not because of any prohibition imposed upon the ordinary criminal Courts but only in accordance with long established practice Section 162 of the English Act to a certain extent corresponds to sections 69 and 70 of the Indian Act whereas section 157 of the English Act has also its counter-part in the Indian Act in sections 66, etc The English law on the subject is summarised in Halsbury's Laws of England, Hailsham Edition, Volume VIII, page 642, in paragraph 1398, which is as follows

" Nothing is to affect any jurisdiction of any civil Court to try a person subject to military law for any offence If he has been previously tried for the same offence by a court-martial, the civil Court must, in awarding punishment, have regard to the military punishment he may already have undergone Where a person subject to military law has been acquitted or convicted of an offence by a competent civil Court, he is not liable to be tried for that offence by court-martial And he is not so liable if he has been previously acquitted or convicted of the same offence by a court-martial Similarly a person is not liable to be dealt with summarily for any offence of which he has been acquitted or convicted by a civil Court or court-martial "

Therefore it is clear that in England it is only by means of long established practice that the offence of criminal breach of trust of Army property was tried by court-martial instead of by ordinary criminal Courts.

After the enactment of the Indian Army Act of 1911, the position here is practically the same As stated already, though the first paragraph of Article 170 was retained in the Amending Act XII of 1894, the same was repealed when the Act of 1911 was passed by which the words " civil offence " and " offence " were defined There can be no doubt that if the prosecution story is true, what the petitioner has committed is a " civil offence " as well as " an offence ", and in the absence of the re-enactment of Article 170 in the Act of 1911 and also in view of thd disappearance of the classification of offences as military and non-military offences, I am inclined to hold that after 1911, an offence like the one with which we are now concerned, is triable both by an ordinary criminal Court as well as by a court-martial I may once again refer to section 71 of the Indian Army Act which lays down that a person acquitted or convicted by a court-martial may afterwards be tried by a criminal Court for the same offence or on the same facts and section 70 provides that if a criminal Court having jurisdiction is of opinion that proceedings ought to be instituted before itself in respect of any alleged offence it may require the prescribed military authority, at its option, either to deliver

over the offender to the nearest Magistrate to be proceeded against according to law or to postpone proceedings pending a reference to the Central Government The fasciculus of sections beginning with section 66 and ending with section 71 gives ample justification for holding that the rights and powers of the ordinary criminal Courts have been well established by the Act of 1911 to be the same as those obtaining in England If one may hazard a reason for this, it can be found in the circumstances that in the beginning and in the middle of the last century, the ordinary criminal Courts in India were not so advanced or were manned by efficient professional judges that the trial of persons subject to the Army Regulations could be entrusted to such Courts with confidence But by the time the Amending Act of 1894 was passed and certainly by 1911, the Indian Courts had attained such a degree of development and progress that it could be said with justification that they would compare very favourably with any of the ordinary criminal Courts in England, though most of the Magistracy and some of the Judges in India were not professional lawyers I can find no justification for holding that in the absence of a section like Article 170 of the 1869 Act in the present day Army Act, the ordinary criminal Courts have no jurisdiction to try an offender for committing breach of trust of Army property.

Relying upon the maxim *generalia specialibus nonderogant*, Mr Jayarama Aiyar, contends that a special Act like the Army Regulations having provided for the trial of the offence of breach of trust of Army property by a court-martial as early as 1861, and having continued it in the subsequent Acts, unless a special provision is made for its trial by the ordinary criminal Courts it should be presumed that the special jurisdiction is retained In other words, his contention is that in a case where a special Act deals with a subject, a subsequent general Act cannot be deemed to have dealt with it without a special mention of the matter He also refers to section 5 of the Indian Penal Code which says that "Nothing in this Act is intended to repeal, vary, suspend or affect any of the provisions - or of any special or Local Law" He relied upon a passage at page 156 of Maxwell on the Interpretation of Statutes, eighth edition, by Sir Gilbert H B Jackson, which is in the following terms

"Having already given its attention to the particular subject and provided for it, the Legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language"

In *Barker* v *Edger*,[1] Lord Hobhouse in delivering the judgment of the Judicial Committee observed as follows·

"When the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision unless it manifests that intention very clearly Each enactment must be construed in that respect according to its own subject-matter and its own terms"

In *Seward* v *Vera Cruz*[2], the Earl of Selborne, L C, in his speech observed as follows

"Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so"

and his Lordship relies upon the case of *Hawkins* v *Gathercole*[3] where it was held that

"all those general words about tithes and rectories, and so on, were capable of a reasonable application to subjects not affected by any particular legislation, etc"

To the same effect is a quotation from a case of the Exchequer Division reported in *Dryden* v *Overseers of Putney*[4]. Quain, J, observed as follows

"It may be laid down as a rule for the construction of statutes, that where a special provision and a general provision are inserted which cover the same subject-matter, a case falling within the words of the special provision must be governed thereby, and not by the terms of the general provision',

1 (1898) A C 748 (754)
2 (1884) 10 A.C 59
3 (1855) 6 De G M & G 1 43 E R 1129.
4 L R (1875-76) 1 Ex. Div 223 (232)

In addition to relying on the above passages, Mr Jayarama Ayyar has got a further contention to the effect that the repealing of the earlier Army Regulations and the consolidation in the one Act of 1911 does not necessarily deface all the provisions of the repealed enactments, unless stated in positive terms and therefore the spirit of the old Article 170 still remains even if not specifically re enacted in 1911 For this purpose, my attention is invited to passages in Craies, on Statute Law, Fourth Edition The passage at page 114 to the effect that

"to alter any clearly established principle of law a distinct and positive legislative enactment is necessary"

is brought to my notice He also relied upon various passages at pages 132, 135, 305 and 306 In effect, what is contended for is that in construing a consolidated statute the provisions must be traced to what they were at the very inception and effect should be given to those provisions even if they had not been continued throughout The short answer to this argument is found in the observations of Lord Watson in *Administrator-General of Bengal* v *Prem Lal Mullick*[1] where his Lordship repeals an argument in the following words

"The respondent maintained this singular proposition, that, in dealing with a consolidating statute each enactment must be traced to its original source, and, when that is discovered, must be construed according to the state of circumstances which existed when it first became law The proposition has neither reason nor authority to recommend it The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code aplicable to the circumstances existing at the time when the consolidating Act was passed"

Following as I am bound to do, the above dictum of the learned Law Lord, Mr. Jayarama Ayyar's contention that the enactment of section 5 of the Indian Penal Code taking away from the operation of that statute all the special and local laws would make the offence of criminal breach of trust of Army property triable only by a court-martial in 1861 and the subsequent consolidation of the various Army Regulations into one Act would continue to keep such an offence triable only by Military Courts, cannot be accepted

If the very object of consolidation is the collection and co-ordination of the various local enactments till then scattered about over different periods of time, it is a futile attempt in construing such a consolidated statute to probe into the origin of the legislation and delve deep into the times of antiquity to find out the exact causes The Act of 1911 being the provision of law now in force, I do not think I will be justified in interpreting it with reference to the previous state of the law, though in construing a consolidation Act prior statutes which even if repealed are reproduced in substance are regarded as *in pari materia* and judicial decisions on the repealed statutes are regarded as applicable to *substantially identical provisions* of the repealing Act, it would be an extremely hazardous proceeding to refer to provisions which have been absolutely repealed in order to ascertain what the Legislature intended to enact in their room and stead For, it is almost impossible in the process of consolidation to avoid some dislocation and change in the effect of the consolidated enactments (Per Lord Watson in *Bradlaugh* v *Clarke*[2]) The effect of consolidation is stated at length in pages 305 and 306 of Craies on Statute Law, Fourth Edition, and I need not repeat the observations of the learned author supported by a large body of authority on which he relies. But one thing is clear that by the deletion of Article 170 in the Consolidation Act, the Legislature did not intend to keep the distinction between military and non-military offences and the necessity of handing over a person governed by the Army Act, to the ordinary criminal Courts even in cases of offences not mentioned specifically in section 41

Though "The Regulations for the Army in India" issued under the authority of the Government of India are not to be considered as of any binding authority to be followed in the ordinary Courts, still they may afford some guide to a correct appreciation and understanding of the position which the Army authorities adopt

1 (1895) L R 22 I A 107 I L R 22 Cal 788 (P C) 2 (1883) L R 8 A C. 354 (380)

in dealing with such matters Regulation No 385 of the Army Regulations, Reprint 1942, states that all civil offences except those specified in the proviso to section 41 of the Army Act can be tried either by a court-martial or by a civil Court Offences under sections 27 (*d*), 35 (*a*) and (*b*), and 39 (*b*) and (*d*) as well as *most offences* under section 31 can also be tried by a court-martial or a civil Court It is further stated that the procedure to be followed in a case where there is dual jurisdiction is laid down in sections 69 and 70 of the Indian Army Act, the prescribed military authority being the General Officer, Commander-in-Chief, of the Command, the district, brigade or station commander Further light is thrown by the instructions contained therein that if the offender is in military or civil custody, the Officer Commanding the unit or the Magistrate will take steps to request the prescribed military authority to decide the Court before which proceedings shall be instituted But 'in cases falling under section 41 of the Army Act, not being cases covered by the proviso to that section in which death has resulted, the decision shall rest with the District Commander or the General Officer, Commander-in-Chief of the Command As I have already stated, by the Act of 1911, the position in India has been brought up to the same state as that which was obtaining in England But in England it was by a course of long established practice alone and not by any statutory authority that the offence of embezzlement of military property was usually tried by a court-martial Such a well established and long practice has not obtained in India and in view of the various provisions of the Army Act discussed by me above, it seems to me that the offence with which the petitioner is charged can be enquired into and tried both by the ordinary criminal Courts in the land as well as by a court-martial Before leaving this part of the case, I shall advert to the two points raised by the learned Advocate-General for the Crown, *viz*, that under section 26 of the General Clauses Act, where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence He contends that even though embezzlement of Army property is made a specific offence triable by a court-martial under section 31 of the Indian Army Act, nonetheless it is an offence punishable under the Indian Penal Code because section 2 of the Penal Code enacts that every person shall be liable to punishment under the Penal Code and not otherwise for every act or omission contrary to the provisions thereof of which he shall be guilty within the territories mentioned in the previous section, *viz*, those which are, or may become vested in the Crown by Statute 21 and 22, Victoria, Chapter 106, entitled "An Act for the better Government of India". According to section 5 of the Indian Penal Code, this Act is not intended to repeal, vary or suspend any special or local law Moreover, section 5 of the Criminal Procedure Code, enacts that all offences under the Indian Penal Code shall be investigated, enquired into, tried and otherwise dealt with according to the provisions of the Criminal Procedure Code, and as regards offences under any other law, the Criminal Procedure Code applies subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences Therefore the learned Advocate-General contends that unless by express exclusion the offence of embezzlement of Army property is taken away from the jurisdiction of the ordinary criminal Courts, the criminal Courts in the land have jurisdiction to enquire into and try this offence. The definition of the words "offence" and "civil offence" has already been considered and as the Army Act now stands, it cannot be said that there is any express provision of law which takes away from the ordinary criminal Courts, the right and power to enquire into and try an offence of criminal breach of trust whether committed with regard to Army property or other properties; or whether the delinquent is an Army personnel or an ordinary citizen Therefore the first argument of the learned advocate for the petitioner that an offence of criminal breach of trust of military property by an officer subject to the Indian Army Act is exclusively triable by a court-martial is unsupported by the provisions of the Indian Army Act.

"69 When a criminal Court and a court-martial have each jurisdiction in respect of an offence, it shall be in the discretion of the prescribed military authority to decide before which Court the proceedings shall be instituted, and, if that authority decides that they shall be instituted, before a court-martial to direct that the accused person shall be detained in military custody"

"70 (1) When a criminal Court having jurisdiction is of opinion that proceedings ought to be instituted before itself in respect of any alleged offence, it may, by written notice, require the prescribed military authority at its option either to deliver over the offender to the nearest magistrate to be proceeded against according to law, or to postpone proceedings pending a reference to the Central Government

(2) In every such case the said authority shall either deliver over the offender in compliance with the requisition or shall forthwith refer the question as to the court before which the proceedings are to be instituted for the determination of the Central Government whose order upon such reference shall be final"

Rule 167 of the Indian Army Act Rules describes what is meant by a "prescribed authority" under sections 69 and 70 of the Act It says that the prescribed military authority for the purpose of sections 69 and 70 of the Act shall be the officer commanding the army, army corps, division, brigade or station in which the accused person is serving, provided that, in cases falling under section 41 of the Act, in which death has resulted, the prescribed military authority shall be the officer commanding the army, army corps, division or independent brigade in which the accused person is serving and no lower authority My conclusion in the earlier part of the judgment that the offence said to have been committed by the petitioner is triable both by a court-martial and by the ordinary criminal Court, necessarily involves that section 69 of the Act is applicable to the present case Therefore the prescribed military authority may, first of all, decide before which Court the proceeding shall be instituted How far the evidence produced both before the lower Court and this Court tends to show that the prescribed military authority has exercised his discretion has next to be considered The quantum of evidence on this part of the case is meagre and consists in certain affidavits of responsible officials in the Central Government as well as an affidavit by the then investigation Inspector of the Special Police Establishment, Government of India, Madras. I accept the statements in them completely The question is whether the facts mentioned in them are sufficient to lead one to the conclusion that the provisions of section 69 of the Indian Army Act, have been complied with Mr. Subbiah, the Special Police Inspector, states that after he completed the investigation conducted under the ordinary provisions of the Criminal Procedure Code, he interviewed Brigadier Stevens of the I A O C Head Quarters, Southern Command, Poona, in charge of Ordinance Depots on 21st February, 1947, because the said Brigadier was in charge of the Returned Stores Depot, Alamadi, under Avadi Sub-Area, and the petitioner was an officer under that Brigadier during the relevant period. Brigadier Stevens was informed of the details and the result of investigation and was told that there was enough evidence for initiating a prosecution against the petitioner under section 409, Indian Penal Code According to the deponent of the said affidavit the Brigadier, after going through the records and hearing the representations of the Inspector, agreed to the prosecution of the petitioner in a criminal Court No doubt what the Brigadier told the Inspector will be hearsay evidence, but certainly the Inspector is competent to depose about the result of the discussions with the Brigadier and to state the latter's concurrence in the view suggested by him Thereafter the procedure of sending the final reports to the General Head Quarters, New Delhi, through the Inspector-General and the War Department followed At this point, reference has to be made to another affidavit filed here, *viz*, from Mr R N Vasudeva, Under-Secretary, Ministry of Defence, Government of India, which, is in the following terms

"The undersigned R N Vasudeva, Under-Secretary, Ministry of Defence, Government of India, New Delhi, solemnly affirms as follows —

1 The final report of the Investigating Officer, dated the 29th of March, 1947, and the comments of the Legal Adviser (Mr Jain), Delhi Special Police Establishment, New Delhi, dated the 11th of April, 1947, and a letter from the Personal Assistant to the Inspector-General of Police, Special Police Establishment, dated the 17th of April, 1947, were received by the Ministry of Defence through the Ministry of Home Affairs, who had been moved for grant of sanction under section 197, Criminal Procedure Code, on the 28th of April, 1947

2 Sanction was requested for the prosecution of Major F K Mistry in one case on three counts under section 409, Indian Penal Code and his prosecution, along with Jamadar Koshi Mathai in another case under section 120-B read with sections 409, 409 and 409/109, Indian Penal Code

3 The file as such with the documents mentioned above was forwarded by the Ministry of Defence to the Adjutant-General's Branch for their concurrence

4 The concurrence of the Military authorities in the following words was received by my office on the 13th of May, 1947, signed by A A G /P S I —

"This Branch has no objection to the prosecution in civil Court of Major F K Mistry and Jamadar Koshi Mathai These officers will not be claimed for trial by Court-Martial"

5 The undersigned returned the file to the Ministry of Home Affairs on 14th May, 1947, with the following endorsement —

"This branch has no objection to the prosecution of the officers in question in a civil Court"

6 The undersigned solemnly affirms that the statements contained in paras Nos 1 to 5 above are correct statements of facts and nothing has been kept back"

What transpired at the General Head Quarters, New Delhi, is contained in another affidavit sworn to by Captain Sarup Singh, Staff Captain in the Adjutant-General's Branch Personal Services, 1, New Delhi, which is as follows :—

"The undersigned Captain Sarup Singh, solemnly affirms that he was holding the post of staff Captain P S 1 (*a*) General Headquarters, New Delhi, in April and May, 1947

2 The undersigned solemnly affirms that in the first week of May, 1947, our office received from the Home Department, Government of India, copies of the final report of the Investigating Officer of the Delhi Special Police Establishment, and comments of their Legal Adviser for the concurrence of the Department for the prosecution of two cases in civil Court

Major F K Mistry was the accused in one case and was recommended for prosecution under section 409, Indian Penal Code on three counts

Major F K Mistry and Jamadar Koshi Mathai were accused under section 120-B read with sections 409, 409 and 409/109, Indian Penal Code in the other case

3 That the undersigned solemnly affirms that the two cases were dealt with by me in the Office of the General Headquarters

4 That the undersigned solemnly affirms that on 5th May, 1947, a signal was sent by the undersigned to the Avadi Sub-Area, with copies to Madras Area and Southern Command in the following terms "1382392/PSI (a) Confidential ( ) Misappropriation Stores ( ) State if You have objection to trial by civil Court, Major F K Mistry and Jamadar Koshi Mathai of Return Stores Depot Almadi"

(Sd) Sarup Singh,
Captain,
For Lt Col
AAG/PSI,
5 May, 47

5. That the undersigned solemnly affirms that Avadi Sub-Area was then under the command of a Brigadier

6 That the undersigned solemnly affirms that on 8th May, 1947, the following reply was received from the Avadi Sub-Area —

"Misappropriation Stores Your 1382392/PSI (A) of 5 May No objection trial by civil Court both individuals Case handled throughout by Delhi Special Police Establishment"

7 That the undersigned solemnly affirms that from the reply received, it is apparent that copies of the reply were also sent by Avadi Sub-Area to Madras Area as also to Southern Command.

8 That the undersigned solemnly affirms that it was thereafter that the A G 's Branch gave their concurrence to the prosecution of Major F K Mistry and Jamadar Koshi Mathai in the following terms —

"This Branch has no objection to the prosecution in civil Court of Major F K Mistry and Jem Koshi Mathai These officers will not be claimed for trial by court-martial

(Sd)
for Lt Col AAG/PSI,
10 May, 47 (D Brysen)

9 That the undersigned solemnly affirms that copies of the two signals mentioned in paras Nos. 4 to 6 attached to the affidavit are correct copies prepared from the record maintained in the

office of A.-G.'s Branch, P. S. I, Army Headquarters, New Delhi, and which can be produced in Court, if desired.

10. That the undersigned solemnly affirms that the above statement of facts is correct to my knowledge and nothing has been withheld or concealed therefrom."

It will thus be seen that on the 10th of May, 1947, the Assistant Adjutant-General, P. S. I., after contacting the Avadi Sub-Area replied to the Ministry of Defence that the Adjutant-General has no objection to the prosecution of the petitioner in an ordinary criminal Court. Thereafter the Ministry of Defence sent back the file to the Ministry of Home Affairs on 14th May, 1947, with the endorsement that that Branch had no objection to the prosecution of the petitioner and another in a criminal Court. What transpired between the Home Ministry and the Inspector-General of Police is not before the Court but according to the affidavit of Mr. Subbiah, the Deputy Superintendent of Police received a reply from the Inspector-General of Police and he directed Mr. Subbiah to file the charge sheet which was done on 24th August, 1947, before the District Magistrate, Chingleput, by the Deputy Superintendent of Police, Special Branch, Madras. The District Magistrate forwarded the two charge-sheets to the Additional First Class Magistrate, Chingleput, for disposal according to law. Mr. Jayarama Ayyar strongly contends that the affidavits of the officers filed before this Court ought not to be taken into consideration and that as there is no evidence before the Court that the authorities have taken any action under section 69 of the Indian Army Act, the whole proceedings are void and without jurisdiction. I am not prepared to hold that it is open to the petitioner to object to the reception of these affidavits at this stage, for, the petitioner should have raised the objection to the jurisdiction of the criminal Court at the earliest possible opportunity, *i.e.*, before the enquiry began. Not only did he not do so, but the objection was taken for the first time only after the charges were framed and the prosecution had closed its case. I do not intend to lay down as a general proposition that an accused person is not entitled to take objections which go to the very root of the proceedings at any stage later than the commencement of the enquiry. But if an objection is not taken at the proper time but is raised at a much later stage, the prosecution is also entitled to have the answers to that objection put forward by such form of evidence as would be available at that stage.

The procedure in cases of civil offences committed by persons subject to the Indian Army Act is contained in rule 385 of the Regulations for the Army in India, explaining the applicability of sections 69 and 70 and such procedure is amplified a little more in Chapter VI of the Manual of Indian Military Law, 1937, paragraphs 1 to 3 at pages 91 and 92. It is laid down there that in British India and at places outside British India, where a competent civil Court has been established, it is, as a general rule, desirable to try by a civil Court a civil offence committed by a person subject to the Indian Army Act if the offence is one which relates to the property or person of a civilian or is committed in conjunction with a civilian, or if the civil authorities intimate a desire to bring the case before a civil Court. The words "Civil Court" are only used in contradistinction with a Military Court in the context. It is also stated that the general rule is subject to exceptions and qualifications. The line dividing the Military from the civil offence may be narrow. The offence may have been committed within the Military lines. The offender may be one of a body of troops about to proceed on active service. There may be reasons making the prompt infliction of punishment expedient. In any such case, it may be desirable to try the offence by a court-martial. There are further indications that certain civil offences, for example complicated frauds, are not suitable for trial by court-martial and it would be better to relegate them to the ordinary civil courts, as also cases where intricate questions of law are likely to arise. A perusal of these provisions show that even though an offence of breach of trust relating to Army property can be enquired into and tried by an ordinary civil court, meaning thereby the courts governed by the Criminal Procedure Code,

there is no indication whatever that ordinarily they should not be tried by any court other than a court-martial I have been not referred to any provision of a statute, rule or regulation which gives unrestricted and unhampered jurisdiction to a court-martial to try an offence of criminal breach of trust of Army property by a person subject to the Indian Army Act in a case where no attention has been paid to the application of section 69 Therefore what has now to be considered is whether the facts and circumstances mentioned in the affidavits constitute a sufficient compliance with the mandatory provisions of section 69 of the Indian Army Act? Has the "prescribed military authority" decided before which Court the proceedings shall be instituted? Can it be said that the officer commanding the Army, Army Corps, Division, Brigade or Station in which the accused person was serving before the filing of the charge-sheet considered the matter and come to a conclusion? I am prepared to accept the affidavit of Mr Subbiah that during the relevant period Brigadier Stevens was in charge of the Returned Stores Depot, Almadi, under the Avadi Sub-Area

A careful perusal of the affidavits set forth above shows that the Ministry of Home Affairs whom the Special Police Establishment, New Delhi, approached for sanction under section 197 of the Criminal Procedure Code, forwarded the entire records to the Ministry of Defence which department is the superior authority for the Army General Headquarters in India In its turn, the Ministry of Defence being ordinarily a civil department wanted to ascertain the decision of the Adjutant-General's branch, General-Headquarters, which department I am informed is the one which deals with matters like court-martial, etc , under the Commander-in-chief It is seen from the affidavit of Captain Sarup Singh that the Adjutant-General's office ascertained what the decision of the Southern Command was in the matter For that purpose a signal was sent to the Avadi Sub-Area which is controlled by the Madras Area as its immediate superior authority and by the Southern Command above the Commander in the area The Brigadier in charge of the Avadi Sub-Area in his reply dated 8th May, 1947, has stated that he had no objection to the trial by a civil Court of the petitioner and others since the case had been handled throughout by the Delhi Special Police Establishment The Affidavit also shows that the Madras Area as well as the Southern Command should be deemed to have concurred in that decision

If the facts stated in the complaint before the District Magistrate are true, an offence under section 31 (*a*) of the Indian Army Act has been committed That the same set of facts, though they constitute an offence under section 31, will also constitute an offence under section 41 as well, is clear from sub-clause (2) of section 41, which is in the following terms

"The powers of a court-martial to try and to punish any person under this section shall not be affected by reason of the fact that the civil offence with which such person is charged is also a military offence"

Sub-clause (1) of this section refers to the commission of a civil offence either within British India or at any place beyond British India by an Army personnel and it is stated that such an offender shall be deemed to be guilty of an offence against military law as well , so that it necessarily follows that even if the offence of criminal breach of trust is provided for in section 31, it is also an offence under section 41 with the result that for such an offence the provisions of section 69 are applicable According to the terms of section 69,

"It shall be in the discretion of the prescribed military authority to decide"

From this it is abundantly clear that a discretion is given to the prescribed military authority It may decide before which Court the proceedings shall be instituted It may not as well decide anything There is no compulsory duty cast upon the prescribed military authority in all cases where a criminal Court and a court-martial have concurrent jurisdiction in respect of an offence, to direct in which Court a prosecution should be instituted The words are not "the prescribed military authority *shall* decide." If the section

had been worded "when a criminal Court and a court-martial have each jurisdiction in respect of an offence, *the prescribed military authority shall decide* before which Court, etc " then there is a duty cast upon the authority , but as it stands now it is only a matter of discretion which may or may not be exercised Therefore, even if I were to conclude, that the various acts and proceedings of the military authorities referred to in the affidavits mentioned above, do not constitute a decision by a prescribed military authority, still I would have held that since the initiation of proceedings need not necessarily be as a result of any such decision, the filing of a complaint before the District Magistrate, Chingleput, was not illegal

But having considered the various aspects put before me by Mr Jayarama Ayyar, and the explanation of the actions of the officers of the Adjutant-General's office and the Ministry of Defence along with the decision of Brigadier Stevens, it seems to me that there has been a decision by the prescribed military authority before the proceedings were instituted It is seen from Army Department Notification No 2163 dated 29th October, 1920, that General Officers commanding in chief commands and Officers commanding districts and areas are granted the powers of an officer commanding an Army, Corps, Division and Brigade respectively (*vide* page 142, of the Manual of Indian Military Law, 1937, corrected up to 1942). One may therefore take it that the officer commanding the Madras Area will have the powers of a Brigadier, though the sub-area itself in the present case is under the command of a Brigadier The General Officer commanding the Southern Command will have the powers of an officer commanding an Army corps It is a fact well known that an Army consists of a number of corps, a corps consists of a number of divisions and a division consists of a number of brigades The actual numerical strength of a corps, division or brigade varies with different countries in the world From the affidavits it can be safely inferred that the officers responsible for the Avadi sub-area the Madras Area and the Southern Command have considered the matter and decided that the petitioner should be proceeded against in an ordinary civil Court This is also clear from the decision arrived at by Brigadier Stevens as deposed to by Mr Subbiah I have not been shown any authority by Mr Jayarama Ayyar for holding that the decision arrived at by the Adjutant-General in the General Headquarters at New Delhi is not the decision of the officer Commanding the Army If we consider the whole of the Indian Army as one unit commanded by a Commander-in-Chief with the various commands like the South, East, Central, etc , under him equivalent to army corps, in view of the opinions expressed by the authorities in the hierarchy beginning with the Brigadier in charge of the Avadi Sub-Area, I do not feel any difficulty in coming to the conclusion that if a decision under section 69 is a necessary pre-requisite to the institution of proceedings in an ordinary criminal Court—though I am doubtful whether it is essential—there has been such a decision by the prescribed military authority In the foregoing paragraphs the use of the term "civil Court" is intended to apply to an ordinary criminal Court

We have next to turn to the third argument advanced on behalf of the petitioner and that is that granting that the offence complained against is not one exclusively triable by a court-martial and therefore the ordinary criminal Courts and the court-martial have concurrent jurisdiction and even if the prescribed military atuhority has decided that the proceedings against the petitioner should be instituted in an ordinary criminal Court, still the prosecution has not complied with the imperative provisions of section 549 of the Criminal Procedure Code and the statutory rules made by the Central Government under the provisions of that section These statutory rules are contained in rule 105 of the Criminal Rules of Practice and Orders which have been modified and amended from time to time, the latest of such amendment being by G O M S No 1648, Home, dated 28th May, 1945, and the G O M S No 2099, Home, dated 2nd July, 1945 The scope and applicability of section 549, Criminal Procedure Code, have recently been considered by this Court (Leach, C J. and Lakshmana Rao, J.) in In re *Capt*.

Hugh May Stollery Mundy[1] In that case an engine room mechanic of the Royal Naval Air station, Tambaram, was tried by one of the Presidency Magistrates, Madras, and sentenced to a term of rigorous imprisonment for an offence under section 304-A, of the Indian Penal Code The attention of the Magistrate was not drawn to section 549, of the Criminal Procedure Code or the rules framed thereunder But objection was taken in the High Court regarding the procedure followed by the Magistrate in that he did not conform to the provisions of the rules made under section 549, Criminal Procedure Code The learned Judges held that even though his attention was not drawn to it, the Magistrate was bound to have followed the procedure laid down in the rules framed under section 549, and therefore set aside the conviction The rules as amended by the G Os above mentioned run as follows

1 "These rules may be called the Criminal Procedure (Military Offenders) Rules

2 Where a person subject to military, naval or airforce law is brought before a Magistrate and charged with an offence for which he is liable under the Army Act, the Naval Discipline Act, the Naval Discipline Act as modified by the Indian Navy (Discipline) Act, 1934 or the Air Force Act, to be tried by a court-martial, such magistrate unless he is moved by the competent military, naval or air force authority to proceed against the accused under the Code of Criminal Procedure, 1898, shall before so proceeding give notice to the Commanding Officer of the accused, and until the expiry of a period of five days from the date of service of such notice, shall not

(*a*) convict the accused under section 243, acquit him under section 247 or section 248, or hear him in his defence under section 244 of the said Code or

(*b*) frame a charge against the accused under section 254 of the said Code, or

(*c*) make an order committing the accused for trial by the High Court or the Court of Session under section 213, or sub-section (1) of section 446 of the said Code, or

(*d*) transfer the case for inquiry or trial under section 192 of the said Code, or

(*e*) issue an order under sub-section (1) of section 445 of the said Code for the case to be referred to a Bench"

Sub-clause (6) of the rule lays down that the "competent military authority" in clause (2) means the "Brigadier Commander" The question therefore is whether the District Magistrate of Chingleput before whom the charge sheet was filed on 24th August, 1947, or the Additional First Class Magistrate, Chingleput, to whom the case was transferred presumably under section 192, Criminal Procedure Code by the District Magistrate, was bound to follow strictly the procedure laid down in sub-rule (2) of rule 105 of the Criminal Rules of Practice I may straightaway say that when the charge sheet was filed before the District Magistrate, the petitioner who is a person subject to military law was not brought before the Magistrate charged with the offence If along with the filing of the charge-sheet the petitioner had been produced by the police before the District Magistrate, the District Magistrate, should, before transferring the case for enquiry or trial under section 192 of the Criminal Procedure Code, follow the procedure in rule 105 (2), *i e*, unless the District Magistrate is moved by a competent military authority to proceed against the accused under the Criminal Procedure Code, he should give notice to the Commanding Officer of the accused and allow a period of five days to expire from the date of service before further action is taken Since the petitioner was not produced before the District Magistrate, I do not think that he was bound to follow the procedure contemplated by the aforesaid rule But when once the case has been transferred to the Additional First Class Magistrate and the accused person was brought before him charged with an offence like the one in question for which he is liable under the Army Act, then the Additional First Class Magistrate should have strictly followed such a procedure It is conceded that in this case no competent military authority has moved the Magistrate for proceeding with the case in his Court Therefore the Magistrate ought to have issued notice to the Commanding Officer of the accused and waited for a period of five days from the date of service of such notice In my opinion, the action of the Additional First Class Magistrate in not doing so is illegal and the proceedings before him are void and

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1 (1945) 1 M L J 388 I L.R. (1945) Mad 136.

vitiated by this illegality In the affidavit of Mr Subbiah it is stated that he met the Additional First Class Magistrate on 1st August, 1947, and apprised him of the fact that the charge-sheets were filed by the members of the Special Police Establishment after obtaining the due consent from the Military Headquarters at Delhi and as such the Magistrate was not bound to send a notice to the Commanding Officer of the accused as contemplated by the rules The members of the Special Police Establishment, New Delhi, can under no stretch of language be termed either the competent military authority or the Commanding Officer of the accused person Even if the prescribed military authority under section 69 of the Army Act had come to the decision that the proceeding should be instituted in an ordinary criminal Court, still, in my judgment, according to the true and correct interpretation of section 549 of the Code and rule 105 of the Criminal Rules of Practice, it is incumbent upon the Magistrate to give notice to the commanding officer of the accused person The learned Advocate-General contended that when once the prescribed military authority has come to this decision under section 69 of the Army Act, the observance of the rule by the Magistrate, *viz*, the issuing of a notice, is not necessary, and the insistence upon the following of that procedure will lead only to multiplicity of proceedings and dilatoriness in their termination I do not agree The language of section 549, Criminal Procedure Code and of rule 105 of the Criminal Rules of Practice is clear and mandatory When a person subject to the military law is brought before a Magistrate charged with an offence for which he is triable under the Army Act, the Magistrate is bound to follow this procedure The decision of the prescribed military authority under section 69 of the Army Act need not be communicated to the Magistrate and even if it is so communicated, he is bound to follow strictly the provisions of section 549, Criminal Procedure Code and the rules The learned Advocate-General invited my attention to various Ordinances and Act XXV of 1946 by which the Special Police Establishment at New Delhi was created, maintained and continued for the investigation and prosecution of offences relating to the Central Government Departments of which the Army Department is one He also drew my attention to the circulars and proceedings issued by the Adjutant-General's Branch regarding the co-operation and help which the military officers and authorities have to give to the Police Establishment in their investigation I do not think that a detailed discussion or examination of these Ordinances and the Act is necessary, for it is not disputed that the Special Police Establishment at New Delhi has the right to enquire into these offences I am not prepared to hold that since the Special Police Establishment at New Delhi has investigated and filed a charge-sheet against an officer subject to the Indian Army Act with the concurrence or the approval of the military authorities, the magistrate before whom such a person is brought is absolved from the statutory duty of acting according to the rules framed under section 549 of the Criminal Procedure Code If the argument of the learned Advocate-General is correct, I cannot find any reason why the Central Government in its rule making power did not make a special exemption in such a case Rule 105 applies to every case where a person subject to military law is produced before a magistrate governed by the Criminal Procedure Code charged with an offence for which there exists concurrent jurisdiction both in the magistrate as well as in the Army authorities The reason for not providing a special exemption from the operation of the rule in case of a prosecution launched by the special Police Establishment is clear and not far to seek, for a magistrate before whom an accused person is produced should not have the duty cast upon him of finding out how the investigation was started and who the investigators were As a court administering the law, its duty is merely to see that the accused person brought before it is given a fair and proper trial, and relevant and admissible evidence alone is admitted But the duty is enjoined upon the Magistrate that in the case of a person subject to military law he must first of all give the officer Commanding a notice intimating him that such a person has been produced According to sub-rule (4), if the Commanding Officer of the accused person gives notice to the magistrate that the accused person should be tried by a court-martial, then the magistrate is bound to stay the pro-

ceedings and deliver the accused with the statement prescribed in section 549 of the Code to the authority specified in this section It may be that in cases where there has already been a decision that the person should be tried by a criminal Court, a subsequent notice is a surplusage and a formality, but as the section stands this court has to interpret it on its plain terms Another point suggested during the course of the arguments is that it is not open to the accused to raise the point at this late stage The competent military authority has not moved in the matter Nor has the accused raised the point at an early stage I do not think that because the accused person for some reason or other did not object at the earliest opportunity, there can be any question of waiver If the provisions of section 549 and the rules are mandatory, acquiescence on the part of the accused in an irregular or illegal proceeding will not regularise or legalise the proceedings In *Nusserwanjee Pestonjee* v *Meer Mynoodeen Khan Wallud Meer Sudroodeen Khan Bhadur*[1] the Judicial Committee has held that where under Bombay Regulation No VII of 1827, among other things it was enacted that a deed of reference to arbitration must contain the time within which the award is to be given and a particular deed of submission to arbitration contained no such provision, it was held that the award could not be enforced even if there was parol consent given by the parties to the deed of submission before the arbitrator to waive the omission regarding the time at which the award is to be given Therefore the principle deducible is that where in a statute there are certain necessary requirements to be complied with before proceedings become legal, they should be done according to the statutory provisions and not otherwise At page 155, Sir John Patteson observed as follows

"The present question turns upon this principle, that wherever jurisdiction is given to a Court by an Act of Parliament, or by a Regulation in India (which has the same effect as an Act of Parliament) and such jurisdiction is only given upon certain specified terms contained in the Regulations itself, it is a universal principle that these terms must be complied with, in order to create and raise the jurisdiction, for if they be not complied with the jurisdiction does not arise"

Following that principle, it seems to me that the jurisdiction is given to the Additional First Class Magistrate only after the expiry of five days after giving notice to the Commanding Officer of the person produced before him In this connection it is instructive to compare the rules framed on the 12th of March, 1935 and published as G O No 1338, Law (General), dated 16th April, 1935 with the rules as they are now The repealed rules run as follows

"105 (1) Where a person subject to military, naval or air force law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a court-martial such Magistrate shall not proceed to try such person or to issue orders for his case to be referred to a Bench, or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court unless

(*a*) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent military, naval or air force authority, or

(*b*) he is moved thereto by such authority

(2) Before proceeding under clause (*a*) of rule 1 the Magistrate shall give notice to the Commanding Officer of the accused and, until the expiry of a period of five days from the date of the service of such notice, he shall not—

"(*a*) acquit or convict the accused under sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (Act V of 1898), or hear him in his defence under section 244 of the said Code, or

(*b*) frame in writing a charge against the accused under section 254 of the said Code, or

(*c*) make an order committing the accused for trial by the High Court or the Court of Session under section 213 or sub-section (1) of section 446 of the said Code, or

(*d*) issue orders under sub-section (1) of section 445 of the said Code for the case to be referred to a Bench"

The repealed rule gives a discretion to the magistrate for reasons to be recorded, to proceed without being moved by the competent military authority But even there, before proceeding under clause (*a*) of sub-rule (1) he has to give notice to the Commanding Officer of the accused and wait for a period of five days from the date of service of such notice In *Emperor* v *Jerry D'Sena*[2] Wadia and Sen

1 (1855) 6 M I A 134

2 A.I R 1944 Bom 271

JJ had to interpret the rules as they stood prior to the amendment mentioned in 1945 The learned Judges held that where the magistrate was not of opinion that he should proceed to try the accused without being moved thereto by the competent military authority, rule 2 framed by the Government of India will not apply to the case The only alternative is for the military authorities to move him to proceed to try the accused If the magistrate having given an opportunity to the prosecution to obtain the authority or permission of the military authorities receives no communication from the military authorities asking him to proceed with the trial he is right in holding that there is no sufficient ground for proceeding with the trial In that case, because there was no such motion by the military authorities, the magistrate discharged the accused If according to the rules as they stood before 1945, the magistrate could have discharged the accused because he was not moved by the military authorities, *a fortiori* it follows that as the rule now stands the magistrate could not have proceeded to try the accused without giving the requisite notice

As I am of opinion that when the petitioner was brought before the magistrate charged with this offence it was the duty of the court to give notice to the commanding officer of the accused, the proceedings before the magistrate relating to the recording of evidence, etc , were illegal and without jurisdiction I would therefore quash the charge as having been framed without jurisdiction and in excess of authority The entire proceedings before the learned Additional First Class Magistrate subsequent to the appearance of the accused person before him are therefore set aside The parties are therefore relegated to the position in which they were when the petitioner appeared before the magistrate The magistrate is therefore directed to give notice to the commanding officer of the accused and wait for five days to find out what steps the competent military authority is taking and then proceed according to law The charge as framed is quashed.

V P S *Charge quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR JUSTICE VISWANATHA SASTRI

P. Ramiah and others *Petitioners**

v

The Chief Secretary to the Government of Madras and another *Respondents.*

Madras Maintenance of Public Order Act (I of 1947), *section* 2 (1)—*Delegation of power to Commissioner of Police to order detention—If deprives the Provincial Government of the power to make orders for detentions—Activities outside the Province of the person sought to be detained—Relevancy*

Merely because the Commissioner of Police is authorised by the Provincial Government by virtue of section 15 of Madras Act I of 1947 to exercise the powers under section 2 (1), the Provincial Government is not deprived of that power

It cannot be said that it is not open to the detaining authority to take into consideration the activities of the persons (sought to be detained) outside the Province in arriving at the satisfaction contemplated by section 2 (1) of the Act If such a person was at the time of the order within the Province an order for detention can be validly passed by the Government of Madras Where the basis for satisfaction was the activity of the persons concerned in Malaya as Communists indulging in violence, so long as it was proximate enough in date, will be relevant material under section 2 (1)

Petition under section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated therein and in the affidavits filed therewith, the High Court will be pleased to issue directions in the nature of a *Habeas corpus* directing the 2nd respondent to produce the petitioners before the High Court, to be dealt with according to law and direct that they may be set at liberty

V G Row for *Messrs Row and Reddy* for Petitioners

The Crown Prosecutor on behalf of Crown

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* Cr M Ps Nos 442 to 447 of 1949 5th April, 1949.

The Order of the Court was pronounced by

Satyanarayana Rao, J.—The applicants in all these applications are Indians who were living in Malaya for some years, and as they were engaged in Malaya in Communist activities, the Malayan Government seems to have detained some of the important leaders under the Malayan Emergency Regulations. But as they are Indian nationals, the Malayan Government released them and repatriated them The applicants along with others arrived in India by S S Vasna in November, 1948 Immediately after their arrival, on the 19th November, 1948, they were arrested by the police in Madras and were detained in custody They were later produced before the Commissioner of Police, Madras, who remanded them for 9 days, and the period of remand was later extended by a further order. On the 30th November, 1948 orders of detention under Madras Act I of 1947 were passed by His Excellency the Governor of Madras under section 2 (1) of the Act directing the detention of the applicants in the Central Jail, Vellore The grounds of detention were served on these applicants on the 24th December, 1948, and they submitted their representations to the Government on 7th January, 1949 The matter does not seem to have received the attention of the Advisory Council, and the Government has not yet passed final orders under section 3 (5) of the Act

The grounds of detention of the applicants in all the cases are substantially the same The learned advocate for the applicants contended that His Excellency the Governor of Madras had no power to pass an order of detention under section 2 (1), as His Excellency had already delegated the powers conferred on the Provincial Government by section 2 (1) (*a*) of the Act to the District Magistrates or the Commissioner of Police, Madras as evidenced by G O No Ms 907 dated 21st March, 1947, and that the proper authority to have passed an order of detention under the Act was the Commissioner of Police, Madras and not His Excellency the Governor of Madras. Secondly, it was argued that the grounds of detention are vague and indefinite, and that, in any event, the activities of the petitioners which were outside the Province of Madras should not have been taken into consideration in arriving at the satisfaction under the Act that they were acting or about to act in a manner prejudicial to public safety or the maintenance of public Order.

Section 15 of Madras Act I of 1947 empowers the Provincial Government by order to direct that any power or duty conferred upon the Provincial Government be exercised or discharged by any officer or authority subordinate to the Provincial Government One of the powers exercisable by the Provincial Government under the Act is the power to pass an order of detention under section 2 (1) of the Act G O No Ms 907, dated 21st March, 1947, empowered the District Magistrates and Commissioner of Police, Madras, within their respective jurisdictions to exercise the power conferred on the Provincial Government by section 2 (1) (*a*) of the Act It is in these terms .

"In exercise of the powers conferred by section 15 of the Madras Maintenance of Public Order Act, 1947 (Madras Act I of 1947), His Excellency the Governor of Madras hereby directs that the powers conferred on the Provincial Government by section 2 (1) (*a*) of the said Act shall be exercised also by all the District Magistrates and the Commissioner of Police, Madras, within their respective jurisdictions

(By Order of His Excellency the Governor)"

The contention urged on behalf of the applicants is that when once a transfer of the power was effected by virtue of the power of delegation conferred under section 15 upon the Provincial Government, the Provincial Government had no further power to exercise that particular power which has been so delegated, and in support of this proposition a passage from the judgment of the Judicial Committee in *Emperor* v *Sibnath Banerji*[1], was relied on Referring to sub-section (5) of section 2 of the Defence of India Act, the Judicial Committee therein observed :

"Their Lordships would also add, on this contention, that sub-section (5) of section 2 provides a means of delegation in the strict sense of the word, namely, a transfer of power or duty to the

1 (1945) 2 M L J 325 (334) (1945) F L.J 222 (P C)

officer or authority defined in the sub-section, with a corresponding divestiture of the Governor of any responsibility in the matter, whereas under section 49 (1) of the Act of 1935, the Governor remains responsible for the action of his subordinate taken in his name"

This passage in the judgment of the Judicial Committee, in our opinion, refers to the manner and the mode of delegation contemplated by sub-section (5) of section 2 of the Defence of India Act It is not authority for holding that, where under a power of delegation permitted under an Act, the transfer of the power is circumscribed and is restricted in the manner in which we find in the G O now under discussion, the Provincial Government is absolutely prohibited from exercising the power so transferred In the present case, the Government order makes it clear that the District Magistrates and the Commissioner of Police, Madras were also empowered to exercise powers under section 2 (1) in addition to the Provincial Government It is not an absolute transfer by the Provincial Government of the power to pass an order of detention under section 2 (1) of the Act but a partial delegation or transfer of its power which is not prohibited by section 15 of the Act. Section 15 itself lays down that the transfer may be effected in such circumstances and under such conditions as may be specified in that direction In view of this language of the section it would be perfectly open to the Provincial Government to say that they would not part with the power under section 2 (1) entirely and would reserve to themselves a part of it Of course, in the case of the same person the Provincial Government and the Commissioner of Police at Madras cannot exercise the power of detention under section 2 (1) of the Act But there is nothing in the provisions of the Act to limit or restrict the authority of the Provincial Government to delegate its powers in the manner in which it was effected in the G O above referred to The observations of the Judicial Committee must be taken to be confined to cases where the actual wording of the delegation is not restricted in its scope but is absolute This view of the Government order is really sufficient to dispose of this aspect of the case

We are, however, of opinion that in cases where a statute authorises an authority to delegate its power or duty, the principles laid down by Coleridge C J, and Wills, J in *Huth* v *Clarke*[1], would be more apposite than the observations of Scott, L J, in the decision in *Blackpool Corporation* v *Locker*[2] In *Huth* v *Clarke*[1], under the Local Government Act of 1888, an executive committee of a county council was authorised to appoint a sub-committee or sub-committees and delegate to them all or any of the powers of the executive committee with or without restrictions and from time to time to revoke or alter any such delegation. The point raised was whether after this delegation the executive committee of the county council could exercise the power under the Act notwithstanding the fact that there was a delegation of the power to the sub-committee The argument raised in that case was that delegation implied a denudation of the power and authority, and that therefore the executive committee had no right to exercise the power Coleridge, C J, answered the contention thus

"But delegation does not imply a denudation of power and authority, the 6th schedule of the Act provides that the delegation may be revoked or altered and the powers resumed by the executive committee The word "delegation" implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given Unless, therefore, it is controlled by statute, the delegating power can at any time resume its authority Here the executive committee has exercised the power which the sub-committee might have exercised—but did not—and no question of conflict of jurisdiction arises"

Wills, J, considers the legal import of the word "delegation," and he observes at page 395

"Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself The notion, therefore, that the use of the word "delegate" implies that the executive committee parted with their own authority is misconceived"

1 (1890) 25 Q B D 391 2 (1948) 1 K B 349

In view of this authority of Coleridge, C J, and Wills, J, even if the language of the G O were otherwise, we think that merely because the Commissioner of Police is authorised by the Provincial Government by virtue of section 15 of the Act to exercise the power under section 2 (1), the Provincial Government is not deprived of that power The decision of the Court of Appeal in *Blackpool Corporation* v *Locker*[1], on which reliance was placed by the learned advocate for the applicants does not conflict with the decision in *Huth* v *Clarke*[2] The point was considered only by Scott, L J, and Evershed, L J, did not think it necessary to consider the question in the view he took of the case The observations of Scott, L J, dealing with the interpretation of Regulation 51 of Defence (General) Regulations, 1939, particularly clause 5, proceeded on the assumption that what the Lord Justice was called upon to consider was the effect of delegated legislation and not a case of delegation of a power or duty under an Act We are not now concerned here with a case of delegated legislation, and therefore we think that the dicta of Scott, L J, in *Blackpool Corporation* v *Locker*[1], are not applicable, and we prefer to follow the decision in *Huth* v *Clarke*[2], which is more in point

We have perused the grounds in all these cases, and we do not agree with the contention strongly pressed on behalf of the applicants that the grounds are indefinite and vague It was definitely stated in the grounds that these people were members of the Communist Strong Arms Intimidation Squad of Singapore Harbour Labour Union, that a special feature of this group of Communists was that they have been noted for their violence lately seen in the beating and stabbing of Chinese labourers during the strike, that these applicants were members of the Singapore Harbour Labour Union *Thondar Padai*, and that they took active part in intimidating labourers under the orders of the Communist leaders of the Union In case of some of the applicants there were also further grounds These grounds cannot be said therefore to be indefinite or vague

The argument that it is not open to the detaining authority to take into consideration the activities of the applicants outside the Province in arriving at the satisfaction contemplated by section 2 (1) of the Act is, in our opinion, unsound The person against whom action was proposed under section 2 (1) at the time of the order was within the Province of Madras The detaining authority had before it material to reach the satisfaction that the person is likely to act in manner prejudicial to public safety or the maintenance of public order The basis for this satisfaction was the activity of the person concerned in Malaya, and his activity therefore certainly would be proper material for consideration under section 2 (1) of the Act in coming to a conclusion whether the person of that description would or would not act in a manner prejudicial to public safety or the maintenance of public order The Act applies to the whole of the Province, and the danger contemplated was the danger to the public safety and maintenance of public order of this province The antecedent history of the person—whether he lived in Malaya or elsewhere it does not matter—so long as it was proximate enough in date, if it is such as to produce the satisfaction in the mind of the detaining authority that the person concerned was likely to act in a manner prejudicial to public safety and the maintenance of public order, will be perfectly relevant material under the section We see no objection for taking into consideration under section 2 (1) of the Act, the activity of the person outside the Province to justify action under section 2 (1) of the Act

For these reasons we are of opinion that the orders of detention of the applicants are legal, and that no interference is called for The applications are dismissed.

K S *Applications dismissed.*

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1 (1948) 1 K B 349 2 (1890) 25 Q B D 391

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE MACK

T. S Seshachariar . *Petitioner**

v

T S Pattammal and another *Respondents*

Court-Fees Act (VII of 1870), *section* 7 (iv) (c)—*Suit for declaration of plaintiff's right to a fourth share in* mirasi *office—Valuation for jurisdiction at certain amount—Court-fee is payable* ad valorem *on same valuation for the consequential reliefs*

In a suit for a declaration of his right to a fourth share in a *mirasi* office in a temple as cook entitled to certain emoluments, the plaintiff valued the suit for purposes of jurisdiction at Rs 3,100 and paid for the declaration he sought court-fee of Rs 100 under Article 17-B of Schedule II of the Court-Fees Act He asked for certain consequential reliefs, one of them being, for an injunction to the temple committee to cancel certain orders and to permit him to perform his duties and enjoy the emoluments He valued this relief at Rs 100 and paid a court-fee of Rs 11-3-0

Held as the plaintiff has taken upon himself to value the office which he substantially seeks to recover at Rs 3,100, he cannot be heard to say that he can value his relief for purposes of jurisdiction at Rs 3,100 and then that for purposes of consequential relief, the value of the suit is incapable of valuation to evade court-fee on this ground by valuing it at Rs 100 Article 17-B does not apply and *ad valorem* court-fee is payable

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Chittoor dated 28th day of November, 1947, and passed in A S No 191 of 1947 (O S No 15 of 1946, Sub-Court, Chittoor)

B C Seshachala Aiyar for Petitioner

The Governoment Pleader (*K Kuttikrishna Menon*) for the Government.

D Ramaswami Aiyangar and *W Krishnaswami Naidu* for Respondents

The Court delivered the following

JUDGMENT —This petition raises a point of Court-fee Plaintiff sued for a declaration of his right to a 4th share in Gamica mirasi office in a temple, in other words, for the office of a temple-cook entitled to certain emoluments and perquisites. He valued his suit for purposes of jurisdiction at Rs 3,100 and paid for the declaration he sought court-fee of Rs 100 under Article 17-B of Schedule II He asked for certain consequential reliefs One of them was for a direction to the temple Committee by a mandatory injunction to cancel certain orders they passed and to permit him to perform the duties of this office and enjoy all the emoluments attached to it He valued this relief for injunction at Rs 100 and paid a court-fee of Rs 11-3-0 There was also another prayer for an account, with regard to the emoluments, for the year prior to the suit with which we are not concerned

The learned Subordinate Judge upheld the objection of the Court-fee examiner and found that the plaintiff under section 7 (iv) (*c*) of the Court Fees Act should pay Court fee on the amount at which he valued his relief, *viz* Rs 3,300 altogether It is urged that Article 17-B of the Court Fees Act is applicable on the strength of two decisions placed before me The first is *Karuppanna Nadar* v *Mathalai Karuppa Nadar*[1] That was a suit originally filed in the District Munsif's Court for a mere declaration that the plaintiff was the rightful manager of a school and for an injunction restraining the defendant from acting as such. The relief was valued at Rs 100 and a Court-fee of only Rs 11-3-0 was paid It was held that the correct Article applicable was Article 17-B but that the value for jurisdiction was determined by the value of the institution and its properties, that the proper Court-fee payable would be Rs 100 under Article 17-B and that suit should be filed in the sub-Court That decision cannot be applied here for the simple reason that in this case, the plaintiff has taken upon himself to value the office which he substantially seeks to recover at Rs 3,100 He cannot be heard

*C R P No 242 of 1948 14th March, 1949

1 (1939) 2 M L J 226

to say that he can value his relief for purposes of jurisdiction at Rs 3,100 and then that for purposes of consequential relief the value of his suit is incapable of valuation to evade Court-fee on this ground by valuing it at Rs 100 Article 17-B applies to cases where in the plaint it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for in this Act Plaintiff here has taken it upon himself to value the subject matter of the dispute

My attention has been drawn to another decision in *Angara Seshamma* v. *Peddisetti Suramma*[1], by Pandrang Row, J That was a suit for a declaration of title to the office of archaka, for delivery of the office to the plaintiff and for restraining the defendants from interfering with the exercise of the office It was also filed in the Munsiff's Court which directed certain amendments to be made in the plaint on which additional Court-fee should be paid It was held that the Court-fee payable should be determined on the plaint as it stood and the plaintiff left to take the risk of applying for amendment and paying additional court-fee for the reliefs he asked It may of course happen that contentions in the written statement necessitate an additional Court-fee being paid on the plaint if the plaintiff is to get the relief he desires For instance, in a suit for declaration of title with a prayer for injunction, the defendant may claim to be in actual possession in which case, it is open to the plaintiff to ask to amend his plaint by a prayer for possession on payment of *ad valorem* court-fee. The plaintiff of course takes the risk of being non-suited so far as substantial relief is concerned if he does not pay this additional court-fee and this is what was emphasised in *Seshamma* v *Suramma*[1].

Under section 8 of the Suits Valuation Act, in the case of suits other than those referred to in section 7, paragraphs V, VI, and XI and paragraph X, clause (*d*) in which court-fees are payable *ad valorem* under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same This statutory principle is applicable in my opinion to the present plaint in which the plaintiff has taken upon himself to value the subject-matter of the suit for purposes of jurisdiction and he cannot adopt a different valuation for court-fee The learned District Judge's order is in my view correct and is upheld The petition is dismissed with costs of the Government Pleader Time for payment of additional Court-fee one month from this date

K S. *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Ordinary Original Civil Jurisdiction)

PRESENT —MR JUSTICE PANCHAPAGESA SASTRY

Tansukhrai M Karundia . *Applicant**

v

The Official Liquidator, Andhra Paper Mills Co , Ltd , (in liqn) *Respondent*

Companies Act (VII of 1913), section 109 (f)—Document creating security over company's assets—Validity —Tests—Registration with Registrar of Joint Stock Companies—When essential

A creditor was given possession of the items of moveables pledged to him and it was provided that as and when other moveable properties come into his possession, they also stand pledged to him The security itself was expressly stated to be a continuing one On default of payment when demanded he was given the right to have the properties in his possession sold by public or private auction and apply the net proceeds in liquidation of the amounts due to him Though the debtor company was allowed to run its business, it was only run by the creditor as an agent under an irrevocable power of attorney In the circumstances,

Held, that it cannot be said that this is a mere floating charge coming under clause (*f*) of section 109 of the Companies Act and non-registration of the deed cannot invalidate the security The element of possession, which is contemplated by the deed and which was actually given, is an important factor, which stands in the way of the document being regarded as creating a purely equitable charge of a character coming fairly within the description of a floating charge requiring registration.

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1 (1941) 1 M L J Short Notes, p 55.

*O P No 235 of 1947.
Appln. No 3309 of 1948. 16th February, 1949.

Jones and Co v *Ranjit Roy*, (1926) I L R 54 Cal 513 and *Bank of Baroda* v *Shivdasani*, (1926) I L R 50 Bom 547 referred to

K Narasimha Aiyar for *Messrs C R Krishna Rao* & *D B Jagannath Rao* for Applicant

V Radhakrishnayya for *Messrs Short Bewes & Co.*, for Respondent

The Court delivered the following

JUDGMENT —This is an application to vary the order of the Official Liquidator of the Andhra Paper Mills Co , Ltd , (in liquidation) disallowing the claim of the applicant to have a charge over the movable assets of the company for a sum of Rs. 1,01,172-15-2 The liquidator admitted that the amount claimed was due, but he disallowed the claim to rank as secured creditor on the ground that the document creating the security was not registered with the Assistant Registrar of Joint Stock Companies, Cocanada, as required by section 109 of the Indian Companies Act This order further states that in any event, the amount of Rs 34,000 included in the claim representing payment made on 15th July, 1947 to Messrs Natwarlal Shamaldas and Co cannot be treated as a secured debt No grounds for the same are however mentioned in the order

The applicant Tansukhrai M Karundia, claims to have advanced the aforesaid sums in circumstances set out below The Andhra Paper Mills would appear to have issued debentures to the extent of eleven lakhs By about 1945 interest on the same had accumulated to another six lakhs The company having made default in payment under the terms of the debenture document, the debenture trustees had taken possession, but they were themselves unable to work the concern They seem to have delivered over the premises again to the Mills on certain conditions, which were not fulfilled and the trustees again entered into possession of the debenture premises on the 14th February, 1947 Certain proposals would appear to have been made by the trustees to the Board of Directors as to the terms upon which moneys could be borrowed for running the concern and at the suggestion of the trustees the Company had agreed to execute deeds giving a lien or charge to any person who might be found by the debenture trustees to be willing to advance funds A resolution to this effect was passed on 10th March, 1947 (Ex P-1) and on the same day a draft agreement between the company and the company's banker and treasurer was also approved by them (Ex P-2) In pursuance of the draft so approved, Ex P-3 was executed on the 21st March, 1947, between the company and the applicant, therein referred to as the treasurer It is under this document that the applicant claims to have advanced moneys from time to time to the company and now claims to have a security over the properties mentioned in the document for the balance of the amounts due to him In view of the contentions urged regarding the invalidity of the document, as against the liquidator, it is necessary to set out its main terms, which are as follows

" These presents witness That in consideration of the said Tansukhrai M Karundia having agreed to lend and advance to the company such sums or moneys or credit of any nature and kind whatsoever for the purpose of carrying on the business and affairs of the company and working the factory at Rajahmundry, the Company hereby agrees and binds itself as under —

(1) All movable properties of every description in the treasurer's possession on the company's account, or for the time being held by the treasurer on company's behalf whether alone or jointly or with others in India or elsewhere including any bullion, deposit receipts, promissory notes, bills of exchange, hundies, bills of lading, railway receipts, other documents of title to goods, any other negotiable or transferable instruments or securities, bills or other documents relating to supplies made or services rendered to Government or to any other person or mercantile documents of every description or contracts other than those pertaining to immovable properties requiring registration in India and other documents evidencing the company's title as creditors or members of any corporation, association, company or syndicate in India or elsewhere, are hereby hypothecated for and shall stand charged with, and

(2) all marketable securities and goods coming into the treasurer's possession on the company's account or deposited with the treasurer or for the time being held by the treasurer on the company's behalf, are hereby pledged for and shall stand charged with
the due payment of the amount of any advacne or credits with interest thereon at one per cent over the bank rate with a minimum of 4 per cent per annum with six monthly receipts, and all costs charges and expenses incurred by the treasurer in connection with such advances or credits "

The document contains various other clauses which are also important in this connection It is stated to be a continuing security to cover the amount of advance. It is provided that the treasurer shall not be responsible for any loss, damage or depreciation suffered by the movable properties, securities, and books in his possession or in the course of realisation, nor bear loss or damage caused by theft or burglary. The company undertakes to maintain a margin on the said movable properties, securities or goods and failing repayment on demand of the amount of advance with interest, etc , the treasurer is entitled, but not bound to sell or otherwise dispose of all or any of the movable property marketable securities or goods by public auction or by private sale without reference to the company or without obtainings its consent. The proceeds of such sale should be applied in payment of all costs and in repaying the amounts due to the treasurer and, if there is any balance, to be paid over to the company The treasurer is to carry on business and maintain the necessary staff for which the company will pay the salaries, wages and expenses The company is to give an irrevocable power of attorney to the treasurer with necessary powers to manage the concern The power is not to be revoked until all the moneys due to the treasurer are fully paid up Another clause expressly provides that all movable property in any shape or form including raw materials, stores and finished products, etc, shall be in the treasurer's possession and control and he shall be entitled to deal with the same as he thinks fit The treasurer has a right to sub-delegate his powers under the power-of-attorney to be granted to him and to grant power-of-attorney on his own behalf to other persons On the same date the company gave a power-of-attorney as contemplated to the applicant, a copy of which is Ex P-4 It is therein recited *inter alia* that he has power to hold moneys, negotiable instruments, goods, hundies, promissory notes, cheques, bills of lading, railway receipts, etc , and the proceeds thereof in his possession and to appropriate the same towards the moneys due to him as the company's banker Further all moneys and all movable property belonging to the company, whether actually received or likely to be received by the treasurer and all goods actually held by the attorney or to be received by him on behalf of the company, are to be received, held and appropriated by him towards liquidation of the moneys advanced by the attorney In pursuance of the power-of-attorney, the applicant appointed one Mr N K Gokhale as attorney to be in charge of the Mills at Rajahmundry and run the concern This arrangement was acted upon until the company was ordered to be wound up by order of this Court dated 23rd September, 1947, in O P No 235 of 1947, filed on 22nd August, 1947 The provisional liquidator, who was appointed took possession of the Mills on 6th September, 1947, from the said Gokhale, who was admittedly in possession till then on behalf of the applicant.

The question for decision is whether the document, Ex P-3, is void against the liquidator for the reason that it has not been registered with the Assistant Registrar of Joint Stock Companies as required by section 109 The applicant's advocate contends that this document created a pledge on the movable properties of the company and does not require registration under section 109 (1) (*c*) Although the order of the Official Liquidator does not refer to any particular clause of section 109, in the counter-affidavit filed by him in this application, it is stated that the document requires registration, as the applicant claims a charge on the stock-in-trade of the company The learned advocate for the applicant conceded that a pledge on stock-in-trade would require registration, but he submitted that he was willing to give up his claim for security over stock-in-trade and was content with a declaration that he is entitled to have his security over all the properties covered by the document, Ex P-3 other than stock-in-trade In the argument before me, however, the advocate for the liquidator took a different line and contended that

the entire document is void against the liquidator for the reason that it amounted to creating a floating charge and hence required registration under clause (*f*). He relied on the decision of the Judicial Committee in *Imperial Bank of India* v. *Bengal National Bank (in liquidation)*[1], and that of the High Court of Allahabad in *Babu Nandan Lal* v *Parsottam Sahu*[2] As pointed out by Buckley, L J , in *Evans* v. *Rival Granite Quarries, Ltd*[3], a floating security is not a specific security , it is only one which affects the assets included in it, which are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee.

> " A floating security is not a specific mortgage of the assets, plus a license to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security "

In the present case it will be noted that the applicant was given possession of the items pledged to him As and when other moveable properties come into his possession, they also stand pledged to him. The security itself is expressly stated to be a continuing one On default of payment when demanded, he is given the right to have the properties in his possession sold by public or private auction and apply the net proceeds in liquidation of the amounts due to him No doubt, the company is allowed to run its business, but it is only run by him as an agent under an irrevocable power-of-attorney This scheme was devised apparently to ensure his possession of the properties delivered to him and also his continued possession of all the moveable properties covered by the document These characteristic features are sufficient to negative the contention that this is a mere floating charge coming under clause (*f*) of section 109 As pointed out by Rankin, C J , in *Jones & Co* v *Ranjit Roy*[4], the element of possession, which is contemplated by the deed and which was actually given, is an important factor, which stands in the way of the document being regarded as creating a purely equitable charge of a character coming fairly within the description of a floating charge The decision in *Bank of Baroda* v *Shivdasani*[5] is also in point In the present case, the possession of the moveable properties should be taken to be with the applicant in his capacity as pledgee and not merely and solely as an agent of the company I am of opinion, therefore, that clause (*f*) is not applicable and that the document does not require registration, as a floating charge

If it is a pledge of moveable properties other than stock-in-trade, the document does not require registration either under clause (*e*) In answer to a specific question from the Court, the learned advocate for the liquidator admitted that the document can be given effect to as regards all moveables contained therein other than stock-in-trade in spite of the inclusion of the stock-in-trade also in the document and its non-registration It was not contended that the document is bad *in toto* As I stated already it was admitted that it may be enforced as creating a good security over the rest of the properties other than the stock-in-trade In view of that admission, it is not necessary to deal with that point

It is next argued that, at any rate, a sum of Rs 34,000 cannot be treated as a secured advance No reasons are given why this amount is treated in a different manner from the rest of the advances either in the order of the liquidator, or in the counter-affidavit filed by him In the arguments, however, the advocate for the liquidator stated that this amount was advanced within three months prior to the winding up order and hence it was bad under section 211 as a fraudulent preference No evidence was let in to show that the payment was made by the applicant with a view to give that creditor a preference over other creditors The mere fact that the money was paid within three months prior to the presentation of the petition for winding up is not by itself sufficient to avoid the transfer or payment as invalid under section 231 When this was pointed out, the learned advocate for the liquidator tacitly gave up his contention, as he had no evidence to let in.

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1 (1931) 61 M L J 589 L R 58 I A 323 I L R 59 Cal 377 (P C)
2 I L R 1942 All 119
3 (1910) 2 K B 979 at 999
4 (1926) I L R 54 Cal 513
5 (1926) I L R 50 Bom 547

In the result, the applicant is entitled to a declaration that he has a valid security over such of the moveable assets of the company as are comprised in the document, Ex. P-3, but excluding stock-in-trade therefrom for the total sum of Rs 1,01,172-15-2 The order of the liquidator is varied accordingly to that extent The applicant will get his costs from the respondent The liquidator will have his costs from out of the company's funds I fix advocate's fee for each side at Rs 350

K S ——— *Order of liquidator varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR JUSTICE VISWANATHA SASTRI

K R Kesavan .. *Appellant**

v

The South Indian Bank, Ltd. . *Respondent*

Madras High Court Original Side Rules—Order 7, rule 6—Unconditional leave to defend—When granted—Tests—Object of requiring leave to defend in summary suits

The object of the rule requiring that leave to defend should be obtained in suits under summary procedure is to see that in the class of suits to which the order applies the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining a decree early by raising untenable and frivolous defence It is not intended, however, by that rule to deprive a man of his right of defending the suit in court if he has a good defence but at the same time a man of raising a sham defence or unreal defence should not be allowed to delay the action In the latter case leave would be granted only conditionally

To entitle a defendant in a summary suit to get unconditional leave to defend, the defence must raise a plausible case for trial and if established must be a sufficient answer to the claim The only test to be applied is to see whether the defences raised a real issue and not a sham issue in the sense that if the facts alleged by the defendants are established there would be a plausible defence on those facts

Jacobs v *Booth's Distillery Company*, (1901) 85 L T 262, *Bailberg* v *Abrahams*, 77 L T 255 (C A), *Periya Miyana Marakayar* v *Subramania Aiyar*, (1923) 46 M L J 255, *Sundaram Chettiar* v *Valliammal*, (1934) 68 M L J 16 I L R 58 Mad 116 and *Ebrahim Sait* v *South India Industrials, Ltd*, (1938) 2 M L J 568 I L R 1939 Mad 36, discussed

On appeal from the Judgment and Order of Yahya Ali, J , dated 13th July, 1948, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No 326 of 1948 in C S. No 480 of 1947.

Sundararajan and *Sivaswami* for Appellant

Messrs John & Row and *C T Verghese* for Respondent

The Judgment of the Court was delivered by

Satyanarayana Rao, J—This is an appeal by the defendant against the decision of our learned brother, Yahya Ali, J , dismissing the appeal perferred against the order of the Master

The respondent to this appeal is the South Indian Bank, Ltd , which instituted a suit, C S No 480 of 1947, for recovery of a sum of Rs 10,310-10-0 from the defendant The suit was instituted under summary procedure provided under Order 7, rule 6 of the Original Side Rules and under Order 37, rule 2 of the Civil Procedure Code The claim was based on a cheque for a sum of Rs 10,000 dated 12th April, 1947, drawn by the appellant on the Indian Bank, Ltd , Thyagarayanagar, in favour of one K C M C Rathnasabapathi Nadar and Sons The drawee of the cheque negotiated it to the plaintiff bank and it was alleged in the plaint that it was endorsed to it for valuable consideration and that the plaintiff is a holder in due course The cheque was presented to the Indian Bank by the plaintiff but it was dishonoured on 16th April, 1947 The plaintiff, therefore, claims that he is entitled to recover the suit amount from the defendant on the basis of the negotiable instrument

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*O S A No 40 of 1948 23rd March, 1949

As the suit was filed under summary procedure the defendant had to obtain leave to defend the suit under Order 7, rule 6, Original Side Rules and for this purpose he made an application to the Master, Application No 3010 of 1947 The main defences raised by him in that application were that the plaintiff was not a holder in due course as there was no consideration for the endorsement and secondly that the plaintiff had no cause of action to sue for the recovery of the amount as no notice of dishonour was given to the defendant until 26th May, 1947, which according to him was wholly an unreasonable notice as considerable time had elapsed from the date of dishonour.

The Master was of opinion that as the payee endorsed the cheque in reduction of his previous liability and also to provide a margin for future advances the endorsement was supported by consideration and that, the plaintiff was a holder in due course To get over the plea of unreasonable delay in issuing a notice the plaintiff pleaded that after the cheque was dishonoured by the Indian Bank on 16th April, 1947, the defendant was informed of the same but the defendant requested the plaintiff to present the cheque again Twice it was presented and twice it was dishonoured and therefore it was alleged that there was oral notice of dishonour immediately after the cheque was dishonoured by the Indian Bank on 16th April, 1947 For these reasons he was of opinion that though there was a triable issue the defence was not *bona fide* He, therefore, granted conditional leave to defend the suit the condition being that the defendant should within four weeks from the date of this order deposit into Court a sum of Rs 10,000 or furnish security for that sum within that period

Against this order there was an appeal which was disposed by Yahya Ali, J. The learned Judge agreed with the conclusion of the Master and confirmed the order granting conditional leave to defend the suit

In this appeal against that order the learned advocate for the appellant raised the contention that as it was found by the Master as well as by the learned Judge that there were triable issues arising on the defence unconditional leave should have been granted and that the question of *bona fide* nature of the defence should not have entered into consideration in view of the finding that triable issues were raised in the defence

Under Order 7, rule 6, Original Side Rules, an order granting leave to defend may be unconditional or subject to terms The language of the rule is word for word the same as that of Order 14, rule 6 of the rules of the Supreme Court in England The rule in England received an authoritative interpretation by the House of Lords in *Jacobs* v *Booth's Distillery Co* [1] The principles laid down in that decision for the guidance of the Courts in England in deciding the question when and under what circumstances leave to defend should be granted subject to conditions and when it should be granted unconditionally, afford useful guidance in interpreting rule 6 of Order 7 of the Original Side Rules and rule 2 of Order 37, Civil Procedure Code The defence raised, according to the decisions of the House of Lords should not be a sham one but should raise a fair issue to be tried by a competent Tribunal By sham defence is meant that the facts alleged in the defence even if true would not amount to a valid defence in law, and a fair issue has been interpreted to mean a plausible issue in the sense that if the facts alleged are established there would be a tenable defence In coming to a conclusion whether such a test is satisfied or not the Court should take into consideration all the circumstances of the case as disclosed in the plaint and in the affidavits and other material that is available as was laid down by Buven, L J , in *Blaiberg* v *Abrahams.*[2] The question was considered in our Court after the decision of the House of Lords (*Jacobs* v *Booth's Distillery Co* [1]) by Schwabe, C J , and Ramesam, J , in *Periya Miyana Marakayar* v *Subramania Aiyar*[3], and it was explained in that decision

1 (1901) 85 L T 262
2 77 L T J O 255 (C A)
3 (1924) 46 M L J 255

that by the expression "triable issue" is meant a plea which at least is plausible. The defence must not be as pointed out by Lord Chancellor Halsbury in *Jacobs* v *Booth's Distillery Co*,[1] an attempt merely to delay the the trial of the action

The object of the rule requiring that leave to defend should be obtained in suits under summary procedure is to see that in the class of suits to which the order applies the defendant does not unnecessarily prolong the litigation and prevent the plaintiff from obtaining a decree early by raising untenable and frivolous defence. It is not intended however, by that rule to deprive a man of his right of defending the suit in Court if he has a good defence but at the same time a man by raising a sham defence or unreal defence should not be allowed to delay the action. In the latter case leave would be granted only conditionally As pointed out by the Lord Chancellor in *Jacobs* v *Booth's Distillery Co*[1] in his speech

"People do not seem to understand that the effect of Order XIV is, that, upon the allegation of the one side or the other a man is not to be permitted to defend himself in a Court, that his rights are not to be litigated at all There are some things too plain for argument and where there were pleas put in simply for the purpose of delay which only added to the expense and where it was not in aid of justice that such things should continue Order XIV was intended to put an end to that state of things and to prevent sham defences from defeating the rights of parties by delay and at the same time causing great loss to the plaintiffs who were endeavouring to enforce their rights"

Lord James of Hereford in the same case stated as his opinion that in a proceeding to obtain leave to defend, the Court is not called upon to consider the merits of the case All that the Court has to be satisfied to quote the words of Lord James of Hereford is "the view which I think ought to be taken of Order XIV is that the Tribunal to which the application is made should simply determine "Is there a triable issue to go before a jury or a Court" It is not for the Tribunal to enter into the merits of the case at all It ought to make the order only when it can say to the person who opposes the order "You have no defence You could not by general demurer, if it were a point of law, raise a defence here We think it impossible for you to go before any Tribunal to determine the question of fact" We are not expressing any opinion whatever upon the merits of the case It appears to me that there is a fair issue to be tried On which side the chance of success are it is not for this House to determine but thinking as I do that there is a fair issue to be tried by a competent Tribunal it seems to me to be perfectly clear that the order of the Court of appeal ought to be reversed"

The principle in *Jacobs* v *Booth's Distillery Co*[1] and the principle of the decision in *Periya Miyana Marakayar* v *Subramania Aiyar*[2] were again applied by this Court in *Sundaram Chettiar* v *Valliammal*[3] According to the learned Chief Justice (Sir Owen Beasley) the test is to quote his words.

"If the defendant sets up a defence in his affidavit in support of his application for leave to defend which, if he should succeed in proving, would entitle him to succeed in the suit, then the Master or the Court before whom the application comes has no discretion whatever in the matter and unconditional leave to defend must be granted A triable issue in such a case has been raised by the defendant and it is not open to the Master or anybody else other than the trial Judge to go into the merits and discover whether that case is a true one"

In the yearly Practice of the Supreme Court for 1939 the effect of the judgment of the House of Lords in *Jacobs* v *Booth's Distillery Co*[1], is stated in the following terms:

"If the defendant by his affidavit or otherwise shows that there are facts which, if true, constitute a defence to the claim, he should be given unconditional leave to defend"

In *Ebrahim Sait* v *South India Industrials, Ltd*[4], in an action by a company for recovery of a large amount overdrawn by the defendant from the company th

1 (1901) 85 L T 262
2 (1923) 46 M L J 255
3 (1934) 68 M L J 16 I L R 58 Mad 11
4 (1938) 2 M L J 568 I L R 1939 Mad

efendant applied for leave to defend and stated as his grounds of defence that he plaintiff, managing director who instituted the suit on behalf of the company ad no proper authority to sue, that he was entitled to set-off against the claim f the company, the bonus and dividends due to him from the company and also o set-off the amount which he might receive from the company in the liquidation roceedings He also raised the plea of limitation It appeared, however, that here was an acknowledgment by him of his liability to the company which saved he suit from the bar of limitation In respect of the set-off the plaintiff produced letter whereunder the defendant released his claim unconditionally—to the bonus nd dividends due to him from the company He was not entitled in law to claim et-off against the company, a sum which might become due to him upon the winding ip of the company as against the moneys due by him to the company until the noney due by him to the company was paid On these defences the Master before vhom the application came for hearing thought that leave to defend should be ranted conditionally on his furnishing security for a sum of Rs 25,000 within period of two months The order was confirmed on appeal by Gentle, J, (as ie then was) and against that order of the learned Judge an appeal was preferred vhich came up for hearing before Madhavan Nair, O C J, and Krishnaswami Aiyangar, J The learned Judges considered the matter and the decisions on the oints including the decision in *Jacobs* v *Booth's Distillery Co* [1], and held that the lecision of Gentle, J, was correct and that the defendant was not entitled to an inconditional leave to defend At page 41 of the report, however, there are ertain observations of the Honourable the Officiating Chief Justice which go to ndicate that in order to entitle a defendant to unconditional leave he should atisfy the Court not only that there was a triable issue but also that his defence vas *bona fide* The decision in *Sundaram Chetti* v *Valliammal*[2] was also doubted The decision in *Sundaram Chetti* v *Valliammal*[2] did lay down the broad proposition hat the defence should not only raise a triable or real issue or a plausible issue out that it should also be a *bona fide* one If the issue raised is a real one no further juestion of the consideration of the *bona fide* nature of the defence arises The very act that the defence is real indicates that it is *bona fide* The learned Judges, when hey referred to the triable issue and *bona fide* defence at page 41 in *Ebrahim Sait's* case[3] must have meant by those observations to indicate, that it is not enough o have an issue whatever be its nature and substance but that it should be real ind substantial The defence must raise a plausible case for trial and if established i sufficient answer to the claim We do not think that the decision in *Ebrahim Sait* v *South India Industrials, Ltd* [3], is intended to lay down a rule which is contrary o the decision of the House of Lords in *Jacobs* v *Booth's Distillery Co* [1], and is in conflict with what was laid down in the earlier decisions of this Court On the acts of that case the defence was really not a *bona fide* one and there was no plausible ssue for trial We think that the only test to be applied is whether the defence aised a real issue and not a sham issue in the sense that if the facts alleged by the lefendant are established there would be plausible defence on those facts

The finding of the learned Judge in the present case amounts, in our opinion, o no more than that the defence is a sham one and does not raise a triable issue In the affidavit filed in support of the application for leave to defend the defendant idmitted that when he drew the cheque he expected the drawee to furnish the iecessary funds to the Indian Bank in order to enable the cheque to be cashed and hat the cheque was issued by him only as an accommodation cheque It cannot, herefore, be said that by reason of want of notice of dishonour he suffered any prejudice and in those circumstances he would not be entitled to notice as the ase falls under section 98 (*b*) of the Negotiable Instruments Act He is a person who suffered no damage and therefore would not be entitled to any notice as he never deposited any money in the bank The plea, therefore, for want of notice of dishonour on the facts as disclosed in the affidavit, is not a real defence at all As

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1 (1901) 85 L T 262
2 (1934) 68 M L J 16 I L R 58 Mad 116
3 (1938) 2 M L J 568 I L R 1939 Mad 36.

regards the other plea that the plaintiff is not a holder in due course in view of the allegation in the affidavit, we are unable to hold that even this plea has any substance in it. Even according to the defendant the cheque was issued only as an accommodation cheque and therefore must have necessarily been intended to constitute the endorsee a holder in due course The drawee wanted the cheque to be drawn in his favour with a view to enable him to discharge or meet the liability he owed to the Bank The endorsement, therefore, was supported by valuable consideration and the plaintiff unless the presumption under section 118 of the Negotiable Instruments Act is rebutted would *prima facie* be holder in due course Of course, we are not expressing any opinion on the merits of the case and we are not finally deciding any of the questions which have been raised in the application for leave to defend *Prima facie* we are satisfied that the defence raised by the defendant in his affidavit raises no real issue in the case so as to entitle him to unconditional leave to defend For these reasons we think that the decisions of the learned Judge is correct

It is, however, represented to us on behalf of the appellant that he had already given an undertaking not to alienate his immoveable properties which are outside this city pending disposal of this appeal He is willing and undertakes not to alienate the properties until security as directed by the order of the Master is furnished. The undertaking will, therefore, continue until the security is furnished as directed. Time fixed for giving security expired but we extend it by one month from this date The respondent has no objection to the appellant's tendering as security his immoveable properties situated in the mofussil to the satisfaction of the Second Assistant Registrar, Original Side

In the result, the appeal is dismissed with costs of the respondent Time for filing written statement is extended to two weeks after security is furnished

K S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR P V. RAJAMANNAR, *Chief Justice* AND MR JUSTICE BALAKRISHNA AYYAR

Messrs P A Raju Chettiar and Brothers *Petitioners**

v

Commissioner of Income-tax, Madras *Respondent*

The Federal Court (Enlargement of Jurisdiction) Act (I of 1948), *sections* 2 (b) *and* 3 *and Civil Procedure Code (V of* 1908), *section* 110—*Judgment of High Court delivered on a reference under section* 66 *of the Income-tax Act—Appeal to Federal Court—If lies*

A judgment of the High Court delivered on a reference made under section 66 of the Income-tax Act is one passed in a civil case and would be a judgment to which Act I of 1948 applies with the result that an appeal will lie to the Federal Court from such a judgment under the provisions of Act I of 1948 where it is certified to be a fit case for appeal

Tata Iron and Steel Co, Ltd v *Chief Revenue Authority of Bombay,* (1923) 45 M L J 295 · L R. 50 I A 212 I L R 47 Bom 724 (P C) distinguished

Petition under section 110 of Act V of 1908, read with section 66-A (2) of the Indian Income-tax Act, 1922, praying that in the circumstances stated therein the High Court will be pleased to issue a certificate for leave to appeal to the Federal Court of India against the judgment of the High Court of Madras dated 12th August, 1948 and passed in Case Referred No 19 of 1946 referred to the High Court by the Income-tax Appellate Tribunal under section 66 (1) of Act XI of 1922 as amended by section 92 of the Income-tax (Amendment) Act, 1939, in 66 R. A No 81 Madras 1944-45 on its file

K S Ramamurthi for the Advocate-General (*K. Rajah Aiyar*) and *K. Srinivasan* for Petitioners

C. S. Rama Rao Sahib for the Respondent

*C M. P No. 1371 of 1949 21st March, 1949.

The Order of the Court was made by

The Chief Justice—This is an application for leave to appeal to the Federal Court against the judgment of this Court in Referred Case No 19 of 1946 As a question arose before us and was discussed whether an appeal lay to the Federal Court against the judgment of this Court, we may deal with the point briefly.

Under Section 3 of Act I of 1948, as from the appointed day, that is, the first day of February, 1948, an appeal shall lie to the Federal Court from any judgment to which the said Act applies A " judgment to which this Act applies " is defined in Section 2 (*b*) of the Act as .

" any judgment, decree or final order of a High Court in a civil case from which a direct appeal could have been brought to His Majesty in Council, either with or without special leave, if this Act have not been passed "

Undoubtedly, the judgment of this Court was passed in a civil case, because the category of civil cases excludes only criminal cases from the application of the enactment The question then is whether the judgment sought to be appealed against is the judgment from which a direct appeal could have been brought to His Majesty in Council There can be only one answer to this question, and that answer rests upon the language of Section 66-A (2) of the Indian Income tax Act, which rus thus :

" An appeal shall lie to His Majesty in Council from any judgment of the High Court delivered on a reference made under section 66 in any case which the High Court certifies to be a fit one for appeal to His Majesty in Council "

The judgment of this Court was such a judgment delivered on a reference made under section 66. It is clear, therefore, that an appeal will lie to the Federal Court under the provisions of Act I of 1948

The ruling of the Judicial Committee in *Tata Iron and Steel Co , Ltd* v *Chief Revenue Authority of Bombay*[1], was brought to our notice In that case, it was held that no appeal lay to the Privy Council under clause 39 of the Letters Patent of the Bombay High Court from a decision of the High Court upon a case stated and referred to it by the Chief Revenue Authority under section 51 of the Indian Income-tax Act of 1918 From the elaborate discussion of their Lordships and from the final conclusion, it becomes abundantly clear that the *ratio decidendi* of that decision was that the decision or judgment or order made by the High Court under section 51 of the Income-tax Act 1918, was merely advisory, and not in the proper and legal sense of the term final It was necessary for their Lordships to discuss the import of the word " final," because in clause 39 of the Letters Patent the words are " from any final judgment, decree or order " It may be noticed that according to the definition contained in section 2 (*b*) of Act I of 1948 " judgment to which this Act applies " means " any judgment, decree or final order " and not " any final judgment, decree or order ". The difference in the language makes the ruling of the Privy Council in the Bombay case inapplicable to the present application

In our opinion, the question raised before this Court was of considerable importance, and we certify that this is a fit case for appeal to the Federal Court The application is granted

V S *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SUBBA RAO AND MR JUSTICE PANCHAPAKESA AYYAR

Panangipalli Suryanarayanacharyulu and another *Appellants**

v

Panangipalli Seshamma (died) and another .. *Respondents*

Hindu Women's Rights to Property Act (XVIII of 1937)—Right to archakatvam *service—If " property" within the meaning of the Act—Right of maintenance-holder to be maintained out of such property*

The right to perform *archakakatvam* service carrying perquisites in whatever shape it may be for the due performance of the said services is " property " within the meaning of Act XVIII of 1937 and

1 (1923) 45 M L J 295 L R 50 I A 212 I L R 47 Bom 724 (P C)

* Appeal No 63 of 1946 6th April, 1949

even apart from the provisions of that Act a maintenance-holder is entitled to be maintained from and out of the family income of such property

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram, in O S No 34 of 1945

P Somasundaram and *P Suryanarayana for* Appellants

K Bhimasankaram and *G Venkatarama Sastri* for Respondents

The Judgment of the Court was delivered by

Subba Rao, J—This appeal raises an interesting point of law, namely, whether the right to *Archakatvam* service is property within the meaning of Act XVIII of 1937, and whether from and out of the family income of such property a maintenance holder is entitled to be maintained The plaintiff's husband one, Gopalacharyulu, was the hereditary *archaka* of Sri Madanagopalaswami Varu, enshrined in the village of Podagatlapalli and of Sri Venkateswaraswami Varu and Sri Kothandaramaswami Varu enshrined in the village of Vedireswaram An extent of 32 acres and 75 cents comprised in items 2 to 10 of a schedule annexed to the plaint was in the enjoyment of the said Gopalacharyulu as *Archaka* service inam Gopalacharyulu died on 1st January, 1940 The first defendant is his undivided son and the second defendant is the undivided son of the first defendant On the death of Gopalacharyulu the first defendant has been enjoying the said *archaka* service inam and rendering *archakatvam* service personally in the temples of Venkateswaraswami and Kothandaramaswami and, through a deputy, in the temple of Madanagopalaswami Varu In addition he also died possessed of item No 1 in A schedule and other items mentioned in schedules B and C The plaintiff, widow of Gopalacharyulu, and the step-mother of the first defendant, filed O S No 34 of 1945, on the file of the Court of the Subordinate Judge, Amalapuram, *in forma pauperis*, and though she asserted her rights to claim partition in items 2 to 10 of A schedule properties, she confined her relief only to maintenance from and out of the income of the family properties She claimed maintenance at the rate of Rs 200 per year for arrears for the period from 1st January, 1940 to 1st January, 1944 and future maintenance at the rate of Rs 300 a year in addition to incidental reliefs The learned Subordinate Judge held that she was entitled to maintenance from the income of the entire A schedule properties and to a share in the houses and sites described in the B schedule properties and also in the C schedule moveables He awarded maintenance at the rate claimed by the plaintiff both in regard to arrears of maintenance as well as future maintenance The first defendant preferred an appeal against the decree and judgment of the lower Court Pending appeal the plaintiff died and the legatee under the will was brought on record In view of the supervening event the only question that remains to be considered is the right of the plaintiff to arrears of maintenance

The contention of the learned counsel for the appellant is that the *archakatvam* service inams comprised in item No 2 to 10 of A schedule would not be property within the meaning of Act XVIII of 1937, and that, therefore, the plaintiff would not be entitled to a share in them under the said Act She would not also be entitled to any maintenance from and out of the income of the said properties as the income was not the family income but only the personal income of the first defendant The relevant provisions of sub-section (1) of section 3 of Act XVIII of 1937, read as follows

"When a Hindu governed by the Dayabhaga School of Hindu Law dies intestate leaving any property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property, his widow, or if there is more than one widow all his widows together, shall, subject to the provisions of sub-section (3), be entitled in respect of property in respect of which he dies intestate to the same share as a son"

Sub-section (2) of section 3 is as follows

"When a Hindu governed by any school of Hindu Law other than the Dayabhaga school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall subject to the provisions of sub-section (3), have in the property the same interest as he himself had"

Under these provisions a widow would inherit the separate property of the husband and also the interest of her husband in the joint family property In either case under sub-section (3) the interest inherited by her shall be the limited interest known as a Hindu woman's estate though she would be entitled to claim partition in regard to her share The question is whether *archakatvam* service is property within the meaning of the section

The argument of Mr Somasundaram, the learned Counsel for the appellant, ignores the nature of the service tenure and the charge of the grant The origin of the *archakatvam* service inams is lost in antiquity A brief history of the origin of this *archakatvam* service and its incidents was given by Seshagiri Aiyar, J, in his referring judgment to the Full Bench case reported in *Annaya Tantri* v *Ammakka Hengsu*[1]. In his view this *archaka* service grants had their origin in the time of *Puranas* when temples came into existence Citing *slokas* from the writing of Vaidyanatha Dikshitar the learned Judge pointed out the inferior status of the *archakas* who were looked down upon and considered to be a very inferior class of Brahmins. Saathathapa says

" A *vipra* (Brahmin) who performs *pooja* for the sake of money is known as the Devalaka , such a person becomes incompetent to participate in the usual *Havya* and *Kavya* rites enjoined on Brahmins "

In another stanza he expresses that

" *a vipra* who, though he may be well versed in the four Vedas is desirous of getting money, and who performs the worship of the Gods for the sake of another will be considered equal to a *chandala* "

As they were looked down upon in the above manner naturally great inducements had to be offered by liberal grants of land and by the promise of perquisites That is how the *archaka* office came to be founded Large endowments were given by generous donors for the due and regular performance of the services This right to *archakatvam* service ordinarily continued to be in the same family for generations and the properties pertaining to the same were being enjoyed by the members of the families for generations In recent years Courts have introduced the three-pronged classification in regard to the said grants In *Subramaniam* v. *Srivaikuntam Kailasanathaswami Koil*[2], Venkatasubba Rao, J, observed .

" There are three possible views that may be taken of grants of this kind , first, that the land was granted to the institution , secondly, that it was intended to be attached to a particular office , and thirdly, that it was granted to a named individual, burdened with service, the person so named, happening to be the office-holder, at the time of the grant "

As observed by another learned Judge, these nice short quillets of law are of comparatively recent origin and are modern innovations But it is too late in the day to wipe out these distinctions or ignore the classifications Even so the question arises whether the *archaka* office to which perquisites are attached is property within the meaning of Act XVIII of 1937 If the lands were granted to the *archakas* burdened with service no difficulty would arise as the property is that of the grantee just like any other property but in the case of *archaka* service inams the nature of the income from the lands depends upon the office In this case no evidence has been placed before the lower Court in regard to the nature of the grant but a perusal of the pleadings show that both the parties assumed that items 2 to 10 of A schedule are not lands burdened with service but only service inams We shall proceed to consider the question raised in the appeal on that assumption If the office is property within the meaning of Act XVIII of 1937 succession to the property will be governed by the provisions of the Act in which case the plaintiff would be entitled to succeed to the property in the manner prescribed by the Act

A learned exposition of the office of the hereditary priest of a temple is found in the decision reported in *Krishna Bhat Bin Hiraganga* v *Kapa Bhat Bin Mahal Bhat*[3] On a consideration of the text books on Hindu law and other treatises the learned

1 (1918) 35 M L J 196 I L R 41 Mad 886 3 6 Bom H C R 137
2 (1933) 39 L W 389

Judges came to the conclusion that the office of the hereditary priest in a temple is immoveable property within the meaning of clause 12 of section 1 of Act XIV of 1869 The following extracts from relevant text book are found in that decision :

"In Elberling on 'Inheritance', S 206, it is said that the right of performing the religious ceremonies of certain classes of people as *Purohit*, is by custom considered analogous to real property; and in 2 Strange H L 363, Mr Colebrooke says, that if an office in a family be hereditary, the dues or profits appertaining to it must be subject to be shared, but in such case it classes with immoveables" "Colebrook in his Digest (Volume I, page 375, Madras edition, 1863) describes the position of *Purohita* and *Agraharika* priests, and says they are considered hereditary offices, while Elberling (page 96, Sections 206 and 207) states that by custom these offices are considered analogous to real property"

In *Annayya Tantri* v *Ammakka Hengsu*[1], the Full Bench held (Sadasiva Aiyar, J, dissenting), that according to the practice and precedents obtaining in the Madras Presidency, a Hindu female is not incompetent by reason of her sex to succeed to the office of *archaka* in a temple and to the emoluments attached thereto. At page 898, Wallis, C J, says

"It is not disputed that in this part of India the user in the case of temple *archakas* is that the office is hereditary and descends in the ordinary course of succession to women, who are not themselves competent to perform the duties of the office by ministering in the temple and perform them by deputy"

It was held that succession to the office is regulated by Hindu Law It is also not disputed that in the case of hereditary *archaka* inams the office is held by the heirs jointly, and by mutual arrangement they perform services by rotation or convenient turns It is also a well known incident of these grants whether sanctioned by custom or otherwise, that the members of the family partition the properties between themselves and such partitions are recognised by Courts so long as services for which grants are made are regularly performed No doubt, the alienation of such inams was held to be invalid on the ground of public policy In *Anjaneyalu* v. *Sri Venugopala Rice Mills, Ltd*[2] a Full Bench of this Court held, that *Swastivachakam* service tenure is inalienable on the grounds of public policy and the principle of that decision will equally apply to an alienation of *archakatvam* service inam It will, therefore, be seen that *archakatvam* office is heritable property governed by Hindu Law of succession The office is jointly enjoyed by all the heirs and for convenience it is performed by turns The property pertaining to the office can be partitioned among the office-holders so long as the services are duly performed. Only the alienation of the property is prohibited We, therefore, hold that the right to *archakatvam* service of the office of *archaka* is heritable property and therefore governed by the provisions of Act XVIII of 1937

Mr Somasundaram in support of his argument relied upon a decision reported in *Umayal* v *Lakshmi*[3] The learned Judges, there, held that the right to trusteeship is not property within the meaning of sub section (3) of S 3 of the Act XVIII of 1937 In the learned Judges' view the Act applies only to property which belonged to the deceased person in his own right The Federal Court in appeal against that judgment accepted that view, and Varadachariar J in *Umayal Achi* v *Lakshmi Achi*[4] observed that Act XVIII of 1937 was intended to apply only to property beneficially owned by the propositus and not to anything in the nature of a trusteeship though the learned Judge recognised that Hindu Law regarded trusteeship as property for certain purposes The learned Judge held on a consideration of the relevant provisions of Act XVIII of 1937 that succession to such property is not governed by the Act Though the observations of the learned Judge are wide, the decision proceeded only on the main ground that the Act governs succession to property beneficially owned by the propositus In this case of *archakatvam* service, the office-holder or holders for the time being are beneficially entitled

1 (1918) 35 M L J 196 I L R 41 Mad 886

2 (1922) 42 M L J 477 I L R 45 Mad 620 (F B).

3 (1944) 1 M L J 70 I L R 1944 Mad 556.

4 (1945) 1 M L J 108 I L R 1945 Kar. 39 (1945) F L J 8 (F C)

to enjoy the income of the property, and, therefore, that decision does not directly affect the question to be decided in the present case

Assuming that the office is not property within the meaning of Act XVIII of 1937 it would still be property under Hindu Law, and succession to it is, therefore, regulated by Hindu Law

In *Bhabatarini Debi* v. *Ashalata Debi*[1] the Judicial Committee held that *Shebaiti* is property and is heritable property and succession to it is governed by Hindu Law. Its logical consequence would be that the heir or heirs would succeed to the estate just like to any other assets and would be liable to meet the legal obligations from and out of the perquisites of that asset If so, persons who would be entitled to be maintained from and out of the income from the assets devolving on the heir or heirs would equally be entitled to be maintained out of the perquisites

Mr Somasundaram relied upon a decision in *Nagadeva Venkatasubbamma* v *Nagadeva Venkateswarlu*[2] in support of his contention that the plaintiff is not entitled to maintenance out of the income from the *archakatvam* service inams In that case, the widow of a coparcener filed a suit for maintenance against the surviving coparceners Some of the properties in the hands of the defendants were *purohit* service inam lands The widow contended that income from *purohit* service inam lands should be taken into consideration for arriving at the quantum of her maintenance The learned Judge, mainly relying upon the provisions of Act III of 1895 (Madras) and Regulation VI of 1831, held that the emoluments enjoyed by the office holder for the time being would be separate property as salary for the services rendered by him and that this income could not be deemed to be joint family property That decision, turning upon the statutory provisions, cannot conceivably be applied to a case of *archakatvam* service inam which, under the law and custom, has been recognised to be property heritable and partible between the members of the family

In *Adinarayana Chetti* v *T T. K K Appan Srirangachariar*[3], the learned Judges, at page 224, make the following observations which may usefully be extracted here

> " The law relating to village service inams is moreover to be found in special laws such as Madras Hereditary Village Offices Act, 1895, and it would not be justifiable to import those laws when dealing with temple service inams in which the grantee or the holder of the inam is a Hindu Joint family and alienation is prohibited on the ground that it is opposed to public policy and contrary to the nature of the interest effected by the transfer."

We, therefore, hold that the right to perform *archakatvam* service carrying perquisites in whatever shape it may be for the due performance of the said services is property within the meaning of Act XVIII of 1937, and that, even apart from the provisions of Act XVIII of 1937, the plaintiff would be entitled to maintenance from and out of the income of the service inam lands

The plaintiff, though she is entitled to claim a share in the property, has confined her relief only to maintenance The lower Court has awarded her maintenance at the rate of Rs 200 per year towards past arrears and at Rs 300 per year for future maintenance As the plaintiff died pending appeal, Mr Somasundaram did not press his appeal in regard to future maintenance and has confined himself only to past arrears In the view we have taken, we are of opinion that the lower Court's finding with regard to the rate of maintenance is correct The appeal is dismissed with costs

K S *Appeal dismissed.*

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1 (1943) 2 M L J 70 (P C)
2 (1935) 43 L W 718
3 A I R 1941 Mad 217

[PRIVY COUNCIL.]

(On appeal from the Supreme Court of Canada)

PRESENT —VISCOUNT SIMON, LORD MACMILLAN, LORD SIMONDS, LORD OAKSEY AND LORD MACDERMOTT

Attorney-General of Saskatchewan .. *Appellant**

-*v*

Attorney-General of Canada and others .. *Respondents*

Constitutional Law—Legislative powers—Dominion and Province—Canada—Saskatchewan—Provincial legislation to give relief in cases of failure of crop by modifying the contractual rights of mortgagors and purchasers —Nature of—If "interest" legislation—If concerns "agriculture in the Province"—Validity—Farm Security Act (section 30 *of Statutes of Saskatchewan,* 1944, *as amended by section* 2 *of C* 28 1945), *section* 6—*British North America Act* (1867), *sections* 91 (19) *and* 92 (13)

The Farm Security Act, 1944 of Saskatchewan had for its main object the lightening of the contractual obligations of a mortgagor or purchaser of farm land in the event of the yield of grain grown on the land falling below a prescribed minimum Section 6 of the enactment provided for the modification of the contractual rights of mortgagees or vendors of Farm Land in respect of contractual payments due to them in the event of a "crop failure" as defined under the Act It was contended that paragraph 3 of sub-section (2) is *ultra vires* the Provincial Legislature because it is an enactment in relation to "interest"—a matter which by section 91 Head 19 of the British North America Act is within the exclusive legislative power of the Dominion Parliament The impugned legislation was sought to be supported on the ground that the "pith and substance" of paragraph 3 is "property and civil rights" a matter in relation to which the Provincial Legislature has an exclusive legislative power, and that in so far as paragraph 3 affects "interest" it does so only incidentally It was further said that its "pith and substance" is "agriculture in the Province" within the meaning of section 95 of the British North America Act

Held, a Provincial Statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest The Dominion power would likewise be invaded if the Provincial enactment was directed to postponing the contractual date for payment of interest without altering the rate, for this would equally be legislating in respect of interest In the light of the above considerations it must be held that paragraph 3 of sub-section (2) of section 6 trenches upon the Dominion field and is therefore invalid Dealing with interest in this sub-section is not incidental for it lies at the heart of the matter

What is sought to be statutorily modified is a contract between two parties one of whom is an agriculturist but the other of which is a lender of money However broadly the phrase "agriculture in the Province" may be construed, and whatever advantages to farmers the re-shaping of these mortgages or agreements for sale might confer, this legislation cannot be regarded as valid on the ground that it is enacted in relation to agriculture

Cronkit K C, *Meldrum, K C* and *M C Schumiatcher* (all of the Canadian Bar) for Appellant

Ilsley, K C, (of the Canadian Bar,) *Gahan* and *D W Mundell* (of the Canadian Bar) for Respondent, the Attorney-General of Canada

Their Lordships' Judgment was delivered by

VISCOUNT SIMON —This is an appeal by special leave from a judgment of the Supreme Court of Canada, dated 13th May, 1947, (Rinfret, C J, Kerwin, Rand and Kellock, JJ, Taschereau, J, dissenting), which answered a question propounded by the Governor-General in Council concerning the constitutional validity of section 6 of the Farm Security Act, 1944, enacted by the Legislature of the Province of Saskatchewan, as amended by section 2 of chapter 28 of the Statutes of Saskatchewan, 1945 There was also a second question, framed on the hypothesis that section 6 was not *ultra vires* and asking whether the section was operative in the case of mortgages securing loans by the Crown in right of Canada and in certain analogous cases The majority in the Supreme Court held that section 6 was wholly *ultra vires* and therefore found it unnecessary to answer the second question. Taschereau, J, was of opinion that section 6 was *intra vires,* and answered the second question in the negative

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* P C Appeal No 99 of 1947 22nd November, 1948

The questions referred by the Governor-General in Council to the Supreme Court for hearing and consideration were formulated as follows.

"1 Is section 6 of the Farm Security Act, 1944, being Chapter 30 of the Statutes of Saskatchewan, 1944 (second session) as amended by section 2 of Chapter 28 of the Statutes of Saskatchewan, 1945; or any of the provisions thereof, *ultra vires* of the Legislature Assembly of Saskatchewan either in whole or in part, and if so in what particular or particulars and to what extent? 2. If the said section 6 is not *ultra vires*, is it operative according to its terms in the case of mortgages (*a*) securing loans made by His Majesty in right of Canada either alone or jointly with any other person under the National Housing Act, 1944, or otherwise, (*b*) securing loans made by the Canadian Farm Loan Board; or (*c*) assigned to the Central Mortgage and Housing Corporation?"

The Farm Security Act, 1944, of Saskatchewan is entitled 'An Act for the Protection of Certain Mortgagors, Purchasers, and Lessees of Farm Land,' and the main object of the Act is to lighten the contractual obligations of a mortgagor or purchaser of farm land in the event of the yield of grain grown upon the land falling below a prescribed minimum The earlier sections of the Act provide for relief of this nature being granted also to lessees, who rent such land on the terms that the lessor is to receive a share of the crop, but section 6 is concerned only with the modification of the contractual rights of the mortgagees or vendors of farm land in respect of the contractual payments due to them in the event of a 'crop failure.'

Sub-section (1) of section 6 defines 'crop failure' as meaning a 'failure of grain crops grown in any year on mortgaged land or on land sold under agreement of sale, due to causes beyond the control of the mortgagor or purchaser, to the extent that the sum realisable from the said crops is less than a sum equal to six dollars per acre sown to grain in such year on such land' The sub-section also contains a definition of the phrase 'period of suspension,' which means 'the period commencing on the first day of August in the year in which the crop failure occurs and ending on the thirty-first day of July in the next succeeding year' Sub-section (2) of section 6 must be set out in full It runs as follows:

"(2) Notwithstanding anything to the contrary, every mortgage and every agreement of sale shall be deemed to contain a condition that, in case of crop failure in any year and by reason only of such crop failure 1 The mortgagor or purchaser shall not be required to make any payment of principal to the mortgagee or vendor during the period of suspension, 2 Payment of any principal which falls due during the period of suspension and of any principal which thereafter falls due under the mortgage or agreement of sale shall become automatically postponed for one year, 3 The principal outstanding on the fifteenth day of September in the period of suspension shall on that date become automatically reduced by four per cent thereof or by the same percentage thereof as that at which interest will accrue immediately after the said date on the principal then outstanding, whichever percentage is the greater, provided that, notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced"

In the view which their Lordships take on the constitutional validity of sub-section (2), and on its relation to the rest of section 6, it is not necessary to set out the remaining sub-sections of section 6, though they have been carefully examined to see if they throw further light on sub-section (2)

The contention of the respondents is that paragraph 3 of sub-section (2) is *ultra vires* of the Provincial Legislature of Saskatchewan because it is an enactment in relation to 'interest'—a matter which by section 91, Head 19, of the British North America Act is within the exclusive legislative power of the Dominion Parliament It is further contended by the respondents that the impeached provision conflicts with provisions of the Interest Act of Canada Reliance was also placed on Head 21 of section 91, which confers on the Dominion Parliament the exclusive power to legislate in relation to 'Bankruptcy or Insolvency' On this last point their Lordships would be disposed to agree with Taschereau, J (who alone deals with it) that the respondents' contention is unsound, but the real difficulty in the appellant's way lies elsewhere.

The appellant argues that the 'pith and substance' of paragraph 3 is 'property and civil rights,' a matter in relation to which the Provincial Legislature has an exclusive legislative power, and that in so far as paragraph 3 affects 'interest' it does so only incidentally. In support of this view, the Attorney-General for

Saskatchewan relies upon *Ladore* v. *Bennett*[1] and especially on the concluding passage of Lord Atkin's judgment[2] A further ground in which the appellant contends that the impeached paragraph is *intra vires* of the Province is that its 'pith and substance' is 'agriculture in the Province' within the meaning of section 95 of the British North America Act and that it is not repugnant to any Act of the Parliament of Canada such as is referred to in that section

It is convenient to deal first with this last contention, which provided a chief ground upon which the dissenting judgment of Taschereau, J., was based

There was abundant evidence that agriculture is the main industry of Saskatchewan and that it is the principal source of revenue of its inhabitants It is, moreover, clear, that the result of the impeached legislation, if it is validly enacted, would be to relieve in some degree a certain class of farmers from financial difficulties due to the uncertainties of their farming operations But, as Rand, J, points out, there is a distinction between legislation 'in relation to' agriculture and legislation which may produce a favourable effect upon the strength and stability of that industry Consequential effects are not the same thing as legislative subject-matter. It is 'the true nature and character of the legislation'—not its ultimate economic results—that matters (*Russel* v *R* [3]) Here, what is sought to be statutorily modified is a contract between two parties, one of which is an agriculturist but the other of which is a lender of money. However broadly the phrase 'agriculture in the Province' may be construed, and whatever advantages to farmers the re-shaping of their mortgages or agreements for sale might confer, their Lordships are unable to take the view that this legislation can be regarded as valid on the ground that it is enacted in relation to agriculture

A more difficult question is raised by the alternative contention that the legislation is in relation to civil rights in the Province Contractual rights are, generally speaking, one kind of civil rights and, were it not that the Dominion has an exclusive power to legislate in relation to 'interest', the argument that the Provincial Legislature has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the Province could not be overthrown But proper allowance must be made for the allocation of the subject-matter of 'interest' to the Dominion Legislature under Head 19 of section 91 of the British North America Act. There is another qualification to the otherwise unrestricted power of the Provincial Legislature to deal with civil rights in Head 18 'Bills of Exchange and Promissory Notes' The Dominion power to legislate in relation to interest cannot be understood to be limited to a power to pass statutes dealing with usury such as were repealed in the United Kingdom in 1854 (17 & 18 Vict, c 90) So restricted a construction was rejected by the Judicial Committee in *Lethbridge Northern Irrigation District Trustees* v *Independent Order of Foresters and Attorney-General of Canada*[4] for reasons stated by Viscount Caldecote. The validity of the Interest Act of the Parliament of Canada (Revised Statutes, c 120) has not been challenged in any particular Section 2 of this statute provides:

"Except as otherwise provided by this or by any other Act of the Parliament of Canada, any person may stipulate for, allow and exact, on any contract or agreement whatsoever, any rate of interest or discount which is agreed upon"

It is therefore clear that a Provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest The Dominion power would likewise be invaded if the Provincial enactment was directed to postponing the contractual date for the payment of interest without altering the rate, for this would equally be legislating in respect of interest.

There thus remain two questions to be considered first, does the Provincial statute now under consideration operate to the above effect? And secondly, even if it does, can the consequent invalidity be avoided because this result should

1. (1939) A C 468
2. *Ibid*, 483
3. (1882) 7 A C 829, 840
4. (1940) A C 513, 530-1

be regarded as merely incidental to the achievement of the real and valid statutory purpose, so that, although the topic of interest is trenched upon, the subject of interest is not the pith and substance of the Act

The first of these questions must be answered in the light of an established rule of construction in such cases, *viz.*, that regard must be had to the substance and not to the mere form of the enactment, so that ' you cannot do that indirectly which you are prohibited from doing directly ' (*Per* Lord Halsbury in *Madden* v. *Nelson and Fort Sheppard Ry Co* [1]) If, under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay interest on the principal which is modified, the enactment should be regarded as dealing with interest With this rule in mind, their Lordships have examined the language and effect of section 6 of the Farm Security Act with much care, and they have been greatly assisted in this task by the arguments of counsel on either side

Sub-section (2) of section 6 provides in effect that, in the event of crop failure, (*a*) the mortgagor or purchaser shall not be required to make any payment of principal during the period of suspension, (*b*) the payment of any principal which is contractually due during that period and any principal which thereafter falls due shall be postponed for one year, (*c*) the principal outstanding on the fifteenth of September in the period of suspension shall on that date become automatically reduced by 4 per cent thereof ' or by the same percentage thereof as that at which interest will accrue immediately after the said date on the principal then outstanding, whichever percentage is the greater,' but (*d*) notwithstanding such reduction, interest shall continue to be chargeable, payable and recoverable as if the principal had not been so reduced

It is not in dispute that mortgages or agreements to defer payment of purchase money of land in Saskatchewan practically without exception, provide for interest on outstanding principal at a rate greater than 4 per cent. per annum The effect, therefore, is to reduce the outstanding principal, in the event of crop failure, by an amount equal to the amount of interest called for under the contract, but to require this same amount of interest to continue to be paid as though the outstanding principal had not been reduced If the sub-section had said in plain terms that for the period of suspension there should be no interest charged and that the payment of outstanding principal should be postponed, the result (at any rate in the first year of suspension) to the mortagee or vendor would be the same. Moreover, such agreements normally stipulate for a 'rate' of interest on outstanding principal, and a 'rate' is the ratio which the sum payable as interest bears to the amount of such outstanding principal To provide that principal is to be reduced by statute but that the amount to be paid as interest is to remain unaltered is necessarily to increase the rate on the principal outstanding But Provincial legislation which alters a stipulated rate of interest would conflict with section 2 of the Interest Act.

These considerations lead their Lordships to confirm the conclusion to which the majority of the Supreme Court has arrived, that para 3 of sub-section (2) of section 6 trenches upon the Dominion field It is obvious that the language used has been ingeniously chosen in an endeavour to avoid a conflict with Dominion powers and legislation, but in the view of their Lordships the endeavour is not successful This view of the matter renders it unnecessary to determine what would be the correct application of the words used in the difficult situation of successive years of suspension analysed in the Judgment of Kellock, J

Secondly, can the remaining argument be upheld that this interference with the topic of interest none the less remains valid because it is merely incidental to the exercise of a valid power to legislate for a modification of principal debts ? On this, it is to be observed that there is not only an exclusive power to legislate

1 (1899) A.C 626 at 627. 2 (1943) A C 356 at 370

in relation to interest vested in the Dominion Parliament, but that such legislation has been enacted in the Interest Act Viscount Maugham laid it down on behalf of this Board in *Attorney-General of Alberta* v. *Attorney-General of Canada*[1], that:

"Since 1894 it has been a settled proposition that, if a subject of legislation by the Province is only incidental or ancillary to one of the classes of subjects enumerated in section 91 and is properly within one of the subjects enumerated in section 92, then legislation by the Province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation"

Viscount Maugham's reference to the year 1894 points to the decision of this Board in *Attorney-General of Ontario* v *Attorney-General of Canada*[2] Apart, however, from the obstacle created by the existence of the Dominion Interest Act, their Lordships are unable to take the view that the dealing with interest is only incidental, for it lies at the heart of the matter Their Lordships are not called upon to discuss, and do not pronounce upon, a case where a Provincial enactment renders null and void the whole contract to repay money with interest Here the contracts survive, and once the conclusion is reached that as Kerwin, J, said 'the legislation here in question is definitely in relation to interest,' reliance upon such a decision as *Ladore* v *Bennett*[3], is misplaced The Provincial legislation there considered was legislation in relation to 'municipal institutions in the Province,' and, as Viscount Caldecote pointed out in the *Lethbridge case*[4],

"having come to . the conclusion that the pith and substance of the legislation in question related to one or more of the classes of subjects under section 92, the Board had no difficulty in holding that the regulation of the interest payable on the debentures of the new City was not an invasion of Dominion powers under Head 19 of section 91"

Lastly, does the invalidity of para 3 involve the consequence that section 6 is *ultra vires* as a whole? Their Lordships agree with the Supreme Court that it does, and this view renders it unnecessary to answer the final question posed by the Governor-General in Council The Board has recently had occasion, in *Attorney-General of Alberta* v *Attorney-General of Canada*[5] to set out some of the considerations which have to be weighed in deciding whether legislation, a portion of which is found to be *ultra vires*, is invalid only as to that portion Applying these tests, it is clear that paras 1 and 2 of sub-section (2) of section 6 are bound up with para 3 and that sub-section (2) expresses a single scheme Sub-section (2) in its turn is the main effective provision of section 6 and thus section 6 is *ultra vires* as a whole

Their Lordships will humbly advise His Majesty that the appeal should be dismissed

Solicitors for Appellant: *Blake & Redden*

Solicitors for Attorney-General for Canada *Charles Russell & Co*

Solicitors for Dominion Mortgage and Investments Association. *Lawrence Jones & Co.*

V S — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE SUBBA RAO AND MR JUSTICE PANCHAPAKESA AYYAR.

K. M Oosman and Company *alias* K M Khadir Brothers by Managing Proprietor K M Oosman Sahib and another ... *Appellants**

v.

K. Abdul Malik Sahib and others ... *Respondents.*

Trade-marks—Partnership—Dissolution—Sale of trade-marks—Title in goodwill not sold—Purchaser of trade-marks—No title in him to use trade-marks—Denial of title by seller—Estoppel by acquiescence

Two cross suits O S Nos 13 and 14 of 1944 were filed by the respective parties for declaration of their title in the trade-marks and for an injunction restraining the other parties from interfering

1 (1943) A C 356 at 370
2. (1894) A C 189
3. (1939) A C 468
4 (1940) A C 513 (532)
5 (1947) A C. 503.

* Appeals Nos 37 and 38 of 1946.

25th March, 1949.

with their rights Originally there was a dissolution of the firm of which one of the plaintiffs in one of the suits herein was a partner As the other partner died it was dissolved and a suit for a declaration for the same purpose was settled by arbitration The arbitrators sold the assets of the firm and the trade-marks of the firm separately The trade-marks in dispute in O S No 14 of 1944 were sold to a lady who sold them later on to her brother from whom the plaintiffs in O S. No 14 of 1944 purchased them The goodwill was not sold In a suit by the purchaser of the trade-marks to restrain the defendants from interfering with their use

Held: As the law does not recognise transfer of trade-marks *per se*, separate from goodwill or the business, the sale deeds could not have conveyed to the purchaser any valid title in the trade-marks and so the plaintiff in O S No 14 of 1944 who is only a purchaser from a purchaser did not acquire a legal title in the trade-marks sold

The defendants were not estopped by any acquiescence on their part so as to preclude them from denying the right of the plaintiffs to the trade-marks

O. K Mohideen Bawa v. *Rigaud Perfume Manufacturers*, (1931) I L R 10 Rang 133; *Proctor* v. *Bennis*, (1887) 36 Ch D 740 at 761 and *Ramsden* v *Dyson*, L R 1 H L 129, referred to

Held further, that in the other suit O S No 13 of 1944, the trade-mark used by defendants was clearly a colourable imitation of plaintiffs' trade-mark and therefore the plaintiffs were entitled to claim title in the trade-mark and obtain an injunction against the defendants from using the same

Appeals against the decrees of the District Court of North Arcot at Vellore in O. S. Nos. 13 and 14 of 1944.

A Viswanatha Aiyar and *D C Krishnamurti* for Appellants

K V Ramachandra Aiyar for Respondents

The Judgment of the Court was delivered by

Subba Rao, J—These two appeals arise out of two cross suits, O S Nos 13 of 1944 and 14 of 1944, filed by the respective parties for declaration of their title in the trade-marks and for an injunction restraining the other parties from interfering with their rights One K A Kadir Sahib, father of defendants 2 to 6 and husband of the 7th defendant carried on business in partnership with another, S A Sattar Sahib, under the name and style of " S A. Sattar and K A Kadir and Co " Sattar Sahib died in June 1938 Kadir Sahib, the other partner filed O S No 363 of 1938 on the file of the District Munsiff's Court, Vellore, for a declaration that the firm of " S A Sattar and K A Khadir and Co " was dissolved on 10th June, 1938, and for accounts The suit was settled by arbitration The arbitrators, on 25th March, 1940, decided to sell the properties of the firm and the trade-marks separately in auction and also to sell the amount of decree dues and the arrears of shop rent in another lot Pursuant to that resolution the assets of the business were sold and divided between the parties The trade-marks 'Rising Sun,' 'Tiger Shooting,' and 'Asal Jadi' were sold to one Zuleika Bi Bi. After the sale and the allotment, an award was passed confirming the various sales which was unanimously agreed to by all parties On 20th April, 1940, a decree was passed, Ex P-1, in terms of the aforesaid award. On 7th July, 1940, Zuleika Bi Bi sold the three trade-marks to her brother, Abdul Wahab Saheb The plaintiff in O S No 14 of 1944 purchased the three trade-marks from Abdul Waheb Sahib, under Ex P-1 (*b*) dated 10th February, 1941 The effect of the arbitration, the sales and the decree passed in terms of the award was that the proceeds of the assets and the trade-marks of the firm were divided between erstwhile partners. The title in the goodwill, not having been sold, must be deemed to have continued in all the partners. The plaintiff in O S No 14 of 1944, having purchased the aforesaid three trade-marks, filed the suit for a declaration of his title and for an injunction restraining the defendants from interfering with his rights " K A. Khadir and Sons " by proprietor, K A Khadir Sahib, filed the other suit, O S No. 13 of 1944, regarding the 'original Lion 7' trade-mark Plaintiffs 2 to 8 are the children of Khadir Sahib, and the 9th plaintiff, his widow Plaintiffs 2 and 4 to 9 are defendants in O S No 14 of 1944 The 1st defendant in O S No 13 of 1944 is the company styled as " K M Oosman and Co " *alias* " K M Khadir & Brothers." The second defendant is K M Oosman Sahib who is the plaintiff in O S. No 14 of 1944. After the dissolution of the aforesaid partnership, the case of the plaintiffs is that they started another *beedi* business at Gudiyattam

in the year 1938. For the purpose of that trade they have designed the trade-mark, the subject-matter of the suit, and the prominent feature of the same was number "7" They alleged that the defendants, who had no right to the said trade-mark, were using the said mark, and that, therefore, they were entitled to an injunction restraining them from doing so

The learned District Judge held, in O. S No 14 of 1944, that the plaintiffs therein did not acquire any right to the three trade-marks as the sale in favour of Zuleika Bi Bi of the trade marks *simpliciter* was invalid in law In the other suit, the learned District Judge held that the plaintiffs acquired a right to the trade-mark, and that, therefore, the defendants had no right to either use that trade-mark or any colourable imitation thereof In the result, he dismissed O S No 14 of 1944 and decreed O S No 13 of 1944, except as regards the damages claimed and the accounting, since there was no proof of damages, and no question of accounting arose The plaintiffs in O S No 14 of 1944, and the defendants 1 and 2 in O S No 13 of 1944, preferred the above two appeals

At this stage we may notice the law on the subject.

"A trade-mark is a mode of warranting the origin of the goods to which it is attached or their trade association, and it is of the essence of a trade-mark that its representation should be true" *The British American Tobacco Co, Ltd* v *Mah Boob Buksh*[1]

The manner in which a trade-mark can be validly assigned is stated in *Lactesote, Ltd* v *Alberman*[2] It has been established since the decision in the *Leather Cloth Co* v *American Leather Cloth Co.*[3], that the purchaser of a mark becomes owner of it only if he becomes at the same time the purchaser of the manufactory or—(to put it rather more widely, in view of modern developments) —the business concerned in the goods to which the mark has been affixed The same principle has been accepted and applied in another decision by Fry Lord Justice in *Edwards* v. *Dennis*[4] The learned Lord observes

"No trade-mark can be assigned except in connection with the goodwill of the business in which it has been used, which business must be co-extensive with the goods or classes of goods in respect of which the trade-mark is registered"

The learned advocates accepted the correctness of the principles embodied in the aforesaid decisions

The first argument of the learned advocate for the appellants may be put thus. The lower Court was wrong in considering the allotment of trade-marks apart from the other terms of the compromise decree Under the terms of the decree not only the trade-marks were allotted to Zuleika Bi Bi but the sale proceeds of the assets were also divided between the various partners In any view, the goodwill not having been sold or allotted to any of the parties must be deemed to continue to vest in all partners He therefore argued that the trade marks *simpliciter* were not assigned but they were allotted to Zuleika Bi Bi along with other assets and her interest in the goodwill This argument is rather attractive but in our view does not help the plaintiffs at all Whatever might be said in regard to the effect and the gist of the transaction under which Zuleika Bi Bi got the right to the trade-marks, Zuleika Bi Bi herself, in her turn, only sold under Ex P-1 (*a*) her right in the trade-marks to Abdul Wahab Saheb who, in his turn, under Ex P-1, (*b*) sold the three trade-marks to the plaintiff As the law does not recognise transfer of trade-mark *per se*, separate from goodwill or the business, the sale deeds could not have conveyed any valid title in the trade-marks either to Abdul Wahab Saheb or to the plaintiff We therefore agree with the lower Court that the plaintiffs in O S No 14 of 1944 did not acquire a legal title in the three trade-marks, "Rising Sun," "Tiger Shooting" and "Asal Jadi"

The learned Advocate then argued that the defendants could not derogate from their grant and he relied upon *Jennings* v *Jennings*[1] in support of his contention. The passage relied upon by him may be extracted

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1 (1910) I L R 38 Cal 110
2 44 R P C 211
3 (1865) 11 H L C 523 11 E R 1435.
4 (1884) 30 Ch D. 454.

"A man may not derogate from his own grant, the vendor is not at liberty to destroy or depreciate the thing which he has sold, there is an implied covenant, on the sale of goodwill, that the vendor does not solicit the custom which he has parted with, it would be a fraud on the contract to do so."

In that case, a suit was filed for recession of the partnership on the ground of misrepresentation. The suit was compromised and the defendant got all the assets of the firm except a sum of £1,200 which was allotted to the plaintiff. In the assets the goodwill was not mentioned Taking advantage of that *B* went on canvassing the customers of the old firm *A* filed a suit on the ground that the allotment of assets carried with it also the right to the goodwill and therefore *B* could not canvass the customers of the old firm in derogation of the right conveyed to *A* The learned Judges held that goodwill is an asset and therefore it formed part of the assets that were allotted to *A* and therefore *B* could not canvass the customers of the old firm This case absolutely has no application to the facts of the present case. In the present case what was conveyed was only the trade-marks, and the vendor was not doing anything to derogate from the title he actually conveyed to Zuleika Bi Bi The only question is whether the trade-mark was validly conveyed under the compromise decree We, therefore, reject this argument of the learned advocate.

It was then argued that, in any view, the defendants are estopped in view of their acquiescence The learned counsel relied on the decision reported in *O. K. Mohideen Bawa* v *Rigaud Perfume Manufacturers*[2] In that case the plea of acquiescence was raised but the learned Judges did not accept it on the ground that mere delay in bringing the suit could not amount to acquiescence in law The law of acquiescence is succinctly stated in two judgments, in *Proctor* v *Bennis*[3] and in *Ramsden* v *Dyson*[4] In *Proctor* v. *Bennis*,[3] Lord Justice Cotton observed :

"It is necessary that the person who alleges this lying-by should have been acting in ignorance of the title of the other man, and that the other man should have known that ignorance and not mentioned his own title"

and at page 761 Lord Justice Bowen observed

"In order to make out such acquiescence it is necessary for them to establish that the plaintiff stood by and knowingly allowed the defendants to proceed and to expend money in ignorance of the fact that he had rights and meant to assert such rights"

Applying this principle it is impossible to hold that in this case there was any acquiescence on the part of the defendants so as to preclude them from denying the right of the plaintiff to the trade-marks The two facts relied upon are one, some delay in filing the suit, the other, that the plaintiffs used the trade-marks for a short period without being questioned In our view these facts are not sufficient to substantiate the plea of acquiescence.

In the other suit as we have already stated after the dissolution of the partnership the plaintiffs designed a new trade-mark, the main feature of which was the number "7", perhaps an auspicious number from the standpoint of the plaintiffs. We have seen the plaintiffs' trade-mark and compared it along with the trade-mark "Rising Sun" and also the trade-mark that is now being used by the defendants Between the trade-mark "Rising Sun" and the plaintiffs' trade-mark there are differences in design, in colour scheme and also in details The main feature in the "Rising Sun," namely, the rising sun, is not to be found in the plaintiffs' trade-mark, but, instead, the crown is found As we have already held, the defendants have no right to the trade-mark "Rising Sun" The plaintiffs' trade-mark is being used from the year 1938 and has been associated with the business of the plaintiffs The trade-mark used by the defendants is clearly a colourable imitation of the plaintiffs' trade-mark We, therefore, hold that the lower Court was right in declaring the title of the plaintiffs in the suit trade-mark and issuing an injunction against the defendants from using the same

In the result, Appeal No 38 of 1946 is dismissed with costs, and Appeal No. 37 of 1946 without costs

K C ——— *Appeals dismissed.*

1. (1898) 1 Ch D 378
2. (1931) I L R 10 Rang 133
3. (1887) 36 Ch D 740
4. (1866) L R 1 H L. 129.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

The Jawahar Mills, Ltd, Salem .. *Appellant**

v

Sha Mulchand and Co, Ltd (in liquidation by the Official Receiver, High Court, Madras) *Respondent.*

Companies Act (VIII of 1913), section 38—Forfeiture of shares for non-payment of unpaid call money after further notice which is shorter than that required by the articles of association—Irregularity makes the forfeiture voidable at the instance of shareholder—Application for rectification of register of the company—Limitation—Limitation Act (IX of 1908), Article 120 is applicable—Long delay in making application causing prejudice to company—Re-allotment of forfeited shares to others—Effect on right to relief—Shareholder a private limited company consisting of only two persons struck off the register under section 247 of the Companies Act as that company had ceased to function—Notice of forfeiture addressed to, after that date—The two shareholders taking no steps to have a restoration of their company for a long time—Conduct of the shareholders in standing by if affects the company's right to question the forfeiture.

There is a distinction between the accrual of the power of a company to forfeit shares and the exercise of that power When there is a default in the payment of a call after notice was issued and the date fixed for payment has expired the power to forfeit is complete Where, as part of the exercise of that power the regulations of the company require a notice to be given naming a further day which is not earlier than the expiry of 14 days from the date of the notice on or before which the payment required by the notice is to be made and that in the event of non-payment of the unpaid call money before the time fixed the shares would be liable to be forfeited, but the notice is actually shorter by one day, the irregularity makes the forfeiture voidable at the instance of the shareholder.

An action under section 38 of the Companies Act for rectification of the register does not fall within the purview of either Article 48 or Article 49 of the Limitation Act as such an action is not for detenue or trover though shares or other interest of a member in a company is moveable property under section 28 of the Companies Act In the absence of any specific article, the only alternative is to apply the residuary Article 120 of the Limitation Act

Where a period of limitation is prescribed for a suit or proceeding mere delay is no bar unless it is of such a character as to lead to an inference of abandonment of the right or unless it is established that the person against whom the action or proceeding is instituted was actually prejudiced by reason of such delay

Where the conduct of the shareholder amounts to standing by to see whether the company would ultimately turn out sufficiently profitable to make it worthwhile to assert his claim as shareholder, he will not be entitled to relief especially where the company had parted with the forfeited shares to others on the footing that the forfeiture was valid and also there was a reduction in the capital with the approval of the Court

Where such shareholder is a private limited company consisting of only two shareholders and at the date of forfeiture that company had been removed from the register under section 247 of the Companies Act as that company had ceased to function and the two shareholders merely stood by without taking steps to restore the company and to question the validity of the forfeiture for nearly five years, that company is affected by the conduct of its shareholders In such a case the tendency of modern decisions in England is to " lift the veil of corporate personality " and disregard the corporate form The conduct of the two shareholders disentitled the company to claim rectification of the register

In any event as the forfeited shares had been re-allotted to others the property is not available and it is impossible to compel the company to deliver possession of the specific moveable property. The only right in such an event of the party injured is to claim the value of the property But in a proceeding under section 38 of the Indian Companies Act, the Company can only be ordered to pay damages when their register is ordered to be rectified, and not otherwise

Further, the Court cannot order rectification of the register in respect of the particular shares in the absence of the third parties (to whom they had been allotted) whose rights will be affected by the rectification

Authorities discussed

The Judgment appealed against, of *Clark, J*, dated 15th November, 1946, was as follows —

Until the 30th June, 1939, the Applicant-company, Shah Mulchand and Company, Ltd was the managing agent of the Respondent-company, Jawahar Mills, Ltd Shah Mulchand and Company is a private company and at all times material it consisted of only two members, T V T Govindaraju Chetti and K N Sundara Ayyar On the 30th June, 1939, these two gentlemen purporting to act on behalf of their company entered into an agreement with one Palaniappa Chettiar by which the latter was to replace Shah Mulchand and Company, as managing agents of the Respondent-company The Applicant-company itself held 5,000 shares in the Respondent-company and by the

* O. S. A. No. 3 of 1947. 11th March, 1949.

terms of the arrangement with Palaniappa Chettiar these shares were to be transferred to him but have not yet been transferred On that date, the Respondent-company's capital was divided into ordinary shares of Rs 10 face value each of which Rs 5 had been paid On the 20th August, 1939, that is, nearly two months after the change of managing agents, the Respondent-company made two calls, one of Rs 2 and the other of Rs 3 per share payable on the 1st October, 1939, and the 1st December, 1939, respectively These calls, of course, would make the share fully paid up On the 23rd January, 1940, T V T Govindarajulu Chetti who was the managing director of the Applicant-company was adjudicated an insolvent and his office as director was thereby vacated

It would appear that all the shareholders did not pay the call, for on the 12th August, 1940, the directors of the Respondent-company passed a resolution giving two further months' time for payment of the calls in arrears At the same time it was resolved that shares, in respect of which calls remained unpaid after that extended time would be forfeited The managing agents were empowered to give notice of this resolution to the shareholders concerned requiring them to pay within a period of two months The Applicant-company received one of these notices from the managing agents, but did not comply with the result that on the 25th November, 1940, there was a resolution of the directors of the Respondent-company forfeiting the Applicant-company's shares It appears that the auditors of the Respondent-company were doubtful as to the validity of the forfeiture and it was accordingly cancelled by the directors on the 31st December, 1940, and on the 25th February, 1941, the directors passed a fresh resolution for the issue of notice to the Respondent-company This resolution was not arrived at at a meeting of the Board of Directors It was taken in circulation In purported compliance with that resolution, the managing agents addressed a notice, dated the 15th March, 1941, to the Applicant-company requiring payment of the calls in arrears on or before the 31st March In this notice the Applicant-company was informed that if the amount outstanding was not paid, steps would be taken for forfeiture of the shares The total amount due was Rs 5, in respect of each of the 5,000 shares, that is Rs 25,000 in all The Applicant-company did not comply and on the 5th September, 1941, the directors of the Respondent-company passed a resolution forfeiting the shares

In the meantime, matters were developing, which finally led to the Applicant-company being struck off the register of companies On the 27th May, 1941, notice of this possibility was published in the Gazette and on the 28th August, 1941, the Applicant-company was struck-off the register by the Registrar of Joint-Stock Companies and the Gazette notice on this account was published on the 9th September, 1941 In passing, I may refer to the provision of section 247 (5) of the Companies Act, by which publication of such a notice operates to dissolve the company Thus, the Applicant-company was dissolved on the 9th September, 1941, that is, four days after the directors of the Respondent-company had passed the resolution forfeiting the Applicant-company's shares

As regards the striking off the register of the Applicant-company it is common ground that this was brought about by communication sent to the Registrar by the two members of the company One pointed out to the Registrar that the company had ceased to function and the other confirmed this and in addition asked that the company might be struck off

Now, the present application is for rectification of the register of the Respondent-company on the ground that the forfeiture of the 5,000 shares resolved upon by the directors of the company on the 5th September, 1941, was invalid

Before considering the petition, it will be advisable for me to set out the admitted sequence of events after the date of the forfeiture These facts, like those I have already stated, are admitted On the 16th November, 1941, the directors of the Respondent-company passed a resolution allotting the Applicant-company's forfeited shares to a number of other persons It is alleged by the Applicant-company that these other persons were merely *aliases* for Palaniappa Chettiar, the principal partner in the managing agency firm But I do not consider that anything turns on the point and, accordingly, I have not found it necessary to decide it In December, 1941, applications were filed in this Court for the restoration of the Applicant-company to the register These were O P Nos 10 and 11 of 1942 O P No 10 was filed by the Respondent-company and O P No 11 by the Income-tax Officer concerned It is common ground that on the 30th June, 1939, the date when the Applicant-company ceased to be managing agents of the Respondent-company, there was due by the Applicant-company to the Respondent-company a sum of about Rs 25,500 This debt had not been discharged on the date when the Applicant-company was struck off the register The liability of the Applicant-company to the Respondent-company in respect of unpaid calls was of course additional to the liability One of the petitioners in O P Nos 10 and 11 of 1942, asked also for the winding up of the Applicant-company after its restoration to the register These two petitions were settled by payment in full of the amount due to the Income-tax Officer and a sum of Rs 11,000 to the present Respondent-company It is common ground that these demands were met by K N Sundara Ayyar Govindarajulu Chetti, who had a much more substantial interest in the Applicant-company was, it will be remembered, at that time, an insolvent

It seems that K N Sundara Ayyar was then anxious to recoup himself for this expenditure and, with that end in view, he filed a suit in the Subordinate Judge's Court, Salem, against Palaniappa Chettiar, the Respondent-company and certain others claiming a declaration that the forfeiture of the Applicant-company's shares was illegal and also damages against Palaniappa Chettiar in respect of the agreement of June, 1939, when the managing agency was changed. That suit was O S No 39 of 1942, and in it K N Sundara Ayyar described himself as an ex-director of the Applicant-company. It was of course impossible at that date for the Applicant-company to bring such proceedings, as it had been struck off the register and was dissolved as on the 9th September, 1941, by reason of

the Gazette notice of that date. In this suit K N Sundara Ayyar stated that he was prepared to pay the amount of the calls due by the Applicant-company The suit was dismissed on the 1st November, 1945, and that dismissal, so far as it is relevant in a consideration of the present petition, was on the ground that the Applicant-company having been struck-off, the plaintiff, K N Sundara Ayyar, could have no relief K N Sundara Ayyar appealed to this Court against that decision in Appeal No 258 of 1944, but his appeal was dismissed and the Subordinate Judge's decision upheld as against the Respondent-company Before the decision of the Appellate Court was given, an application was filed by K N Sundara Ayyar for the restoration of the Applicant-company to the register That was O P No 199 of 1944 Both Govindarajulu Chetti and the present Respondent-company were parties to that proceeding I dealt with the petition by an order dated 16th February, 1945, and directed the restoration of the Applicant-company to the register and also its winding up. At the hearing of that petition, it was urged as one of the grounds for restoration that the validity of the forfeiture of the applicant's shares in the Respondent-company could not, in the absence of restoration, be decided and it was to some extent on that ground that I ordered restoration Later, and in the winding up proceedings of the Applicant-company, I gave leave to the Official Receiver to file the present application on behalf of the company

Now, the first point to be decided is whether the forfeiture of the Applicant-company's shares on the 5th September, 1941, was valid It is admitted on behalf of the Applicant-company that the calls were duly made and that they were not paid What is contended on behalf of the Applicant-company is that the notice requiring payment of the calls was invalid and that the consequent resolution for forfeiture is inoperative In order to appreciate this point, it is necessary first to set out the relevant provisions of the Respondent-company's articles The Memorandum of and Articles of Association of the Respondent-company are exhibited as Ex R-29 The relevant Articles are as follows

Article 29 —" If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the Directors may at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on him requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued "

Article 30 —" The notice shall name a further day (not earlier than the expiration of fourteen days, from the date of the notice on or before which the payment required by the notice is to be made), and shall state that, in the event of non-payment at or before the time appointed the shares in respect of which the call was made, will be liable to be forfeited."

Article 31 —" If the requirements of any such notice as aforesaid are not complied with, any share in respect of which the notice has been given may at any time thereafter before the payment required by the notice has been made, be forfeited by a resolution of the Directors to that effect "

Article 32 —" A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the Directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the Directors think fit."

Now, the invalidity of notice alleged by the Applicant-firm arises in the following manner — It is said that on the 25th February, 1941, the directors of the Respondent-Company passed the following resolution by circulation —

" Resolved that a notice be sent to Messrs Shah Mulchand & Co , Ltd , Salem, informing them that they are in arrears of calls to the extent of Rs 25,000 (rupees twenty-five thousand only) that this amount of Rs- 25,000 must be paid by them at the Registered Office of the Company on or before the 31st day of March, 1941, that if they fail to pay up the said amount on or before the said date that their shares will be forfeited and that the directors will in case of such default take steps to have the shares forfeited "

This resolution is before me in Exhibit R 9, which appears to be the letter from the managing agents, which was sent round to the directors for consideration It is dated 25th February, 1941, and was dealt with by the directors individually on later dates I am satisfied that it is unnecessary to consider either, whether a resolution of this nature can properly be passed by circulation, or to decide the exact date on which it should be regarded as having been passed It is sufficient to say that there appears to have been such a resolution arrived at by the directors I am concerned more with the action taken on that resolution itself

It is common ground that the managing agents of the Respondent-company sent a letter to the Applicant-Company on the 17th March, 1941 Though that letter is dated 15th March, 1941, it is in evidence also and is not disputed that it was despatched on 17th March and received by the Applicant-company on the 20th March, 1941 That letter required the Applicant company to pay the overdue calls at the Registered Office of the Respondent-company " on or before the 31st March, 1941 " and stated that in default of payment of the amount, the shares would be forfeited The question is whether this notice was valid within the provision of Articles 29 and 30 of the Respondent-company's Articles of Association Under Article 29, the directors are empowered in cases where calls remain unpaid to serve a notice requiring payment and Article 30 requires that the notice " shall name a further day (not earlier than the expiration of fourteen days, from the date of notice)". Now, the resolution to which I have referred shows that the directors had duly decided to serve a notice on the Applicant-company and had fixed a further day for payment *viz* , 31st March, 1941, which, at the time of their resolution, gave a notice of more than 14 days The notice (Exhibit R-10) ent by the managing agents to the Applicant-company was also on the face of it, a compliance with the requirements of Article 30, for it was dated the 15th March and required payment " on or

before the 31st March, 1941 ", that is, 16 days later But, as I have already stated, it is admitted that this notice was not despatched until the 17th March and was not, in fact, received by the Applicant-company in the ordinary course of post until the 20th March Thus, the provision of Article 30 that the further day to be appointed should not be earlier than the expiration of 14 days from the date of the notice, was not complied with, whether " the date of the notice " is taken to be the date of its despatch, the 17th March, or the date of its receipt, the 20th March The only argument raised on behalf of the Respondent-company on this, the fundamental point of the whole case, is that the words " the date of the notice " in Article 30 are properly referrable in this case to the date typed on the notice, Exhibit R 10 Not unnaturally this point was not very strenuously urged In my view it is clearly untenable To interpret those words as meaning the date printed on the notice would be to render the whole provision absurd It is, I think unnecesasry to deal with the point in any detail It will suffice if I say that I am satisfied that the notice issued to the Applicant-company was not in conformity with the requirement ot Article 30 of the Articles of Association

The Applicant-company bases its claim to rectification of the register on this irregularity. It is contended that it invalidates the subsequent resolution of forfeiture and I am satisfied that this contention is sound (vide *Johnson* v *Lyttle's Iron Agency*[1], followed in *Lakshmiah* v *Adoni Electric Supply Co, Ltd*[2] As was observed by Lord Romer in *Premila Devi* v *The Peoples Bank of Northern India, Ltd*[3]

" This may seem to be somewhat technical, but in the matter of the forfeiture of shares, technicalities must be strictly observed "

I hold accordingly that the forfeiture of the Applicant-company's shares by the resolution of the 5th September, 1941, was invalid

As I have already observed, it is contended in the first place on behalf of the Respondent-company that the forfeiture was valid and that contention is based on the argument that the notice was one complying with Article 30 inasmuch as it was dated more than 14 days before the date when the money was payable Counsel for the Respondent-company, in the event which happens—of my refusing to accept his first contention,—submitted that the Applicant-company is not now entitled to relief. He bases his contention in this respect on the grounds of estoppel, acquiescence and laches In developing his argument on these matters, he was in some difficulty as to the position of the Applicant-company, but finally he accepted that the Applicant-company must, by virtue of section 247 (6) of the Companies Act, be deemed to have been in existence throughout. On that footing, he referred to and relied on the following facts in support of his contentions

Following the forfeiture on the 5th September, 1941, the Respondent-company on the 10th September, 1941 gave notice of the forfeiture (Ex R II) to the Applicant-company at its address as stated in the Respondent-company's register of members Admittedly, this notice was, in fact, returned unserved through the Postal Department But it is contended on behalf of the Respondent-company that it must be regarded as having been communicated in view of the fictional existence of the Applicant-company, notwithstanding its dissolution as from the day previous, the 9th September, 1941. It is of course not suggested that this notice was in any way necessary to complete the forfeiture of the shares (vide *Knight's case*[4]) What is said is that it shows that the Respondent-company, at the earliest possible date, informed the Applicant-company of the forfeiture, a fact, which it is urged, is most relevant in a consideration of that company's subsequent conduct

Further, on the 16th November, 1941, the forfeited shares were re-allotted and on the 17th November, 1941, another notice (Exhibit R-15) was sent to the Applicant-company informing it of a resolution of the Respondent-company's directors requesting the immediate return to the Resopndent-company of the necessary papers connected with the forfeited shares This last notice was again addressed to the Applicant-company at its address entered in the Respondent-company's register of members

Now, it is common ground that at some date prior to the date when it was struck off the register the Applicant-company had changed its registered office Its new one was the residence of Govindarajulu Chetti The address to which these notices were sent was the old registered office which was still shown as its address in the register of members of the Respondent-company Now I am satisfied that apart from any other consideration, the despatch of a notice to a company-shareholder would be good notice, if it were addressed to the address given by the member-company and entered in the register of members of the company in which it is a shareholder and this, notwithstanding that the member-company may have properly and validly changed its registered office in the meantime But whether notice can be imputed in the circumstances of the present case, when the company had been dissolved prior to the date of the notice, is a question, which I do not find it necessary to decide But I will assume for the purposes of deciding this case that such notices were operative and that the Applicant-company may now be regarded as having received those notices in the ordinary course On the basis of that assumption and of the circumstances set out, counsel for the Respondent-company contends that the Applicant-company is estopped from seeking the present relief He says that the notices referred to, establish that the Applicant-company was fully aware of the forfeiture and of the re-allocation of the shares to strangers and that notwithstanding that knowledge, the Applicant-company omitted to take any action to set aside the forfeiture These circumstances, he says, estop the Applicant-company from securing the relief now asked for I am satisfied that they do not In my view, the omission of the Applicant-company to take action for the setting aside of the forfeiture

1 (1877) 5 Ch D 687
2 (1944) 1 M L J 107 I L R 1944 Mad
3 I L R (1939) Lah 1 at 18 (1939) 1 M L J 98 (P C)
4 (1867) 2 Ch Ap 321.

can operate as estoppel only if that omission caused the Respondent-company to act in a way that it would not otherwise have done. The matter may conveniently, I think, be expressed in the form of a question Did those circumstances constitute an omission by the Applicant-company by which it intentionally caused the Respondent-company to believe that it (the Applicant-company) accepted the forfeiture as valid and to act on that belief by re-issuing the shares to others? I find it impossible in the present case on the evidence before me to hold either that the omission of the Applicant-company to take action caused the Respondent-company to believe that the Applicant-company accepted the forfeiture, or that it caused the Respondent-company to re-issue the forfeited shares to others Accordingly, I hold that the circumstances of this case do not give rise to any estoppel I may say shortly that I am satisfied that there can be no estoppel, unless the act or omission relied on have, in fact, caused the other party to act in a way different from what it otherwise would have done I am fortified in this view by the observations of Lord Shand in delivering the judgment of the Privy Council in the case of *Sarat Chunder Dey* v *Gopal Chunder Laha*[1]

I have now to consider the further contention of the Respondent-company that the Applicant-company is barred from the relief sought by reason of its acquiescence and laches According to the author of the section on Equity in Halsbury's Laws of England, Volume 13 (Hailsham Edition) (page 208) —

"The term 'acquiescence' is used in two senses In its proper legal sense it implies that a person abstains from interfering while a violation of his legal rights is in progress · in another sense it implies that he refrains from seeking redress when a violation of his rights of which he did not know at the time, is brought to his notice "

The author proceeds to express the view that "acquiescence " used in the first of these two senses operates by way of estoppel whilst in the second sense it is to be regarded as an element in laches I may say with respect that I accept this view as correct

Now I have held that there is no estoppel against the Applicant-company and accordingly it is unnecessary for me to consider further the defence of acquiescence in that sense It remains only to consider whether the claim of the Applicant-company is to be regarded as barred by laches

Now it is well settled law that this defence is only allowed where there is no statutory bar (see *The Garden Gully United Quartz Mining Co* v *McLister*[2], and *Muthuswami Chetti* v *Chinnammal*[3]) and that whether the statutory bar operates either expressly or by way of analogy There is no statutory bar of limitation in respect of an application under the Companies Act for rectification, but I am satisfied that such an application would always be dismissed on the ground of limitation if a suit for the same relief would have been barred I make this observation, of course, with regard only to applications for rectification of a company's register when that company is itself not in liquidation Different considerations may arise when an order for liquidation of a company had been made

Accordingly I hold that there can be no operative bar against the Applicant-company on the ground of mere laches The only question is whether a suit filed by the Applicant-company for this relief would have been barred by the Law of Limitation It is urged on behalf of the Respondent-company that a suit for this relief would be governed by Article 49 of the Limitation Act, because the relief in fact is one for the return of moveable property Reliance is placed on section 28 of the Indian Companies Act, which enacts that shares are moveable property Both sides agree that there is no direct authority on this point On a consideration of Article 49, I am satisfied that it cannot have application to a suit for a declaration that a forfeiture of shares is invalid and for the ancillary relief of rectification of the register by replacing the name of the owner of the forfeited shares It is not suggested that any other article of the Limitation Act is directly applicable and accordingly the article to be applied must be the residuary article, Article 120 That article provides a period of six years from when the right to sue accrues Now, in this case, the right to sue clearly accrued on 5th September, 1941, when the shares were forfeited and a suit for the relief now prayed would have been barred on 5th September, 1947 The present application was filed in March, 1946 Accordingly, I hold that the application is within time

At an early stage in his argument, counsel for the respondent indicated an argument in the alternative That was, as I understood it, to be based on a contention that in the circumstances of this case the Applicant-company would be affected by the acts of its former directors, Govindaraju Chetti, and Sundara Ayyar Govindarajulu Chetti was adjudicated an insolvent in January, 1940 and accordingly ceased to be a director at that time At the time of the forfeiture, therefore, and thereafter, no act of his could affect this company, nor could his knowledge be imputed to the company My attention was not called to any evidence establishing conduct on the part of Sundara Ayyar which would have affected this company with any greater degree of notice than that which I have assumed for the purpose of disposing of this application Later in his argument, however, counsel for the Respondent-company, though he did not expressly give up this alternative plea was content to base his argument on the fictional continuance of the Applicant-company despite his having been struck off the register between the 9th September, 1941 and 16th February, 1945 The alternative argument was only indicated in outline and was not developed and accordingly no decision on it is called for I may observe, however, that I am satisfied that the case for the Respondent-company based on it would not have been any stronger, if as strong as the case based on the fictional continuance of the Applicant-company throughout

1. (1892) L R. 19 I A 203 I.L R 20 Cal 296 (P C)
2. (1875) 1 Ap Cas 39
3. (1914) 26 M L J 517.

There was also a contention raised in the Respondent-company's counter-affidavit that the right to the forfeited shares must be regarded as having vested in the Crown as *bona vacantia* at the date of the dissolution of the Applicant-company. No argument, however, has been addressed to me on this point and the Respondent-company must be taken to have given it up In any event, I am satisfied that there is no substance in the point As I have already observed, it is expressly provided in section 247 (6) of the Act that a company restored to the register shall be deemed to have continued in existence as if its name had not been struck off That being so, and as the Applicant-company has been duly restored to the register, there is in my view no ground for the contention

It now remains to consider the form of order properly to be granted to the Applicant-company. In the summons the Applicant-company asked for rectification of the register " by restoring the name of Shah Mulchand & Co , Ltd , to the said register in respect of 5,000 shares numbering (sic) 15,048 to 20,047 ". But it is agreed by both parties before me that it will be in the circumstances impossible to make such an order. This is because the shares in question have been reduced in value on a scheme by the Respondent-company for reduction of its capital which was approved by this Court on 11th August, 1944, in O P No 84 of 1944 That reduction of capital was effected as follows: The Respondent-company had 84,000 issued shares of Rs 10 each fully paid Its authorised capital was 1,00,000 of Rs 10 shares The reduction was effected by halving the face value of the 84,000 shares which had been issued and repaying to the shareholders of Rs 5 in respect of each share The authorised capital of the company was in this way reduced to Rs 5,80,000 divided into 16,000 shares of Rs 10 each and 84,000 shares of Rs 5 each The 16,000 Rs 10 shares are, as I understand it, still unissued. In these circumstances, it is clearly impossible for me to direct that the Applicant-company shall be replaced on the register in respect of its original shares as the reduction was effected at a time when the Applicant-company had no say in the affairs of the Respondent-company It is agreed by both parties that the proper order will be for the Applicant-company to be placed on the register in respect of 5,000 of the unissued Rs 10 shares and I order accordingly This, however, gives rise to one difficulty Ordinarily, on such an order being made, the shareholder whose name is replaced on the register is entitled to the dividends which have been paid on the forfeited shares from the date of forfeiture In this case, as the parties consent to the matter being disposed of by allotting to the applicant unissued shares, there can, it seems to me, be no order for payment of the dividends Counsel for the Respondent-company leaves the solution of this difficulty to me Counsel forthe Applicant-company suggests that the difficulty may most suitably be overcome by his company foregoing any claim to the accrued dividends in consideration of its not being called upon to pay any interest on the overdue call money. The amount due by the Applicant-company on the 5,000 shares originally held was Rs 25,000 Of this sum, Rs 10,000 was payable on 1st October, 1939, and the balance of Rs 15,000 was payable on 1st December, 1939 By Article 19 of the Respondent-company's Articles of Association calls in arrears are chargeable with interest at the rate of 9 per cent per annum I indicated my intention, if an order was granted in the Applicant-company's favour for rectification, to impose as a condition the payment by it of the calls in arrears, Rs 25,000, together with interest under Article 19 up-to-date The suggestion of the Applicant-company is that it is prepared to forego any claim to the accrued dividends if it is not required to pay the interest on the outstanding call money. This seems to me to be a very reasonable suggestion The Respondent-company has paid dividends of 20 per cent free of tax on its capital in three of the years in question, so that the amount which would ordinarily have been payable in respect of dividend would have been very substantial I direct accordingly that on insertion of the name of the Applicant-company as owner of Rs 5,000 of the unissued shares, the Applicant-company shall pay to the Respondent-company only Rs 25,000 being the amount of calls in arrears This sum shall be payable within two months The Respondent-company will file notice of this rectification with the Registrar within a fortnight from the date of completion of the order It will, of course, be open to the Official Receiver if any difficulty is experienced in raising the necessary money in that time to apply to me in the winding up proceedings for further directions The formal order to be drawn up will contain no provision for payment of the accrued dividends or for payment of the interest on the sum of Rs 25,000

The Respondent-company will pay the taxed costs of this application This has been a case of considerable complexity and one in which I am deeply indebted to Counsel on both sides for their able and carefully considered arguments I have no hesitation in certifying the case as one fit for two Counsel

On appeal from the above judgment and Order of the Honourable Mr Justice Clark, dated 15th November, 1946, and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No 599 of 1946

V. K. Thiruvenkatachari, N V B Shankara Rao and *G. Vasanta Pai* for Appellant.

N. Sivaramakrishna Ayyar and *R. Visvanathan* for Respondent

The Judgment of the Court was delivered by

Satyanarayana Rao, J—This is an appeal from the judgment of Clark, J., arising out of proceedings under section 38 of the Indian Companies Act to rectify the register The respondent-company was the applicant and the application was granted by the learned Judge The substantial prayer in the application was in these terms :

"Why the share register of Jawahar Mills, Ltd, should not be rectified by restoring the name Sha Mulchand & Co, Ltd, to the said register in respect of 5,000 shares numbering 15,048 to 20,047."

Jawahar Mills, Ltd., are the appellants in this appeal. The application was filed by the Liquidator of Sha Mulchand & Co, Ltd., Salem, which was ordered to be wound up by an order of this Court in O. P No 199 of 1944.

Jawahar Mills, Ltd, the appellant, is a company registered under the Indian Companies Act. Sha Mulchand & Co, Ltd, were the managing agents of Jawahar Mills, Ltd, from the starting of the company till 30th June, 1939, on which date they resigned the managing agency On that day Sha Mulchand & Co., Ltd, held 5,000 ordinary shares of Rs. 10 each in Jawahar Mills, Ltd., bearing Nos. 15,048 to 20,047 in respect of which shares Rs 5 was paid by that date, i.e, Rs 2 along with the application and Rs. 3 on allotment. The respondent company owed to Jawahar Mills, Ltd., a sum of Rs 2,5804-12-1 on the date of resignation of the managing agency which sum included the allotment money of Rs 15,000 in respect of the shares.

The respondent company is a private limited company and at all material times, it consisted of only two members T V. T Govindarajulu Chetty and K. N. Sundara Ayyar. On the 20th August, 1939, the appellant-company made two calls in respect of the shares held in that company, one of Rs 2 and the other of Rs 3 per share payable on the 1st October, 1939 and 1st December, 1939, respectively On the 12th August, 1940, the directors of the appellant-company found that all the shareholders did not pay the calls and passed a resolution on that date granting a further period of two months to pay the call money failing which it was intimated to the shareholders that the shares would be forfeited. The managing agents of the appellant-company gave due notice of this resolution to the concerned shareholders and the respondent-company which also received one of these notices from the managing agents did not comply with the demand and the directors by their resolution of 25-11-1940, forfeited the shares of the respondent-company. Some doubt was raised by the auditors of the company regarding the validity of the forfeiture and the directors, therefore, cancelled the forfeiture and re-entered the respondent-company as a member on 31-12-1940. On 20th February, 1941, the directors resolved that notice should be issued to Sha Mulchand & Co, Ltd, informing them that they were in arrears of calls to the extent of Rs 25,000 and that the said amount should be paid at the registered office of the company on or before 31st March, 1941, and that on failure to pay up the said amount on or before the due date, the shares would be forfeited. This resolution though it bears the date 25th February, 1941, was passed in circulation In pursuance of this resolution, a notice bearing date 15th March, 1941, but posted on the 17th was issued to the respondent-company calling upon them to pay up the amount of Rs. 25,000 on or before 31st March, 1941, and that in default the shares would be forfeited. The notice was delivered on the 20th March, 1941. The amount was not paid and on the 5th September, 1941, the directors of the appellant-company passed a resolution forfeiting the shares. The application for rectification out of which this appeal arises was filed on the 5th March, 1946, and the respondent-company raised the contention that the forfeiture was invalid and that the register of the company should be rectified by restoring the name of the respondent-company in respect of the 5,000 shares numbering 15,048 to 20,047.

It would be convenient at this stage to refer to the events that occurred between 30th June, 1939, when the respondent-company resigned the managing agency and the filing of the present application under section 38 of the Indian Companies Act. By an order of the Assistant Registrar of Joint Stock Companies, dated 28th August, 1941, Sha Mulchand & Co, Ltd, was struck off the register under section 247 of the Indian Companies Act and the order was published in the Gazette of 9th September, 1941. The ground on which the order was made was that the company ceased to function and had become defunct In this Govindarajulu Chetty, the managing director of the company and Sundara Ayyar, the director-shareholder concurred and the order of the Assistant Registrar shows that it was

on their statements that the company was not functioning and became defunct that the order under section 247 was passed The publication of the notice in the *Fort St. George Gazette* operates to dissolve the company—*vide* section 247 (5). Govindarajulu Chetty was adjudicated insolvent on the 23rd January, 1940, and under the provisions of the Companies Act, his office as director was thereby vacated in law though in fact he was conducting himself as if he continued as the managing director notwithstanding his bankruptcy The notice of forfeiture was issued by Jawahar Mills, Ltd , on the 10th September, 1941, addressed to the registered address of the respondent-company. After the shares were forfeited, the appellant-company by the resolution of its directors of 16th November, 1941, re-allotted the forfeited shares to various persons some of whom in their turn transferred the shares to others, *vide* Ex R-14 (*a*) and R-14 (*b*) By a notice of the 26th April, 1941, Jawahar Mills, Ltd , demanded the respondent-company to pay the sum of Rs. 25,804-12-1, the balance due to them as per accounts The notice was issued to Govindarajulu Chetty and Sundara Ayyar. In reply to this, Sundara Ayyar wrote to the advocate of the appellant-company on the 7th May, 1941, repudiating his personal liability for the amount and alleging that the company alone was liable and that Govindarajulu Chetty was in possession of the accounts and the records of the company and was the person who really represented the company. As Jawahar Mills, Ltd , did not receive any payment, they were obliged in December, 1941, to file O P 10 of 1942, for restoration of the respondent-company to the register and for winding up As there was default also in the payment of income-tax, the Income-tax authorities concerned also filed O. P No 11 of 1942 for a similar relief To both these petitions, Sundara Ayyar was made a party; Govindarajulu Chetty was represented by the Official Receiver of Salem as he was on that date an insolvent The petitions were opposed but were not allowed to be tried. O. P. No. 10 of 1942 was settled by Sundara Ayyar by paying a sum of Rs 11,000 to the appellant-company in full settlement of all their claims against Sha Mulchand & Co , Ltd Leave was granted by an order dated 2nd April, 1942, for the withdrawal of the petition. O. P. No 11 of 1942 was also settled by paying the Income-tax due to the income-tax authorities and on the 25th June, 1942, the petition was disposed of by recording the settlement.

Having thus successfully prevented the restoration of the company and settled the large claim of Jawahar Mills, Ltd , for Rs. 11,000, Sundara Ayyar instituted on the 27th June 1942, two days after the order in O P No. 11 of 1942, a suit O S No 39 of 1942, Sub Court, Salem, against Jawahar Mills, Ltd , and one Palaniappa, who was impleaded as the fourth defendant, in which he claimed a declaration that the forfeiture of the shares by Jawahar Mills, Ltd , was illegal and inoperative and a mandatory injunction directing them to restore the name of Sha Mulchand & Co , Ltd , in the register There was also an alternative claim for damages against the Jawahar Mills, Ltd , which was the first defendant and the fourth defendant Palaniappa, for a sum of Rs 25,000 This Palaniappa, it must be mentioned here, was a partner of the firm which succeeded as the managing agent of Jawahar Mills, Ltd., after Sha Mulchand & Co , Ltd , resigned on the 30th June, 1939 On the 29th June, 1939, an agreement was entered into between Sundara Ayyar and Govindarajulu Chetty on the one hand and Palaniappa on the other, whereunder it was agreed by Sundara Ayyar and Govindarajulu Chetty that the 5,000 shares of Sha Mulchand & Co , Ltd , should be transferred to Palaniappa and that Palaniappa should pay the further calls due in respect of those shares to Jawahar Mills, Limited. In the plaint it was claimed that by reason of the default of Palaniappa in not carrying out the terms of that arrangement, the shares became forfeited and that therefore they were entitled to claim damages This suit was dismissed on the 17th November, 1943, by the Sub-Court on the ground that Sundara Ayyar was not entitled to maintain the suit as Sha Mulchand & Co , Ltd , ceased to exist and the shares were held by Sha Mulchand & Co , Ltd , in its corporate character and not by Sundara Ayyar, in his individual capacity Against this decision Sundara Ayyar preferred an appeal to this Court (A S No. 258 of 1944).

The appeal was also dismissed against the first defendant Jawahar Mills, Ltd., on the ground that as the company was not restored in the register, Sundara Ayyar was not entitled to claim any relief in respect of the forfeited shares. The suit was, however, remanded as against Palaniappa as Sundara Ayyar apparently wanted to pursue the remedy against him on the footing that the forfeiture was valid. The appeal was disposed of in this court on the 12th February, 1945. In between the dismissal of the suit in 1947 and the disposal of the appeal in 1945, Sundara Ayyar filed O.P No. 199 of 1944 on the Original Side on the 21st August 1944, to revive the company and to wind it up Four days after the disposal of the appeal, the learned Judge who made the order now under appeal also dealt with O.P No 199 of 1944 and passed an order directing the restoration to the register of Sha Mulchand & Co , Ltd , and its winding up, mainly on the ground that the question of the validity of the forfeiture of shares had to be considered in a proper proceeding after the restoration of the company. After this order was made, the liquidator with the permission of the Court filed the present application under section 38 of the Companies Act for rectification

The main ground on which the application is filed was that the forfeiture was invalid as the notice of 15th March, 1941, did not comply with the requirement of the regulation of the company that the notice should name a further day not earlier than the expiration of 14 days from the date of the notice on or before which the payment required by the notice is to be made, as it fell short of the period of 14 days by one day. There were also other grounds alleged in the affidavit filed in support of the application, but they are not material now The application was supported by the affidavits of Sundara Ayyar and Govindarajulu Chetty whose adjudication was annulled in 1944 The appellant-company resisted the application on various grounds According to the appellant, the forfeiture was valid and the claim of Sha Mulchand & Co Ltd , was barred by limitation and that even if the forfeiture was irregular and therefore voidable, by reason of the conduct of Sundara Ayyar and Govindarajulu Chetty the applicant was precluded from claiming rectification

The learned judge held that the forfeiture was irregular as the notice of 15th March, 1941, did not comply with the requirement of the articles as it was short by one day The pleas of the appellant regarding limitation, waiver, acquiescence and laches were all overruled Notwithstanding the re-allotment of the shares by Jawhar Mills, Ltd , after the forfeiture and notwithstanding that there was a reduction of the capital of Jawahar Mills, with the approval of the Court, on the 11th August, 1944, in O P No 84 of 1944, the learned judge was of opinion that Sha Mulchand & Co., Ltd , should be registered in respect of 5,000 unissued Rs. 10 shares out of the 16,000 unissued Rs 10 shares available with the company under the reduction scheme, though the learned judge did not think fit to grant any interest to Jawahar Mills, Ltd , in respect of the calls (Rs 25,000) or direct Jawahar Mills, Ltd , to pay the dividends in respect of the shares forfeited There was a direction that the respondent-company should pay a sum of Rs 25,000 after the insertion of their name in the register as the owner of 5,000 unissued shares

In this appeal by Jawahar Mills, Ltd , it is not now disputed that the forfeiture was irregular, but the contention urged is that by reason of this irregularity, the forfeiture was only voidable and not void and that it was open to the respondent-company to waive or abandon their right to dispute the legality of the forfeiture and that in fact by their conduct they have done so, that the claim to rectify the register was barred by limitation and that in any event rectification was impossible, because the shares are not now available *in specie* with the appellant-company and that it is impossible, therefore, to rectify the register, particularly as the transferees of the shares are not impleaded as parties to these proceedings.

The power of forfeiting the shares for non-payment of calls is conferred upon the company by its regulations which constitute a contract between the company and the shareholders The power, therefore, has to be exercised strictly in accordance with the provisions of the contract contained in the regulations The articles of Jawahar Mills, Ltd , regarding calls and forfeiture are identical with the articles

company's register These were in fact the prayers in the plaint in O.S. No. 39 of 1942 filed by Sundara Ayyar as plaintiff Article 48 of the Limitation Act is restricted to recovery of possession of specific moveable property which has been lost or acquired by theft or by dishonest misappropriation or conversion The conversion need not be dishonest—*L P E. Pugh* v *Ashutosh Sen*[1]. Article 49 applies to other specific moveable property whether it is for recovery of possession or for compensation for wrongful taking or injuring the property or wrongfully detaining it. Under the terms of the Contract Act and the Sale of Goods Act, the shares are also "goods" within the meaning of those Acts, vide *Maneckji Pestonji* v *Wadilal Sarabhai & Co*[2] Therefore, it must be taken that the shares in question are specific moveable property within the meaning of articles 48 and 49 of the Limitation Act. The reliefs for declaration and injunction are not within those articles as in both the articles the relief that is contemplated is either possession or recovery of money as compensation These two articles provide the period of limitation for actions which are described under English Law as actions for detenue and trover If the object of the suit or action is to recover possession of moveable property which was unlawfully detained it is an action for detenue. If on the other hand, the object is to recover damages for detention, it is trover If the claim is for damages for conversion which is also a form of trover, it falls within the purview of article 48. In our opinion, therefore, an action of the nature contemplated by section 38 of the Companies Act for rectification of the register does not fall within the purview of either of the articles In the absence of any specific article, the only alternative is to apply the residuary article, article 120 of the Limitation Act The notice of forfeiture was issued to the repondent-company on the 10th September, 1941, by which date the respondent-company ceased to exist It was revived on the 16th February, 1945, by the order in O P No. 199 of 1944 At the moment when the cause of action accrued, the respondent-company was not in existence and therefore there is no person in existence capable of instituting the suit until 16th February, 1945 On the analogy of the principle of section 17 of the Limitation Act, it would seem that Limitation does not begin to run until 16th February, 1945, when the person capable of instituting an action came into existence. Apart from this even if the cause of action dates from the 5th September, 1941, the date of forfeiture, the present application which was filed on 5th March, 1946, is within the period of six years under article 120 of the Limitation Act and the action therefore was within time It may be a question for consideration if more than six years had elapsed from the date of forfeiture whether respondent-company which consisted only of two shareholders who were also directors, one of them being even a managing director, could take advantage of the non-existence of the company from 9th September, 1941, till 16th February, 1945, as it would have been open to the shareholders to have taken appropriate proceedings as they did in O P. No 199 of 1944 to revive the company earlier They had two opportunities earlier in O P Nos 10 and 11 of 1942 to revive the company, but they opposed it It is not open to a person who had the right or the remedy to bring into existence a person capable of instituting a suit or initiating a proceeding to extend the period of limitation by postponing the steps to bring into existence a person capable of instituting a suit or proceeding. However, it is unnecessary in this case to decide that question as even if the cause of action began to run from 5th September, 1941, the present proceeding would be in time as it is within six years We are therefore of opinion that the learned Judge was right in holding that the present claim is not barred by limitation and that it is governed by article 120 of the Limitation Act

It was next argued for the appellant that by reason of long delay of nearly five years, the respondent company is disentitled to claim rectification Where a period of limitation is prescribed for a suit or proceeding, mere delay is no bar unless it is of such a character as to lead to an inference of abandonment of the right or unless

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1 (1928) 56 M L J 517 L R 56 I A 93 I L R 8 Pat. 516 (P C)

2 (1926) 51 M L J 1 L R 53 I A 92 : I L R 50 Bom 360 at 367 (P.C).

it is established that the person against whom the action or proceeding is instituted was actually prejudiced by reason of such delay The appellant relied also upon acquiescence, waiver and estoppel before the learned Judge, but for reasons given by the learned judge, we agree with him that none of these grounds have been established in the present case. The question of abandonment of the right and prejudice to the appellant by reason of delay, however, stands on a different footing.

Courts in England have always viewed with disfavour belated claims for relief against forfeiture by shareholders whose shares have been forfeited and required that the parties interested in the shares should be vigilant and active in asserting their rights. The share money which the shareholder defaulted to pay was required for the adventure of the company of which he was a shareholder and it is not open to him to stand by without payment and see whether the company prospers in business or suffers reverses and ultimately to assert his rights when it is found that the company is affluent and is paying high dividends The capital is required for the business of the company and the shareholder must subject his money, along with the others, to the ordinary risks of the business The fact that the company would be entitled to interest on unpaid calls under the regulations of the company is no consolation to the company when the capital was most needed for the successful running of the business. Vice-Chancellor Knight Bruce considered this question at considerable length in *Prendergast* v *Turton*[1] The question came up for consideration also in *Clarke and Chapman* v *Hart*[2] It is the case of a mining company and the observations of Lord Chancellor (Lord Chelmsford) at page 1453 of the report are apposite

> "The property is of a very precarious description, fluctuating continually, sudden emergencies arising which require an instant supply of capital, and in which the faithful performance of engagements is absolutely necessary for the prosperity and even the existence of the concern And, therefore where parties under these circumstances stand by and watch the progress of the adventure to see whether it is prosperous or the contrary, determining that they will interevene only in case the affairs of the mine should turn out prosperous, but determining to hold off if a different state of things should exist, courts of equity have said that those are parties who are to receive no encouragement, that if they come to the Court for relief, its doors shall be closed against them, that their conduct being inequitable, they have no right to equitable relief"

In *Rule* v *Jewell*[3], there was a delay of six years in claiming that the shares were not regularly forfeited and that they were entitled to be restored and the relief was refused on the ground that the action of the plaintiff in lying by was entirely analogous to the lying by in the case of *Prendergast* v *Turton*[1] in order to see whether the concern would ultimately turn out sufficiently profitable to make it worthwhile to assert their claim as shareholders These principles were also accepted by the Privy Council and applied in *Jones* v *North Vancouver Land and Improvement Company*[4] That was an action by a husband and wife for a declaration that shares standing in the name of the wife were not validly forfeited by the company The husband was also a director of the company and was a party to the resolution of the Board making calls on the shares and also to a subsequent resolution forfeiting the shares The notice of the call and the liability of the shares to forfeiture if unpaid was posted to the wife's address which was the address given by the husband. The complaint was that the shares were not validly forfeited. The company was in financial embarrassment for some time, but subsequently became prosperous and the share began to increase in value Twelve years after the call, the action was brought to declare the forfeiture invalid The action was described by the Privy Council in these words :—

> "A proceeding more unmeritorious, more cynically audacious could not well be conceived, even if the notices given were, in fact, defective in form, which in their Lordships' opinion, for the reason hereafter stated, they are not, or if the service of these notices were irregular, which their Lordships think it was not The principles laid down in *Prendergast* v *Turton*[1] and by Lord Lyndhurs on the appeal, and in the line of cases which followed it, fortunately it would seem, in the interest of that honesty and fair dealing which ought to regulate the conduct of commercial affairs and the

1. (1841) 1 Y. & C C C 98 · 62 E R 807.
2. (1858) VI H L C. 632 . 10 E R. 1443.
3. (1881) 18 Ch 660.
4. (1910) A C 317.

management of companies such as this, are strong enough to defeat such mischievous designs. These authorities show that the plaintiffs must in this case be held to have by their own conduct disentitled themselves to the relief they pray for "

In the present case, Sha Mulchand and Co., though it has a separate corporate existence, is practically identical with the two shareholders The shares were acquired in 1938 during the course of the managing agency and the accounts maintained disclose that even the allotment money of Rs 15,000 was not paid by the director-shareholders of Sha Mulchand and Company. After resignation of the managing agency in 1939 it was found that they owed to Sha Mulchand & Co , Ltd , more than Rs 25,000 The two shareholders concurred and were anxious to have the company dissolved under section 247 of the Indian Companies Act and obtained an order of dissolution on the 9th September, 1941 One of them Govindarajulu Chetty became an insolvent in 1940 There is no reliable evidence on record to show, that this fact was ever intimated to Jawahar Mills, Ltd Govindarajulu Chetty, though he was legally disqualified to be a director, continued to act as managing director till the date of the dissolution of the company It is obvious that the company was in financial embarrassment and the shareholders had no where-withal to pay the calls in respect of the shares It was then not clear whether Jawahar Mills, Ltd , would prosper and the shares would appreciate in value though it is in evidence that in later years Jawahar Mills, Ltd , paid high dividends and the shares also appreciated in value When Jawahar Mills, Ltd , attempted in O. P. No. 10 of 1942, to revive the company and to have it liquidated, the attempt was resisted and Jawahar Mills were obliged to accept a compromise for Rs 11,000 giving up their claim for the balance out of Rs 25,000 and odd The O P filed by the income-tax authorities was also opposed and the resuscitation of the company was successfully prevented by paying the amount due as tax to the income-tax authorities At that time they secured the advantage of wiping out a major part of the liability of Sha Mulchand and Co , to Jawahar Mills, Ltd Having thus secured freedom from liability, Sundara Ayyar started within two days after O P No 11 of 1942, was disposed of, the suit (O S No 32 of 1942) against Jawahar Mills, Ltd , and Palaniappa. At the time of the settlement of O. P No 10 of 1942 it must have been obvious to Sundara Ayyar and Govindarajulu Chetty that there was a forfeiture of the shares and that Jawahar Mills, Ltd , must have entered into the settlement on the assumption that the forfeiture was good and would not be questioned. No doubt there is no express stipulation in the settlement to that effect but while Sundara Ayyar entertained the sinister idea in his mind of settling the claim in O P No. 10 and thereafter questioning the forfeiture by a suit, Jawahar Mills, Ltd , were unaware of it and they must have then thought that the forfeiture would not be disputed, particularly as they had already re-allotted the shares forfeited of which notice was also given to Sha Mulchand and Company It must have been common knowledge at that time that the shares were no longer available with Jawahar Mills, Ltd In the suit, Sundara Ayyar was unsuccessful against Jawahar Mills and the appeal also shared the same fate He, however, prosecuted the claim against Palaniappa in the suit after remand on the footing that the forfeiture was good and that he was entitled only to damages It was during the pendency of the appeal in the High Court that he thought of reviving the company by filing O P No 199 of 1944 as he then found that the liabilities of the company were wiped out, that the shares in Jawahar Mills, Ltd , were fast increasing in value and were paying high dividends. It is with this background that the conduct has to be judged The present proceedings are conducted only for the benefit of the two shareholders and for the benefit of no other In passing it may be mentioned that in O P No 199, the learned Judge directed that Jawahar Mills, Ltd , should prove for the balance of the amount due to them in the liquidation proceedings notwithstanding the compromise in O P No 10.

It will be seen therefore that the conduct of these two shareholders is analogous to the conduct of the plaintiffs in the cases referred to above They had no idea of reviving the company till 1944 and proceeded or acted on the footing that the forfeiture was valid No doubt, the right to avoid the forfeiture was in the company

of Sha Mulchand and not in the shareholders. But it was open to the shareholders to bring into existence the company if they intend to question the forfeiture and they must have been well aware of the position that that they themselves could not take any proceedings to get rid of the forfeiture Jawahar Mills, Ltd, were prejudiced as they had parted with the shares on the footing that the forfeiture was valid and there was also a reduction in the capital with the approval of the Court on the 11th August, 1944, in O P. No 84 of 1944 They gave up in O P No. 10 of 1942 the balance of the liability of Sha Mulchand to Jawahar Mills, Ltd. In O P No 199 of 1944, they were allowed to prove in liquidation for the balance due but even now it is not certain whether they would get sixteen annas in the rupee in the liquidation proceedings in respect of that amount By reason of this long delay in reviving the company and in taking proceedings under section 38 of the Companies Act, Jawahar Mills, Limited, have put themselves in a situation in which it is impossible for them to restore Sha Mulchand, Ltd, to the register in respect of the 5,000 shares numbering 15,048 to 20,047 In view of these facts, if the applicants were Sundara Ayyar and Govindarajulu Chetty, it would have been a case in which the relief should be refused in the light of the principles already adverted to.

Is the company affected by the conduct of its shareholders in view of the doctrine in *Salomon's case*[1] which refused to identify a company with its controlling shareholders The tendency of modern decisions in England is to " lift the veil of corporate personality " and disregard the corporate form In other words, the curtain of the juristic personality of the corporation is lifted and the conduct of individuals behind the mask of juristic person is considered A very illuminating discussion of this question is found in a recent book on "Legal Theory" by W Friedmann at pages 375 and 377 For various purposes, the corporate existence of the company is ignored, *e g*, where the corporate form is used to evade the income-tax and a recent instance of the application of this principle of piercing the veil of corporate personality is *Smith Stone and Knight v Birmingham Corporation*[2] in which it was decided that the possession of a subsidiary company was really on behalf of the parent company which was entitled to compensation under the Land Clauses Consolidation Act (1845), section 121. It was stated in that case by Atkinson, J (at page 121):

> " It seems therefore to be a question of fact in each case, and those cases indicate that the question is whether the subsidiary was carrying on the business as the company's business or as its own " .

The same doctrine of " lifting the corporate veil " is also adverted to in another recent book on the "Province and Function of Law" by Julius Stone Mr Tiruvenkatachari, the learned advocate for the appellant, in his able argument has drawn our attention to these authorities and on an examination of the principles therein enunciated, it seems to us that it is too late in the day to still adhere to the strict formalism of *Salomon's case*[1] while the facts stare us in the face and the corporate personality is utilised to play a game of hide and seek Disagreeing, therefore, with the learned Judge, we are of opinion that by reason of this long delay which caused prejudice to Jawahar Mills, Ltd, the respondent-company should not be granted the relief now claimed

Apart from this there is a more insuperable difficulty in granting the relief to the applicant Jawahar Mills acted all along on the footing that the forfeiture was valid and effective, re-allotted the shares and transferred them to various other persons The capital of the company was reduced with the approval of the Court on the 11th August, 1944, in O P No 84 of 1944 The shares therefore are not available in specie with Jawahar Mills, Limited The learned Judge saw this difficulty and stated in the judgment that it was agreed by both parties before him that in the circumstances it was impossible to make an order of rectification.

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1. (1897) A C 22. 2 (1939) 4 All E L R. 116

Notwithstanding this conclusion of the learned Judge, he directed Jawahar Mills, Limited, to recognise the applicant as shareholder in respect of 5,000 shares out of the 16,000 unissued Rs 10 shares of Jawahar Mills which came into existence under the reduction scheme. It is difficult to find any legal basis for this substitution The principle of substituted security recognised by decisions of the Privy Council and this Court has no application. It was argued on behalf of the respondent that Mr Tiruvenkatachari, the learned Advocate for the appellant, admitted before the learned Judge that the shares could be so substituted On reading the judgment of the learned Judge and after hearing Mr Tiruvenkatachari on this question, we are unable to agree with the contention of the learned advocate for the respondent that Mr Tiruvenkatachari agreed to the substitution of the shares for the shares forfeited He throughout contended that as the shares were re-allotted to strangers who are not parties to the proceedings, it was not possible to set aside the forfeiture, and he also relied upon the fact that the share capital of the company was reduced with the approval of the Court Having contended so strenuously before the learned Judge that it was not possible to restore the name of Sha Mulchand to the register, it is inconceivable that he would have agreed to give up the case of his client He seems to have agreed only as an alternative that if all his contentions were overruled and the learned Judge thought that notwithstanding the difficulty in the way of granting the relief for rectification, the applicant company should be restored to the register, the only shares available being the 16,000 shares of Rs. 10 each unissued, the applicant company could be recognised as a shareholder in respect of 5,000 out of those shares The learned Judge stated in his judgment —

> "It is agreed by both parties that the proper order will be for the Applicant-company to be placed on the regiter in respect of 5,000 of the unissued Rs 10 share and I order accordingly"

So, counsel was driven to the necessity as a last resort of helping the Court with the solution of a difficulty as to what the Court should do when the Court had made up its mind to grant the relief The only course open and suggested by the counsel was to recognise the applicant company for the 5,000 of the unissued shares of 16,000 We do not therefore think that the counsel is precluded from raising the point that it is impossible to rectify the register in the circumstances of this case

The principles governing specific restitution of moveable property are contained in sections 10 and 11 of the Specific Relief Act If for reasons beyond the control of the defendant in an action, the property is not available, it is impossible to compel him to deliver possession of the specific moveable property The only right in such an event of the party injured is to claim the value of the property. In a proceeding under section 38 of the Indian Companies Act, the Court has no jurisdiction to grant the value of the property In a proceeding under section 38, the Company can only be ordered to pay damages when their register is ordered to be rectified In other words, it is only as incidental to the relief of rectification that damages can be granted, see In re *Ottos Kopje Diamond Mines Ltd*,[1]

Further, the Court cannot order rectification of the register in respect of the particular shares claimed by the applicant in the absence of third parties whose rights will be affected by the rectification If the applicant's right is only to get the particular shares and not more, he cannot get that relief in these proceedings as he has not impleaded as parties the transferees of the shares, notwithstanding that such information was available on record as the appellant filed documents furnishing the necessary information, see *Ontario Jockey Club* v *McBride*[2] and *Re Greater Britain Insurance Corporation Lim.*, Ex parte *Brockdorff*[3]

We are therefore unable to agree with the order passed by the learned Judge The appeal has therefore to be allowed and the order of the learned Judge set aside with taxed costs throughout We understand that in pursuance of the Order of the learned Judge, the applicant company paid a sum of Rs 25,000 to the appel-

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1 (1893) 1 Ch. 618.

2. (1927) A C 916

3 124 L T 194

lant and there should be a refund of the amount by the appellant to the person who paid it This order will be communicated to the Registrar of Joint Stock companies, as we understand that the rectification of the Register directed by the learned Judge has been carried out in the registers of the Registrar of Joint Stock companies. We certify for two counsel.

K S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE PANCHAPAKESA AYYAR

Maria Pillai and another . *Appellants**

v.

Muthukumaran and others *Respondents*

Hindu Law—Joint family—Father endorsing promissory note for valuable consideration—Endorsee filing suit —Death of father—Decree against assets of father in hands of sons and grandsons—Execution against father's estate in the hands of sons—Whether legal—Whether binding on sons' shares—Whether entire estate could be attached

A suit was filed against a Hindu father by an immediate endorsee of a promissory note executed in favour of the father by a third party and endorsed by the father for valuable consideration Though the suit was dismissed in the trial court, on appeal a decree was passed in favour of the plaintiff By that time the father had died and so the decree was passed against the assets of the father in the hands of his sons and grandsons The properties in their hands were sought to be proceeded against in execution by the decree-holder On the question (1) whether the debt was an *avyavaharika* debt and as such could not be binding on the sons, (2) whether the ancestral properties could be attached in execution and (3) whether the sons' shares also could be the subject of attachment in execution against the father,

Held, (1) that the endorsor in this case being not a mere surety but a person obliged to make good the amount in case the title he warranted by endorsing the promissory note proved useless, there was no question of any surety debt

(2) That where there was a pious obligation existing, a decree could be passed against the sons and grandsons and could be executed not only against the father's separate estate but also against the joint family assets in their hands

Venkataswami v. *Tatareddi*, (1946) 2 M L J. 361, Applied, and

(3) That in the absence of a genuine partition among the judgment-debtors the entire ancestral property could be proceeded against

Appeal against the order of the District Court, South Arcot, dated 5th September, 1946 in A S No 8 of 1946 (E P R. No 427 of 1944 in O S No 60 of 1932, District Munsiff Court, Kallakurichi).

V. C Viraraghavan for Appellants

M S Venkatarama Aiyar for Respondents

The Court delivered the following

JUDGMENT —The appellants in this second appeal are the sons of one Kumaraswami Pillai and are aggrieved at the joint family properties in their hands being proceeded against for recovering the decree amount in O S No 60 of 1932, on the file of the District Munsiff's Court, Kallakurichi. That suit was filed against Kumaraswami Pillai, the father of the appellants, by one Ayya Pillai, an immediate endorsee of a promissory note executed in favour of Kumaraswami Pillai by some person and endorsed by him for valuable consideration The trial Court dismissed that suit ; but, on appeal, a decree was passed, in 1937, in favour of the plaintiff. By that time, Kumaraswami had died So, the decree was passed against the assets of the deceased Kumaraswami Pillai in the hands of his sons and grandsons, defendants 2 to 6 in the suit The decree was sought to be executed by attaching and bringing to sale the joint family properties in the hands of those defendants. The appellants, the two sons of Kumaraswami Pillai, felt aggrieved by this. They filed an objection against such execution The District Munsiff of Kallakurichi dismissed the petition and held that the properties were liable to be proceeded against They went in appeal to the District Judge of South Arcot who too held

* A. A A O No 136 of 1947. 1st April, 1949.

that the properties were liable to be proceeded against and that in fact the decision in prior proceedings would operate as *res judicata.* He dismissed the appeal with costs. Hence this second appeal.

The learned advocate for the appellants has urged three main contentions before me. I may add that none of these contentions seems to have been urged before the lower appellate Court, but, as they are pure arguments in law, I have heard and decided them The first point urged was that the debt in question was an *Avyavaharika* one, being in the nature of a surety debt, and that, under the Privy Council ruling in *Kesarchand* v *Uttamchand*[1], the theory of pious obligation would not apply to this case I have looked into that ruling, that has no application to the facts of this case Their Lordships have remarked that, to make the ancestral property liable, there must, in reality, be a debt due by the father, and that, unless the security bond was executed by a surety for a debt due by himself, the doctrine of pious obligation of the sons to pay their father's debts cannot make the transaction binding on ancestral property That is undoubtedly so, and has long been the law But, here, there is no question of any security bond or surety debt Kumaraswami Pillai endorsed a promissory note executed in his favour in favour of Ayya Pillai, the plaintiff in O S No 60 of 1932, after receiving valuable consideration from him As regards Ayya Pillai, he was not a mere surety, but a person obliged to make good the amount in case the title he warranted by endorsing the promissory note proved to be a broken reed, as in this case, where the promissory note was held to be unsupported by consideration

The second contention was that the decree, as it stood, had only been granted against the assets of Kumaraswami Pillai in the hands of the appellants and others, and that, as Kumaraswami Pillai had no self-acquired properties of his own, but only ancestral properties, which descended by survivorship to these appellants, and others, both the lower Courts went wrong in allowing execution to proceed against such ancestral properties The argument is untenable It has been held by a Bench of this Court, in *Venkatasami* v *Tatareddi*[2], that, in cases like these, where there is a pious obligation on the part of sons and grandsons, a decree can be passed against them and can be executed not only against the father's separate property but also against the joint family properties of his in their hands Indeed, it was remarked there :

> " We consider that, in view of section 53, the Subordinate Judge should not have limited the decree to the separate assets of the father in the hands of the sons, but he should have made it apply as well to the share of the father in the family estate in the hands of the sons ",

and the decree of the Subordinate Judge was amended accordingly It was urged by the learned advocate for the appellants that in this case there was no specific decree against the ancestral properties. Happily, there is also no specific decree against the separate properties of the father alone and there is no need for any amendment as in the Bench case. The ruling in *Krishnamurthi Iyer* v *Kailasam Aiyar*[3] has also made it abundantly clear that, at any rate, as regards the Madras Presidency, ancestral properties in the hands of sons and grandsons can be proceeded against freely to enforce their pious obligation under a decree. I may also add that, if it were otherwise, great hardship will result to the decree-holders against fathers, as most of these fathers have only ancestral properties and have not got any self-acquired properties of their own to be proceeded against, and the theory of pious obligation will become a costly futility in many cases, if the ancestral properties are not to be proceeded against

The last contention was that not only the father's share of the ancestral properties but all the ancestral properties were being proceeded against, in spite of the partition, and that this at least was illegal. I cannot agree The partition was found to be a bogus and nominal one, like the promissory note itself, it is obvious that a dead father who died undivided cannot have any specific share in the ancestral properties to be proceeded against, and that the entire ancestral properties can be proceeded

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1 (1945) 2 M L J. 160 : L R. 72 I A 165 (P C)
2 (1946) 2 M L J. 361
3 (1947) 1 M.L.J 183

against under the theory of pious obligation for a decree obtained against the father.

In the result, the second appeal deserves to be, and is hereby, dismissed with costs Leave refused.

K C *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE SUBBA RAO.

Clement Aaron .. *Petitioner**

v

Kallat Pathanhara Veethil Chatu Nayar and others .. *Respondents.*

Malabar Tenancy Act (XIV of 1930), *section* 3 (*v*)—*Lessee for the purpose of constructing a smithy—If a 'tenant' under the Act.*

A lessee for the purpose of constructing a smithy who has agreed to pay rent is a tenant within the meaning of section 3 (*v*) of the Malabar Tenancy Act It cannot be said that the word tenant only means an intermediary, a kanomdar, kuzhikanomdar and a verumpattamdar

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Munsiff's Court, Taliparamba, dated the 18th June, 1947, in R. I A. No. 31 of 1947, in O S No 48 of 1946.

A Achuthan Nambiar for Petitioner.

D. A. Krishna Variar for Respondents.

The Court delivered the following

JUDGMENT —The only question in this revision is whether the petitioner who is a lessee for the purpose of constructing a smithy is a tenant within the meaning of the Malabar Tenancy Act Under the document the respondent took possession of the land from the landlord for two years for the purpose of erecting a smithy agreeing to pay a rent of Rs 6 per year in the paramba belonging to the landlord. The tenant is defined in the Malabar Tenancy Act under clause (*v*) of section 3 which reads as follows :

" 'Tenant' means any person who has paid or has agreed to pay rent, or other consideration for his being allowed by another, to enjoy the land of the latter, and includes an intermediary, a kanomdar, a kuzhikanomdar, and a verumpattamdar of any description "

The respondents in this case are clearly persons who agreed to pay rent for their being allowed to enjoy the lands, and, therefore, *prima facie,* they are tenants within the meaning of clause (*v*).

The learned counsel for the petitioner argues that under the Malabar Tenancy Act tenant only means an intermediary, a kanomdar, kuzhikanomdar and a verumpattamdar In effect his contention is that the word "includes" must be read as "means" This argument is contrary to the plain meaning of the terms used in the definition and also contrary to the express provisions of the section The definition of a tenant in the Malabar Tenancy Act is very comprehensive though the rights and liabilities of the four classes of tenants mentioned therein are dealt with in greater detail than in the case of persons who do not come under one or other of the said categories Section 2 of the Act only exempts particular class of tenants from the operation of the Act and it is not argued that the respondents came under that class of tenants. Yahya Ali, J, in C M P No. 4281 of 1946 held that a lessee of land for the purpose of storing timber is a tenant within the meaning of the Malabar Tenancy Act I therefore agree with the lower Court that the respondents are tenants within the meaning of the Malabar Tenancy Act.

The civil revision petition is dismissed with costs.

V.S. *Petition dismissed.*

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* C.R P No 1741 of 1947 1st April, 1949.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE MACK.

Karra Lakshminarasimhayya ... *Petitioner**

v.

Sri Mahant Prayag Dossjee Varu (since deceased) and another . *Respondents*

Civil Procedure Code (V of 1908), *section* 60—*Decree in suit prior to 1st June,* 1937—*Judgment-debtor's salary Rs* 52 *only—If could be attached—Act IX of* 1937—*Act V of* 1943

A teacher of a High School drawing a monthly salary of Rs 52 was the judgment-debtor in a case filed against him and a portion of his salary was attached on a consent order passed in 1938 In the execution stage the Court held that the salary of the teacher was attachable despite the Amending Act V of 1943 which repealed repealing Act IX of 1937 On the question whether under the law as it stands, salaries of private persons in suits filed against them prior to 1st June, 1937, are exempt from attachment up to Rs 100 or whether such decrees also are to be regulated by the same procedure as decrees obtained subsequent to 1st June, 1937,

Held that it was consciousness ofthe inequity of section 3 of the Act IX of 1937 discriminating as it did between class of judgment-debtors which led to the later amendment by Act V of 1943, in particular section 3 being repealed.

Therefore no part of the petitioner's (teacher's) salary was attachable on the ground of even a consenting order The anomalies resulting from section 3 of Act IX of 1937 making invidious distinctions between different classes of lowpaid employees, may well have been a determining factor in the repeal of the Act, not merely as unnecessary being already incorporated in section 60, Civil Procedure Code, but also with the object of doing away with section 3 of the Amending Act IX of 1937 and bring in all judgment-debtors subsequent to Act V of 1943 on the same footing as far as procedure in execution against them is concerned, irrespective of whether decrees were obtained against them in suits prior to or subsequent to 1st June, 1937

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, Chittoor, dated 11th March, 1946, in A. S No 431 of 1945, preferred against the order of the Court of the District Munsiff, Tirupathi, dated 19th October, 1945, in E. P No. 28 of 1944, in O. S. No. 190 of 1933

C A Vaidyalingam and *T Rangaswami Aiyangar* for Petitioner

V M Ramaswami Mudaliar and *N Gopala Menon* for Respondents.

The Court delivered the following

JUDGMENT :—The petitioner is a teacher in the T. T. D. High School, Tirupathi, drawing a salary of Rs. 52. On a decree obtained against him in a suit filed prior to 1st June, 1937, Rs 7-8-0 of his salary was attached on a consent order passed by the District Court of Chittoor in C. M A No 35 of 1937 on 11th January, 1938 In an execution petition filed in 1944 by the decree-holder the District Munsiff held that the salary of the judgment-debtor was attachable despite the Amending Act V of 1943 which repealed Act IX of 1937. Both Acts made very important exemptions from attachment in the case of all persons, whether public officers or not, drawing a salary of less than Rs. 100. Section 3 of the Act IX of 1937 made the amendments inapplicable to proceedings arising out of any suit instituted before 1st June, 1937 This Act was one of those repealed by the Repealing and Amending Act XXV of 1942, and a further Act, Act V of 1943, further amending section 60, Civil Procedure Code, was subsequently enacted making certain modifications and amendments to this section, as already amended by Act IX of 1937, which amendments had been incorporated into section 60 Section 3 of Act IX of 1937 is not repeated in Act V of 1943 The point arising for determination is whether under the law as it stands, the salaries of private persons in suits filed against them prior to 1st June, 1937, are exempt from attachment up to Rs 100, or whether such decrees also are to be regulated by the same procedure as decrees obtained subsequent to 1st June, 1937 The District Munsiff took the view that Act V of 1943, made no alteration in the law as laid down by Act IX of 1937 He

*C R P No 1159 of 1946 4th April, 1949

held that his salary was still liable to be attached. The learned District Judge confirmed this finding following the Bench decision of the Bombay High Court in *Manilal Bhaichand* v. *Mohanlal Maganlal*[1]

The point involved is one of some importance affecting as it does a class of judgment-debtors in needy circumstances The case which the learned Judges of the Bombay High Court were called upon to consider was of a clerk in the employment of a mill against whom a decree was passed in a suit filed on 1st June, 1937. It was held that the whole of his salary including his dearness allowance was liable to attachment under section 60, Civil Procedure Code, as it stood prior to the Amending Act IX of 1937, by virtue of section 3 of that Act

One reason which led to that decision was that the amendment in section 60, Civil Procedure Code, effected by Act IX of 1937, having been incorporated into the Code itself, there was no necessity of burdening the Statute book with Act IX of 1937, and it was therefore repealed by the Repealing and Amending Act XXV of 1942. The repeal therefore was held not to affect the rights and liabilities created by that Act which preserved for decree-holders in suits filed before 1st June, 1937, a right to attach all salaries in accordance with section 60 as it stood on the date of the amendment Their Lordships observed in this connection

"We do not think that Act V of 1943 was intended to take away pre-existing rights preserved by section 3 of Act IX of 1937 since the amendments made by it were only verbal "

Another ground on which this decision was based was that section 4 of the Repealing and Amending Act of 1942 laid down that it shall not affect any act or regulation in which such enactments had been applied, incorporated or referred to, nor shall it affect any right, title, regulation or liability already secured or incurred or any remedy or proceeding in respect thereof With great respect to the Bench of the Bombay High Court, I am constrained to disagree from that view and unable to follow it Section 3 of Act IX of 1937 with the heading retrospective effect, reads as follows

"The amendments made by section 2 shall not have effect in respect of any proceedings arising out of any suit instituted before 1st June, 1937 "

Section 2 made very important amendments doing away with the distinctions between salaries of public officers, servants of railway companies or local authorities and private employees placing them all on the same basis so far as attachment was concerned exempting the first hundred rupees and one half the remainder of such salary We are in the domain of procedural law which is obvious from the mere fact that we are concerned with amendments to the Civil Procedure Code The general principle as stated by Maxwell in his Interpretation of Statutes, 9th edition, at page 233, is that alterations in procedure are retrospective, unless there is some good reason against it. This is well-settled law based on *Gardner* v *Lucas*[2] and *Kimbray* v. *Draper*[3] There can therefore be no doubt that had it not been for section 3 of Act IX of 1937 which specifically withdrew retrospective effect to the amended procedural law to suits filed prior to 1st June, 1937, decrees on such suits would have been governed by the new procedure

Now Act IX of 1937 has been repealed by Act V of 1943, which, no doubt as observed in the Bombay decision so far as it related to amendments of section 60 already effected by Act IX of 1937 and incorporated in the section, made some other changes on this basis Where, however, I am with respect unable to agree is that section 3 of Act IX of 1937 can be brought within the category of these other amendments already incorporated in section 60, Civil Procedure Code, under cover of section 4 of the Repealing and Amending Act XXV of 1942 The exact wording of the first part of section 4 which is relevant for our purposes, is this

"The repeal by this enactment shall not affect any act or regulation in which such enactment has been applied, incorporated or referred to "

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1. A I R 1946 Bom 102
2. (1878) 3 A.C 582 at 603
3. (1868) L R 3 Q.B 160.

There is no authority under Act IX of 1937 for the incorporation of section 3 into section 60, Civil Procedure Code, and the taking away of the retrospective operation of these amendments which does not affect the procedural law as a whole under section 60, Civil Procedure Code, as finally amended, can only derive its sanction from section 3 of Act IX of 1937. I am therefore led to the view that the repeal of Act IX of 1937 by Act XXV of 1942, has the result of repealing section 3 of that Act which is not preserved by anything under section 4 of Act XXV of 1942. With respect therefore, I am unable to agree with the view taken in the Bombay decision that Act IX of 1937 having been incorporated in the Code itself, there was no necessity to burden the statute book with it and that it was therefore repealed without affecting the existing rights and liabilities created by that Amending Act. Had the Legislature intended to restrict the retrospective operation imposed by section 3 of Act IX of 1937, I think this should have been specifically retained in the Amending Act V of 1943, in view of the earlier Act having been repealed. At the time Act IX of 1937 was enacted the intention of the Legislature when dealing with the rights and procedure together, may well have been that old rights would have to be determined by the old procedure and that only new rights under the substituted section were to be dealt with by the new procedure The anomalies resulting from section 3 of Act IX of 1937 making invidious distinctions between procedure applicable to judgment-debtors in general, in view of the Amending Act itself which sought to do away with such invidious distinctions between different classes of low paid employees, may well have been a determining factor in the repeal of this Act, not merely as unnecessary being already incorporated in section 60, but also with the object of doing away with section 3 of the Amending Act IX of 1937, and bringing in all judgment-debtors subsequent to Act V of 1943 on the same footing so far as procedure in execution against them is concerned, irrespective of whether decrees were obtained against them in suits prior to or subsequent to 1st June, 1937 Maxwell has observed at page 234 of his Interpretation of Statutes that even a new procedure would be presumably inapplicable where its application would prejudice rights established under the old or would involve a breach of faith between the parties It is extremely difficult to hold that a procedural right to attach the salary of a class of low paid employees *in toto* under the old law is an established right which should not be interfered with under this principle, or, that its withdrawal would involve a breach of faith between the parties. It is open to the decree-holder in a suit prior to 1937 to continue to execute his decree on exactly the same conditions as decree-holders in suits instituted subsequent to 1st June, 1937 I prefer to take the view that it was consciousness of the inequity of section 3 of Act IX of 1937 discriminating as it did between class of judgment-debtors which led to this Act IX of 1937, in particular, section 3 being repealed

Coming to the present case, it clearly makes no difference that the attachment of Rs 7-8-0 of the petitioner's salary was effected by a consent order in an appeal on the execution side in which he raised some other contentions No part of the petitioner's salary is now attachable nor can any consent order passed on the basis of the old procedural law legalise this attachment subsequent to Act V of 1943 and render it operative In the result, in the view I have taken, the petition is allowed, but in the circumstances I direct the parties to bear their own costs

K C *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

The Public Prosecutor .. *Appellant**

v.

A. K. Gopalaswami Pillai .. *Respondent.*

Indian Arms Act (XI of 1878), *section* 22—*Meaning of ' delivery '.*

Section 22 of the Arms Act punishes ' delivery ' It must be a conscious delivery. It need not necessarily be a physical delivery in that there must be proof that the accused delivered with his hands a firearm to another ; but from the circumstances of the case the only possible inference must be that the firearm in question was delivered Merely because a person leaves in a house of his, which is temporarily leased to another, a firearm belonging to him, from that factum alone, it cannot be inferred that the firearm was delivered to the tenant for his use

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (Accused by the Sessions Judge of East Tanjore Division at Negapatam in Criminal Appeal No. 36 of 1948, dated 12th April, 1948, preferred against the judgment of the Court of the Additional First Class Magistrate, Negapatam, in C C No. 29 of 1948.

The Assistant Public Prosecutor (*A S Sivakaminathan*) for Appellant.

P. Basi Reddi and *P Rajamanickam* for Respondent.

The Court delivered the following

JUDGMENT —The appellant was licensed to possess and use a D B B L. gun which bore the number 75,710 The accused had two houses, one in which he lived and the other in which apparently he kept his gun. The gun itself appears to have been kept in a gun case and the gun case was kept in an almyrah in the house at the rear. It was common ground that on the day the police searched the rear house it was in the possession of one Kolandavelu. What other objects were traced to the possession of Kolandavelu we are not concerned with in this case. The Police found the D B B.L gun in the open gun case in the almyrah with its doors closed but not locked. The only other article declared to have been found in that almyrah was M. O. 2, but whether M. O 2 belonged to Kolandavelu or to anyone else there was nothing in evidence to indicate. The learned First Class Magistrate convicted the respondent under section 22 of the Arms Act with having delivered the gun to Kolandavelu who admittedly had no licence to possess or use a firearm of that kind On appeal the learned Sessions Judge acquitted the respondent holding that there was no proof of delivery as such within the meaning of section 22 of the Indian Arms Act. Against that order of acquittal the Government have preferred this appeal.

I see no reason to differ from the learned Sessions Judge. What section 22 punishes is ' delivery ' It must be a conscious delivery. It need not necessarily be a physical delivery in that there must be proof that the accused delivered with his own hands the gun in question to Kolandavelu, but from the circumstances of the case the only possible inference must be that the gun in question was delivered. All that the prosecution was able to prove was that the gun, disjointed, in an open gun case, was found in an almyrah in the house in possession of Kolandavelu. There was nothing to show that Kolandavelu knew what were the contents of the almyrah, the doors of which were closed though not locked There was nothing in evidence to indicate that Kolandavelu had the use of the almyrah with the express or implied permission of the accused. To reiterate there was nothing to indicate to whom M O No 2 belonged There was nothing to indicate that the accused could not go into the house and take possession of the gun whenever he wanted Kolandavelu apparently lived alone ; and if the evidence of D W 2 is to be accepted Kolandavelu arrived in that house and took possession of it only the evening before the search. Merely because a person leaves in a house of his

* Crl Appeal No. 350 of 1948. 24th November, 1948.

which is temporarily leased to another the articles belonging to him, from that factum alone it cannot be inferred that these articles were delivered to the tenant for his use. That was all that the prosecution was able to prove with reference to the gun in question. The learned Sessions Judge was right in his view that the evidence on record did not disclose the delivery contemplated by section 22 of the Arms Act. The appeal is dismissed.

V.P S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE RAJAGOPALAN.

S. Narayanan .. *Appellant**

v.

The District Board, Salem, by its President .. *Respondent.*

Madras Local Boards Act (XIV of 1920), *section* 225—*Scope of—Statutory restrictions embodied in—Contracts which are and which are not affected by—Contract of service between a Medical Officer of a rural dispensary and the District Board—Suit for damages for breach of—Period of limitation prescribed by section* 225, *if applicable.*

Where a contract is entered into in the direct exercise of a statutory power by the President of a District Board it would come within the scope of section 225 of the Madras Local Boards Act. But where the contract is only incidental to the exercise of a statutory power, the claim based upon such a contract will not be hit by the special statutory restrictions embodied in section 225 of the Local Boards Act

Athimannil Muhammad v *Malabar District Board,* (1934) 68 M L J 125 : I L R 58 Mad. 746 ; *Padmanabhuni Narasimhadas* v *District Board of Kistna,* A I R , 1938 Mad. 239 ; *District Board of Poona* v *Vishnu Raghoba,* (1932) I L R. 57 Bom 67, referred to

A contract of service which the District Board through its President and a doctor enter into for the employment of the latter as the medical officer of a rural dispensary for a certain number of years is not a contract entered into by the President in the discharge of a statutory liability In the maintenance of dispensaries, if a President of Local Board chooses to employ a medical officer and chooses to enter into a contract with him, it might be ultimately to discharge his liability and exercise the right conferred upon the President by clause (*h*) of rule 1 (A) of schedule V of the Madras Local Boards Act But such a contract is only incidental to the discharge of that liability and the exercise of that right by the President The contract itself is not entered into in the exercise of any specific direction to that effect in the statute Hence a claim based upon such a contract will not be affected by the period of limitation prescribed by section 225 of the Act.

Appeal against the decree of the District Court, Salem, in A S. No. 151 of 1944, preferred against the decree of the Court of the District Munsiff, Sankaridrug, in O. S No. 27 of 1943.

V. S. Ramaswami Aiyangar for Appellant

Basheer Ahmed Sayeed for Respondent.

The Court delivered the following

JUDGMENT —Ex P-1 is the contract of service which the respondent, the District Board, Salem, and the plaintiff-appellant entered into for the employment of the plaintiff as the medical officer in charge of a rural dispensary for a period of three years. The plaintiff was first posted to Elachipalayam as medical officer of the rural dispensary there. On 3rd June, 1941, the services of the plaintiff were terminated (*vide* Ex P-4). On appeal to the Government, the plaintiff was reinstated in service on 31st December, 1941 He was out of office between 3rd June, 1941 and 31st December, 1941.

The plaintiff followed up his reinstatement by instituting the suit out of which this second appeal arises He claimed Rs 287-7-0 by way of subsidy from the second defendant, Rs 338-11-0 by way of damages from the first defendant, the District Board, and, in the alternative, the entire sum of Rs 626-2-0 as damages from the first defendant, the District Board The trial Court held that the dismissal of the plaintiff was wrongful ; but the learned District Munsiff upheld the first defendant's contention, that the suit was barred by section 225 of the Madras

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* S.A. No. 877 of 1946 and C.M P. No. 2093 of 1949. 15th March, 1949.

Local Boards Act as it had been instituted more than six months from the date on which the cause of action arose. The plaintiff's suit was dismissed. At the stage of appeal, the first defendant-District Board accepted the correctness of the finding of the trial Court that the dismissal of the plaintiff was wrongful. The only question that the learned District Judge considered was whether section 225 of the Madras Local Boards Act was a bar to the plaintiff's claim The learned District Judge agreed with the learned District Munsiff on that issue and the appeal was dismissed. The second appeal has been preferred by the plaintiff and the only respondent in the second appeal is the District Board.

The main contention of the learned advocate for the appellant was that section 225 of the Local Boards Act and the special period of limitation prescribed thereunder did not apply to a suit to enforce contractual obligations incurred under a contract entered into by the District Board and a person like the plaintiff.

Section 225 runs

"(1) No suit or other legal proceedings shall be brought against any local Board . . . in respect of any act done or purporting to be done in execution or intended execution of this act or any rule, by-law, regulation or order made under it or in respect of any alleged neglect or default in the execution of this act or any such rule, by law, regulation or order until the expiration of two months next after notice in writing . . .

(2) Every such proceedings shall, unless it is a proceeding for the recovery of immoveable property or for a declaration of title thereto, be commenced within six months after the date on which the cause of action arose"

The learned District Judge seems to have based his decision in this case, that section 225 applied to the plaintiff's claim, on *Athimannil Muhammad* v. *Malabar District Board*[1]. Varadachariar, J, observed at page 749 thus:

"The real test is whether what is complained of is some act done in pursuance of the statute. In cases where there is no dispute as to the existence of a contract, all further rights and liabilities between the parties are governed by the ordinary law relating to contracts, and it is true enough, in such a case, to say the rights and liabilities of the parties in respect of the contract are matters of ordinary law and not matters governed by the statute But where, as in the present case, we find that the cancellation of the acceptance of the plaintiff's offer is the necessary result of what the President thought, in accordance with the terms of the Act as he interpreted them, his duty to accept, *viz*, the highest tender we cannot say that the question does not relate to an act done under the statute The right to levy tolls is a special privilege conferred by the statute upon local bodies and, under the terms of section 106 (1), Local Boards are authorised either to manage the collection of the tolls themselves or through their own agency or to lease them out In either case, what the President as representing the Board does in connection with the leasing out of the right to levy tolls is undoubtedly an act done in execution of his powers or duties under the Act"

The scope of the principles which underlay the actual decision in *Athimannil Muhammad* v *Malabar District Board*[1] was discussed by Beasley, C J, in *Padmanabhuni Narasimhadas* v *District Board, Kistna*[2] Referring to the claim in *Athimannil Muhammad* v. *Malabar District Board*[1], Beasley, C J, observed:

"There, the suit was filed . . . claiming damages on the ground that its President improperly cancelled a contract of lease The President in performance of what he thought was his duty under the Madras Local Boards Act, as he interpreted the same, accepted a higher offer by another person and the cancellation of the acceptance of the original offer was the necessary result . . "

The claim Beasley, C J, had to adjudicate upon was for the recovery of the balance of an amount due to the plaintiff under a contract made with the District Board Applying the rule which is formulated in *Athimannil Muhammad* v. *Malabar District Board*[1], Beasley, C J, was of opinion that the claim based upon the contract, that is, upon a breach of the contract, was outside the scope of section 225 of the Madras Local Boards Act In reaching that decision, Beasley, C J, relied upon a decision of Venkataramana Rao, J, in C. R P. No. 1913 of 1934

Varadachariar, J, himself, who delivered the judgment in *Athimannil Muhammad* v. *Malabar District Board*[1], held in *Sivasankaram* v. *Taluk Board, Penukonda*[3]:

"The provision for notice in section 225 as well as the enactment of a shorter period of limitation are co-extensive except as regards suits for immoveable property There is always a distinction

1. (1934) 68 M L J 125: I.L.R. 58 Mad 746.
2. A I R 1938 Mad 239.
3. A I R 1936 Mad. 945

between the cases in which notice is necessary under section 225 and the cases in which notice is not necessary Where on the allegations in the plaint, the suits do not arise out of anything done by the Board in the discharge of a statutory duty, the suits are maintainable without issue of notice and are not barred by limitation under the special provisions of section 225."

In that case, the claim was for re-imbursement under an arrangement agreed to by the Taluk Board of Penukonda to pay the plaintiff the expenses incurred by him in certain contemplated proceedings The claim was on the basis of a breach of the contract.

It may be recalled that in *Athimannil Muhammad* v. *Malabar District Board*[1], it was a statutory right that the President exercised—a statutory liability that he discharged in entering into a contract of lease for the collection of tolls. The contract, Varadachariar, J , had to consider in *Sivasankaram* v. *Taluk Board, Penukonda*[2], was obviously not such a contract , nor is the contract, Ex. P-1 we have to consider in these proceedings such a contract True under Schedule V, rule 1 (A) (*h*) of the Local Boards Act, the President had a right to maintain dispensaries. But, in the maintenance of dispensaries, if he chose to employ a medical officer and chose to enter into a contract with him it might be ultimately to discharge his liability and exercise the right conferred upon the President by clause (*h*) of rule 1 (A) of Schedule V But such a contract was only incidental to the discharge of that liability and the exercise of that right by the President. The contract itself was not entered into in the exercise of any specific direction to that effect in the statute In *District Local Board, Poona* v *Vishnu Raghoba*[3], Patkar, J., pointed out with reference to a similar contract that " the performance of the contract is only incidental to the statutory powers of the Local Board " That, it seems to me, is the real distinction. Where the contract is entered into in the direct exercise of a statutory power by the President it would come within the scope of section 225. That was what was really decided in *Athimannil Muhammad* v. *Malabar District Board*[1]. But where the contract is only incidental to the exercise of a statutory power, the claim based upon such a contract will not be hit by the special statutory restrictions embodied in section 225 of the Local Boards Act That was really the basis on which *Sivasankaram* v. *Taluk Board, Penukonda*[2] and *Padmanabhuni Narasimhadas* v. *District Board, Kistna*[4], were decided and it was on analogous principles that *District Board, Poona* v. *Vishnu Raghoba*[3], was decided. It is unnecessary to go further back and refer to *Municipal Council, Kumbakonam* v *Veeraperumal Padayachi*[5] or *Mayandi* v. *McQuhae*[6].

The learned District Judge referred to *Ivaturi Veera Subramaniam* v *President, District Board, Narasapur*[7], but that did not deal with a claim based upon any contract. It was a fatal accident that was complained of and that constituted the basis of the claim. The contention of the learned Advocate for the appellant that the learned District Judge misconstrued the scope of *Athimannil Muhammad* v *Malabar District Board*[1] is well-founded. The learned District Judge's attention does not appear to have been drawn to *Sivasankaram* v. *Taluk Board, Penukonda*[2].

I reverse the finding of the learned District Judge and also that of the learned District Munsiff on the question of limitation. The decree of the lower appellate Court is set aside and the appeal is remanded for disposal afresh. The other questions for determination will have to be dealt with.

The learned advocate for the respondent pointed out that clause 13 of Ex. P-1 barred by itself a suit where the final decision had been given on the questions at issue between the parties, that is, the plaintiff and the first defendant, by the Government. Whether that contention is well-founded or not will also be one of the points for the lower appellate Court to decide.

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1 (1934) 68 M L J 125 : 58 Mad. 746.
2. A I R 1936 Mad 945
3. (1932) I L R 57 Bom. 67
4. A.I.R. 1938 Mad 239
5. (1914) 28 M L J 147
6 (1878) I L R 2 Mad 124.
7. A I R 1941 Mad. 733

The second appeal is allowed and the appeal is remanded to the lower appellate Court for disposal in the light of the observations made above. Costs in this appeal will abide the result and will be costs in the cause.

The court-fee paid on the memorandum of the second appeal will be refunded.

C. M. P. No. 2093 *of* 1949.—This is an application to admit additional evidence in the second appeal. It does not, however, arise. The appellant, if so advised, may apply to similar effect when the appeal comes on for hearing afresh before the lower appellate Court.

The petition is dismissed.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

H. M. Muhammad Ibrahim .. *Appellant**

v.

M. R. Abdul Hafeez Sahib .. *Respondent.*

Lunacy Act (IV of 1912), *section* 62—*Application for directing judicial inquisition—Permanent residence of lunatic within the jurisdiction of a District Court—Removal of lunatic out of jurisdiction of that District Court—That District Court does not cease to have jurisdiction.*

In view of the interpretation of the word 'residing' occurring in section 62 of the Act placed upon it by a number of decisions it follows that an alleged lunatic has his permanent residence where his parental home exists and where his family permanently resides, and the District Court having jurisdiction over that place can entertain an application for directing judicial inquisition under section 62 of the Lunacy Act. The removal of the lunatic whether by legal means or otherwise to the Mysore State and the residence of the alleged lunatic there might constitute temporary residence, but that would not put an end to the legal residence which the alleged lunatic already possessed and the District Court concerned would not cease to have jurisdiction over the matter.

Appeal under clause 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Horwill, dated 30th January, 1948, and passed in A. A. O. No. 38 of 1947, preferred against the order of the District Court of West Tanjore at Tanjore in O. P. No. 98 of 1946.

G. R. Jagadisan for Appellant.

T. Venkatadri and *V. Krishnaswami* for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J.—The only question that arises for consideration in this appeal is whether the District Judge of West Tanjore had or had not jurisdiction to entertain an application under section 62 of the Lunacy Act for directing a judicial inquisition regarding the lunacy of an idiot, Muhammad Ismail by name, aged 22 on the date of the petition. The petition was dismissed *in limine* by the District Judge on the ground that he had no jurisdiction to entertain it and that it would be open to the petitioner to renew the application if and when the idiot returned to the jurisdiction of that Court. According to the learned Judge the alleged idiot was a permanent resident in Mysore state and therefore, he had no jurisdiction to direct a judicial inquisition regarding the lunacy of the idiot. This order of the learned District Judge was confirmed on appeal by Horwill, J. The learned Judge was also of the same opinion as the learned District Judge for the reason that, as the alleged lunatic was living for three years with the respondent who was a permanent resident of Mysore State it followed that the alleged lunatic also was a permanent resident of Mysore state and that therefore, he was not subject to the jurisdiction of the District Court of West Tanjore.

* L.P.A. No. 10 of 1948. 24th March, 1949.

The petition under section 62 of the Lunacy Act was filed by the father of the alleged lunatic and impleaded as party to that petition the respondent who was appointed the property guardian for the A schedule properties under a settlement deed of May 1936 executed by one Jainambi, maternal grandmother of the alleged lunatic whereunder the property was settled upon the alleged lunatic. Besides this A schedule property Jainambi left also B schedule property to which the alleged lunatic succeeded as her heir. The respondent according to the allegations in the petition was in possession and management of the A schedule property and was also attempting to alienate the B schedule properties after kidnapping the lunatic from Tanjore, sometime in January 1944, and removing him to Mysore State where the respondent was residing The petitioner seems to have taken the matter to the police to recover the custody of the boy but was unsuccessful Notwithstanding the request of the petitioner the respondent refused to send back the boy to his father and as the properties were being mismanaged, the father filed the application under section 62 of the Indian Lunacy Act for removing the respondent from the guardianship in respect of the A schedule properties, for appointing the petitioner as the guardian of the person and property of the alleged lunatic and also for recovery of the custody of the idiot

Under section 3 (5) of the Lunacy Act, the word "lunatic" is defined as meaning an idiot or a person of unsound mind Therefore for purposes of the Act, an idiot is also a lunatic The jurisdiction of the Courts to entertain proceedings for judicial inquisition as to lunacy is defined in part III of the Act Chapter IV relates to proceedings in lunacy in presidency Towns and Chapter V relates to proceedings in Lunacy outside the presidency towns In the presidency towns of Calcutta, Madras and Bombay the High Courts alone have jurisdiction, *vide* section 37 of the Act. Under section 38 of the Act, the High Court has jurisdiction over persons who are subject to the jurisdiction of the Court and who are alleged to be lunatics and to entertain an application for directing an inquisition as to the alleged lunacy of the person concerned Section 43 of the Act seems to contemplate that even if a person is outside the jurisdiction of the High Court and is within the jurisdiction of the District Court, if otherwise the person was subject to the jurisdiction of the High Court, the High Court alone would have jurisdiction to entertain proceedings but power is given under that section to direct inquisition to be made by the District Court within whose local jurisdiction the alleged lunatic may be residing. The jurisdiction outside the presidency towns is conferred upon District Courts and it depends upon the residence of the alleged lunatic If the person is residing within the jurisdiction of the District Court that District Court would have jurisdiction but this jurisdiction is subject, however, to the exclusive jurisdiction of the High Court if the said person happens to be also subject to the jurisdiction of the High Court. This question was considered by the Calcutta High Court in *Amlabala Chowdhurani* v. *Dhirendra Nath Saha*[1], in which the question was elaborately examined by that Court and the conclusion reached was that if a person was subject to the jurisdiction of the High Court, the District Court in whose jurisdiction the alleged lunatic was for the time being residing would have no jurisdiction to entertain proceedings notwithstanding the personal residence of the alleged lunatic.

In this case we do not have the complication of the conflict of jurisdiction between the High Court and that of the District Court. The only question is whether on the allegations in the affidavit filed in support of the petition the District Court of Tanjore has jurisdiction to entertain the application The word "residence" is contained not only in section 62 of the Act, but also in other acts In the Civil Procedure Code, section 20 clause (*b*) the place of the residence of the defendant is made also the basis of the jurisdiction of the Court to entertain the suit among other grounds but there is an explanation added to that section which indicates that a person may have at the same time more than one residence.

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1. (1920) I.L.R. 48 Cal. 577 (F B).

In clause 12 of the Letters Patent the word "dwell" occurs and is given the same meaning as "residence" occurring in the Civil Procedure Code. A person may have more than one residence. He may have a permanent residence at a place where he has got a fixed abode and where his family ordinarily resides and he may for the purpose of his business or for other reasons go to another place and personally reside for a time. Even such a place where he personally resides may be taken as another residence. In *Srinivasamurthi* v. *Venkatavarada Iyengar*[1], the Privy Council had to construe the word "dwell" occurring in clause 12 of the Letters Patent. In that case a person who was a resident of Mysore and was domiciled in that State some months previous to the institution of the suit left his house and hired a house at Madras where he lived with his wife and family and apprenticed himself for a year to a vakil of the High Court with a view to getting himself enrolled as a vakil of this Court. It was held that such a living constituted 'dwelling' within the meaning of clause 12 of the Letters Patent to give jurisdiction to the High Court to entertain a suit against such a person. Dealing with this question their Lordships of the Judicial Committee observed at page 267 as follows

> The question of jurisdiction is too plain for argument Both Courts held that the cause of action arose partly within the jurisdiction of the High Court, and although the Judge of first instance thought himself bound by a decision which had really no application to the case to hold (contrary to his own opinion) that the defendant was not 'dwelling' within the jurisdiction, the High Court not unnaturally thought that inasmuch as he had taken up his abode with his wife and family in a hired house in Madras, meaning to remain there several months, and was actually remaining there when the suit was instituted, he could not be heard to say that he was not 'dwelling' within the jurisdiction of the High Court"

The Calcutta High Court had to consider an identical question under the Lunacy Act, section 62 in *Radharani* v *Nibaran Chandra*[2]. In that case the alleged lunatic was residing in the district of Birbhum but was taken to the mental hospital at Ranchi for treatment Ranchi was outside the jurisdiction of Birbhum District Court and the contention that was raised was that Birbhum District Court had no jurisdiction to deal with an application for judicial inquisition as to the lunacy of the person concerned for the reason that he was at the moment living in the mental hospital at Ranchi The objection was overruled and it was pointed out that the alleged lunatic had properties in the district of Birbhum, had a dwelling and was a permanent resident of that place But the mere fact that he had another residence at Ranchi, at the time, would not take away the jurisdiction of Birbhum District Court to entertain proceedings A person according to the learned Judges may have more than one residence and proceedings under section 62 of the Lunacy Act could be entertained by any of the Courts in whose jurisdiction the person has his residence. In *Amlabala Chowdhurani* v *Dhirendra Nath Saha*[3], already referred to, Mookherjee, Acting C J, who delivered the judgment of the Court also considered the legal import of the word 'reside' used in the Lunacy Act and it was pointed out by the learned Judge that a man may have a legal residence as well as a personal residence The legal residence would be the place where the man has a permanent habitation and where his family ordinarily resides while the personal habitation is a place where the person lives for some purposes temporarily. Both the Courts under whose jurisdiction a man has a personal residence and a legal residence have jurisdiction to entertain proceedings under the Lunacy Act but in that case as there was a conflict of jurisdiction between the District Court and the High Court by reason of the provisions of the Indian Lunacy Act in sections 37, 38 and 43, the jurisdiction of the High Court prevailed over the jurisdiction of the District Court There are similar observations in the decision in *Kamala Bala Debi* v. *Emperor*[4]

In view of the interpretation of the word "residing" occurring in section 62 placed by the decisions above referred to, it follows that in the present case the alleged lunatic has his permanent residence where his parental home exists that is,

1 (1911) 21 M L J 669 · L R 38 I.A 129 I L R 34 Mad 257 (P C).
2. A I R 1929 Cal. 512.
3 (1920) I L R 48 Cal 577 (F.B).
4. A.I R 1931 Cal. 711.

in Tanjore District and where his family permanently resides. The removal of the alleged lunatic by the respondent in January, 1944, whether by legal means or otherwise to the Mysore State and the residence of the alleged lunatic there might constitute temporary residence. As was said in *Amlabala Chowdhurani* v. *Dhirendra Nath Saha*[1], mere bodily presence would be sufficient to constitute residence even though the alleged lunatic is incapable of exercising any intelligence in the matter; but that would not put an end to the legal residence which the alleged lunatic had already possessed in Tanjore District and the District Court, Tanjore, would not cease to have jurisdiction over the matter

Under the Act, if the lunacy of the person is disputed there should be first a public judicial inquisition under section 62 and the subsequent sections of the Act and then if the Court comes to the conclusion after such inquisition that a proper case is made out it would appoint a personal and property guardian for the lunatic. This procedure is laid down in section 67 and the subsequent sections of the Act. The District Judge, therefore, was not justified in our opinion, in dismissing the application on the ground that he had no jurisdiction to entertain the proceedings under the Act. We are clearly of opinion that he had jurisdiction to entertain the application and he should have proceeded with the enquiry under the Act. We, therefore, allow the appeal and set aside the order of this Court in C M A. No. 58 of 1947 and the order of the learned District Judge in O P No. 98 of 1946 and remand the application for disposal according to law in the light of the observations contained in this judgment. The appellant is entitled to his costs in this Court in the Letters Patent Appeal and C. M A from the respondent and costs of the application will be provided for by the learned District Judge in the final order on the application

V.P.S. — *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE BALAKRISHNA AYYAR.

Karuppayee Ammal and others . . *Appellants**

v.

Periasami Goundan . *Respondent*

Court-Fees Act (VII of 1870), section 7 (iv) (c) Proviso (Madras), Article 17-A (1) of Schedule II—Declaratory suit—Injunction prayed for as further relief—Reliefs not founded on the same facts—Court-fee payable.

A suit was filed for declaration that the plaintiff was entitled to the suit properties and for a permanent injunction restraining the defendants from interfering with the plaintiff's possession. The plaintiff paid a court-fee of Rs 100 under Article 17-A (1) of Schedule II of the Court-Fees Act for the relief of declaration of title valuing the properties at Rs 5,200 and an *ad valorem* court-fee on Rs 50-10-0 being half of ten times the kist for the relief of injunction On the question of the correctness of court-fee paid,

Held, that the court-fees paid by the plaintiff was correct On the facts as alleged in the plaint, which must be assumed to be correct for the purpose of determining the court-fee, it cannot be said that the relief of injunction is consequential on the relief of declaration because both the reliefs are not founded on the same set of facts

Karuppanna Thevar v *Angammal*, (1926) 51 M L J 67, referred to.

Appeal against the decree and judgment of the Court of the Subordinate Judge of Coimbatore, dated 10th August, 1945 and made in O S. No. 224 of 1943.

T. V. Muthukrishna Aiyar for *S Ramachandra Aiyar* for Appellants

R. Viswanatha Aiyar for *R Desikan* for Respondent

The Government Pleader (*K. Kuttikrishna Menon*) on behalf of the Government.

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1. (1920) I.L R. 48 Cal. 577

* Appeal No. 525 of 1945. 1st March, 1949.

The Order of the Court was pronounced by

The Chief Justice—Objection was taken to the correctness of the court-fee paid by the plaintiff on his plaint. The suit was for a declaration that the plaintiff was entitled to the suit properties and for a permanent injunction restraining the defendants from interfering with the plaintiff's possession. The plaintiff paid a court-fee of Rs. 100 under Article 17-A (1) of Schedule II to the Court-Fees Act for the relief of declaration of title valuing the properties at Rs. 5,200 and an *ad valorem* court-fee on Rs. 50-10-0 being half of ten times the kist for the relief of injunction. He therefore treated the relief of injunction as separate and distinct from the relief of declaration. It is said that the suit must have been valued as a suit falling under section 7 (iv) (*c*) read with the Madras proviso, that is a suit to obtain a declaratory decree or order where consequential relief is prayed,

"where the relief sought is with reference to immoveable property in which case valuation shall not be less than half the value of the immoveable property calculated in the manner provided for by paragraph (v) of this section."

The question therefore is whether the injunction prayed for by the plaintiff can be treated as a consequential relief within the meaning of section 7 (iv)(*c*) of the Act. It is difficult to lay down a general rule to find out when a relief can be said to be consequential on another relief. But Venkatasubba Rao, J., in *Karuppanna Thevar* v. *Angammal*[1] suggested a test which appears to us to be useful. The learned Judge said:

"In order to determine whether the first relief is consequential upon the second, let me see how the position stands. Supposing the first relief is not granted, does it follow that the plaintiff cannot obtain the second relief? . . It is quite conceivable of course that the plaint may be so drafted that both the reliefs may be claimed on the strength of the same set of facts. In that case the second relief may properly be said to be consequential upon the first. In the present case, however, the facts are entirely different and as I have shown the two reliefs asked for are independent of each other."

In the present case, the allegations in the plaint and in particular, in paragraph 10, make it quite clear that so far as the declaratory relief is concerned, the cause of action arose in November, 1943, when the defendants began to assert their title to the suit properties, whereas the cause of action for the relief of injunction arose on and from 10th December, 1943, that is, a few days before the filing of the plaint when the defendants attempted to trespass into the lands—*vide* also paragraph 9. If the defendants had not threatened trespass, the plaintiff would have been quite content to obtain the declaratory relief alone. Likewise, if the defendants had not asserted any adverse title but had merely attempted to trespass, the plaintiff would have been content to claim a bare injunction.

On the facts as alleged in the plaint which must be assumed to be correct for the purpose of determining the court-fee, it cannot be said that the relief of injunction is consequential on the relief of declaration because both the reliefs are not founded on the same set of facts. We therefore overrule the objection and hold that the court-fee paid by the plaintiff is correct.

When a similar objection was taken in the appeal preferred by the defendants, they paid the higher court-fee as demanded. As we have now held that the proper court-fee is that paid in the Court below, the appellants will be entitled to a certificate for refund of the court-fee paid in excess of the proper court-fee.

K.C. *Court-fee paid held proper.*

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1. (1926) 51 M.L.J. 67.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD MACDERMOTT, LORD REID, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Sri Raja Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Garu and others .. *Appellants**

v

Sri Raja Sobhanadri Apparao Bahadur Zamindar Garu and another . *Respondents*

Indemnity—Sale of minor's property by guardian—Close relative of minor undertaking to indemnify purchaser from all loss, if alienation is disputed by minor on attaining majority—Suit by minor more than three years after attaining majority for possession on the ground of the sale being not binding on him and the sale deed being void as a fraud on the registration law—Though claim to set aside sale found out of time, sale deed found to be a nullity and not an obstacle to suit for possession—Recovery of possession by the plaintiff—Right of the purchaser to recover from surety on the indemnity bond

As a purchaser was unwilling to purchase the property of a minor from his guardian, a close relative of the minor executed an indemnity bond in favour of the purchaser in the following terms. "You (purchaser) may pay the said amount (consideration) to the said guardian for the said minor and get a sale deed executed We (I) hereby agree that, if soon after the minor ceases to be a minor and becomes a major, a ratification-khararnama (agreement) is not caused to be executed and delivered to you and if, for any reason, without consenting to the said sale the minor raises disputes and loss is sustained by you thereby . . . . We ourselves (I myself) shall . . refund the sum (consideration amount) and that if as regards past profits . . . the minor should obtain decree we ourselves (I myself) shall pay the decree amount relating to the said profits" The minor filed a suit more than three years after attaining majority to recover possession of the property sold together with mesne profits on the ground that the sale was not binding on him for want of legal necessity and it was also pleaded that the sale deed was inoperative as its registration amounted to fraud on the law relating to registration of documents It was ultimately found on appeal to the Privy Council that though the minor's suit to set aside the claim would be barred, as there was a device to defeat the Registration Act the sale was a nullity and as there was no effective registration of the conveyance in the eye of the law, the sale was no obstacle to his suit for possession In pursuance of the order of the Board the son recovered possession of the properties sold from the purchaser together with mesne profits The purchaser filed a suit to enforce the indemnity bond.

Held, the indemnity bond was directed to the risk incurred by anyone purchasing the property of a Hindu minor from his guardian and not to the risk of loss occasioned by failure to register the sale deed, a loss arising, not from any action of the minor, but from the negligence of the purchaser himself The whole tenor of the bond showed that it was directed solely to indemnifying the purchaser against the risk involved in buying from the guardian and was not intended to be a general guarantee of title The loss suffered by the purchaser was not covered by the indemnity bond

S. P Khambatta, K.C and *J Chinna Durai* for Appellants.

C S Rewcastle, K.C and *P. V. Subba Rao* for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT —This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated the 17th September, 1943, which varied a judgment and decree of the Court of the Subordinate Judge of Nellore, dated the 31st October, 1940

The first question for determination is whether under a contract of indemnity dated the 25th August, 1910, the appellants are liable to indemnify the first respondent for loss sustained by him in connection with a certain purchase In the event of the appellants being held not liable the first respondent desires to contend that the second respondent is liable to make good to him the whole or part of his loss.

The relevant facts are as follows :—

One Inuganti Venkata Rama Rao, the son of the second respondent (who will be referred to hereafter as "the son"), obtained from his maternal grandfather, by way of gift, a one-fourth share in the Mokhasa village of Somavaram. During his minority, the second respondent (who will be referred to generally

* 21st March, 1949

as "the vendor") as his guardian, agreed to sell the said property to the father of the first respondent for Rs. 27,302. The purchaser was unwilling to purchase the property from the vendor as guardian of a minor without an indemnity. Accordingly the Maharajah of Venkatagiri, the grandfather of the appellants, who was a close relation of the son, undertook to indemnify the purchaser from all loss he might suffer if the son, after attaining majority, should dispute the alienation. Such indemnity was contained in a written bond, dated the 25th August, 1910. The question raised in the appeal depends in the main on the construction of such bond, the precise terms of which will be discussed later.

The term "the purchaser" in this judgment will include the father of the first respondent and his successors in interest at the relevant dates and the term "the surety" will include the Maharajah of Venkatagiri and his successors at the relevant dates.

On the 14th October, 1910, the vendor executed a sale deed conveying the said one-fourth share in the village of Somavaram to the purchaser who paid the purchase money of Rs. 27,302. One square yard of vacant land in the village of Vundur, which is within the sub-registration District of Samalkot, was included in the sale deed with a view to have the document registered at Samalkot, which is near the place of residence of the vendor, instead of at Tiruvur where the Somavaram property was situated. The document was registered at Samalkot on the 14th February, 1911.

In 1922, which was some years after the death of the Maharajah of Venkatagiri and more than three years after the son had attained his majority, the son instituted a suit in the Court of the Subordinate Judge of Bezwada against the purchaser (defendants 1 and 2) He sought to recover possession of the one-fourth share in the Mokhasa village of Somavaram together with mesne profits on the ground that the said alienation by the vendor was not binding on him for want of legal necessity. He also pleaded that the sale deed was void and inoperative as the registration of the document at Samalkot was a fraud on the law relating to registration of the documents because the plot of one square yard of land which was included in the sale deed was not intended to be conveyed but was included solely with the object of giving jurisdiction to the sub-registrar of Samalkot to register the document at Samalkot. The vendor was also impleaded in the suit as the fourth defendant and the surety was impleaded as the third defendant.

The said suit was tried by the Subordinate Judge of Bezwada who on the 20th September, 1924, held that the sale was not for legal necessity and was not binding on the son, but as he had failed to institute the suit within three years from the date of his attaining majority he was not entitled to succeed on that ground. The learned Judge, however, decreed the suit on the alternative ground that the sale deed was void and inoperative as it was not registered according to law and the purchaser acquired no title to the property

The purchaser appealed to the High Court at Madras against the said decision of the Subordinate Judge On the 20th August, 1930, the High Court reversed the decision of the Subordinate Judge and held that the registration of the sale deed was valid, and accordingly dismissed the suit The son appealed to His Majesty in Council, and on the 13th January, 1936, the Board reversed the decision of the High Court, and restored the decree of the Subordinate Judge with a slight modification as to the amount of mesne profits. It was noted in the judgment of the Board that it was common ground between the parties that if the conveyance of the 14th October, 1910, was effective the suit must fail; for if it were necessary for the son to ask that the conveyance should be set aside as not binding on him, his suit was out of time; but if it could be regarded as a nullity there would be no case of limitation. The Board held that there was no intention either to sell or buy the yard of the land in Samalkot district, and its inclusion in the sale was a mere device to evade the Registration Act. Consequently, there was no effective registration of the conveyance which was no obstacle to the son's suit for possession.

In pursuance of the order of the Board, the son, in December, 1937, recovered possession of the properties sold from the purchaser together with mesne profits and costs. On the 14th February, 1938, satisfaction of the decree was entered.

On the 30th January, 1939, the purchaser (the present first respondent), instituted the present suit in the Court of the Subordinate Judge, Nellore, to enforce the indemnity bond, and to recover a sum of Rs. 53,737-5-10 from the surety (the present appellants) as the representatives of the Maharaja of Venkatagiri. He impleaded the present appellants as defendants 1 to 3 and the vendor (present respondent No. 2) as defendant 4. In the alternative, he claimed to recover the said sum from the vendor personally and from his family properties His claim was made up of the following items —Rs. 27,302, the purchase money, with Rs. 1,774-10-1 interest thereon, Rs 11,400, mesne profits paid by him, Rs. 6,884, the costs paid by him in the previous litigation and Rs. 6,376 the costs incurred by him in that litigation and certain sums as interest on these items

On the 31st October, 1941, the Subordinate Judge delivered judgment. He held that the indemnity bond was true and valid, that the defendants 1 to 3 (the surety) were not liable to refund the sale consideration of Rs 27,302 as the conditions of the bond as to delivery of possession had not been fulfilled, but were liable to pay to the plaintiff the *mesne* profits and costs paid by him to the son, that the suit was not barred by limitation, and that the fourth defendant (the vendor) was liable to pay back the sale money which had been paid to him by the plaintiff's father. In the result, he gave a decree for a sum of Rs 24,660-11-9 against defendants 1 to 3 (appellants) and for Rs 29,076-10-1 against the fourth defendant (second respondent). A decreé dated the 31st October, 1940, was accordingly passed.

Against the said decree of the Subordinate Judge defendants 1 to 3 appealed to the High Court at Madras by Appeal No. 260 of 1941, disputing their liability for the amount decreed against them. The plaintiff filed a memorandum of cross-objection to the decree in respect of the claim disallowed as against defendants 1 to 3. The fourth defendant filed Appeal No 267 of 1941 disputing his liability for the amount decreed against him The appeals and the memorandum of cross-objections were heard together by the High Court (Krishnaswami Ayyangar and Horwill, JJ.) and on the 17th September, 1943, Horwill, J , delivered the judgment of the Court in all the matters. The learned Judges held, disagreeing with the Subordinate Judge, that defendants 1 to 3 were liable for the sale money as well as for the sum for which the Subordinate Judge had held them liable and passed a decree against them for the full amount claimed. They held that the plaintiff had fulfilled the terms of the indemnity bond, and accordingly they dismissed the appeal of the defendants 1 to 3 (appellants) and allowed the cross-objections of the plaintiff (the first respondent). In the appeal preferred by the fourth defendant (second respondent) they held that the fourth defendant was the guardian of the son at the time the properties were sold, that the money was received by him and that as he did not prove that it was applied for the benefit of the son, he was liable to refund the amount to the plaintiff under section 65 of the Indian Contract Act; and that there was no proof that the plaintiff's father committed any fraud on the Registration Law as all the parties acted in good faith and in the honest belief, as the law then stood, that there was no harm in including one square yard of site with a view to facilitate the registration of the document at Samalkot They held further that the claim against the fourth defendant (the second respondent) was not barred by limitation, but as such claim was only in the alternative and as the claim for the full amount was allowed against the appellants the High Court allowed the appeal of the fourth defendant and dismissed the suit as against him.

One decree in Appeals Nos. 260 and 267 of 1941 was passed on the 17th September, 1943, by which by clause 1 the present appellants were ordered to pay to the present first respondent the sum of Rs. 53,737-5-10 with interest and by clause 3 to pay to him certain costs; and by clause 2 the suit was dismissed as against

the present respondent No. 2, who by clause 4 was ordered to pay the costs of present respondent No 1.

The rights of the first respondent as purchaser against the appellants as sureties depend in the first place upon the construction of the indemnity bond of the 25th August, 1910. The bond was expressed to be made by the Maharaja of Venkatagiri in favour of the father of the first respondent and was in the following terms

"As regards lands house-sites and tiled houses pertaining to the one-fourth share in Somavaram Mokhasa village, which were made to pass, under a settlement deed, to minor Inuganti Venkatarama Row Garu, daughter's son of Rajah Chelikani Venkatagopala Rao Garu, one of the shares of Somavaram Sarwa Mokhasa (village), attached to Tiruvur Sub-Registration District, Kistna District the price settled for your purchasing the same, as mentioned in the said settlement deed, from the minor's natural-father and guardian Inuganti Sooryaprakasa Row Garu, for the benefit of the minor, is Rs 27,302-0-0, in words twenty-seven thousand three hundred and two rupees You may pay the said amount to the said guardian, Inuganti Sooryaprakasa Row Garu, for the said minor and get a sale deed executed

We (I) hereby agree that, if, soon after the minor ceases to be a minor and becomes a major, a ratification Kharainama (agreement) is not caused to be executed and delivered to you and if, for any reason, without consenting to the said sale, the minor Inuganti Venkatarama Row Garu raises disputes, and loss is sustained by you thereby and if you deliver possession to us (me) of the share in the said Somavara village, and the tiled houses, house sites and all which shall have been sold to you, we ourselves (I myself) shall, as soon as the same are passed to us (me) without having anything to do with the minor or his natural father and guardian, Inuganti Sooryaprakasa Row Garu and without raising any objection, refund the sum of Rs 27,302-0-0, in words, twenty-seven thousand three hundred and two rupees, which you shall have given towards the sale consideration, and that, if, as regards the past profits for the said share, the minor should file a suit against you and obtain a decree, we ourselves (I myself) shall, after you transfer to us (me) all the accounts that you may obtain in connection with the said past profits for taking steps against the said minor, in respect of the losses that may be sustained by you thereby, pay the decree amount relating to the said past profits This is the indemnity bond caused to be written by Ammanamanchi Venkata Narasimhayya, in Venkatagiri, and delivered with our (my) consent"

The risks incurred by anyone purchasing the property of a Hindu minor from his guardian are well known to those conversant with Hindu Law. The minor son at any time within three years after attaining his majority may repudiate the sale on the ground that it was not for necessity or for the benefit of the estate and if he does so the burden of proving that the sale was justified, or that the purchaser made all proper enquiries, lies upon the purchaser, who may find such burden difficult to discharge. The first contention of the appellants is that the indemnity bond was directed to this risk, and not to the risk of loss occasioned by failure to register the sale deed, a loss arising, not from any action of the minor, but from the negligence of the purchaser himself Their Lordships think that this argument must prevail and that the whole tenor of the bond shows that it was directed solely to indemnifying the purchaser against the risk involved in buying from the guardian of a minor and was not intended to be a general guarantee of title The bond recites that the proposed sale is from the minor's father and guardian at the price specified and states

"You may pay the said amount to the said guardian for the said minor and get a sale deed executed"

This stipulation appears to their Lordships to be the foundation of the obligation undertaken by the surety and they think that the words "get a sale deed executed" postulate an effective sale deed conferring a title which could be transferred to the surety, and not one of no force through lack of registration. Again, the obligation of the bond is conditional, amongst other things, on the minor son, soon after becoming a major, not causing a ratification agreement to be executed and delivered to the surety. This points to the transaction, the subject of indemnity, being one capable of ratification by the minor. The minor on attaining majority could ratify a sale deed made by his guardian on his behalf, but he could not ratify a sale deed inoperative through lack of registration. He might, no doubt, if so minded, execute a fresh sale deed but that would not be ratification There is nothing in the bond to suggest that it covers loss arising through failure of the purchaser to register the sale deed according to law

As, in their Lordships' opinion, the loss suffered by the first respondent is not covered by the indemnity bond, it is not necessary to determine the validity of further defences raised by the appellants, namely, that their liability under the bond was discharged by alteration in the property to be included in the sale by the addition of the yard of land in Samalkot District, and also by the failure of the purchaser to effect proper registration of the sale deed, an argument which the appellants supported by reference to the case of *Wulff* v. *Jay*[1] Nor need their Lordships consider the further argument that there was failure to comply with the conditions of the bond relating to handing over possession of the property sold to the surety which discharged him from liability to repay the purchase money as held by the Subordinate Judge.

In the opinion of their Lordships therefore the appeal of the appellants must succeed, and the question then arises whether respondent No. 1 can claim to recover from respondent No. 2 or his representative the whole or any part of the loss sustained by him In their Lordships' view no question between respondent No. 1 and respondent No 2 is before the Board in this appeal As already noted there were two appeals to the High Court, No 260 by the appellants and No. 267 by the second respondent. The High Court passed only one decree in both appeals, and had there been two separate decrees it is clear that respondent No. 1 would have had to appeal against the decree in Appeal No 267, in which he alone was directly concerned But the composite decree passed by the High Court is easily divisible It is apparent from the terms of the decree that clauses 1 and 3 were passed in Appeal No 260 and clauses 2 and 4 in Appeal No 267 The rights of the parties cannot be affected by the act of the High Court in including a single decree passed in two separate appeals In their petition dated the 6th March, 1944, to the High Court for leave to appeal to the Privy Council the appellants sought leave to appeal only against the decree in Appeal No. 260, and the order of the Court granting leave was confined to that appeal Nor have the appellants raised any claim against respondent No 2 In these circumstances, respondent No. 1 ought to have presented a petition to His Majesty praying for leave to appeal against that part of the decree of the High Court passed in Appeal No 267 which dismissed the suit of respondent No 1 against respondent No. 2 That course is not now open to respondent No 1 for two reasons In the first place respondent No. 2 has died, so their Lordships are informed since the hearing of the appeal commenced , and in the second place the jurisdiction of the Board to hear an appeal by respondent No. 1 against respondent No. 2 or his representative at the present time would seem to be taken away by the Federal Court (Enlargement of Jurisdiction) Act, 1947 These matters, however, do not affect the questions arising between the appellants and respondent No 1, and this judgment is confined to those questions Respondent No 1 will be free to take such action as he may be advised against so much of the said decree of the High Court dated the 17th September, 1943, as was granted in Appeal No 267

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, that clauses 1 and 3 of the decree of the High Court dated the 17th September, 1943, be set aside and that the decree of the Subordinate Judge of Nellore, dated the 31st October, 1940, so far as it holds the present appellants liable for a sum of Rs 24,660-11-9 and interest be also set aside and that the suit of the first respondent against the appellants be dismissed The first respondent must pay the costs of the appellants throughout

V S *Appeal allowed.*

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1 (1872) L R 7 Q B 756.

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Nagpur.[1])

PRESENT:—LORD UTHWATT, LORD MORTON OF HENRYTON, LORD REID, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Seth Badridas Daga and another .. *Appellants**

v.

The Commissioner of Income-tax, Central and United Provinces, Lucknow . *Respondent.*

Income-tax Act (XI of 1922 as amended in 1939), sections 4 (1) (c) and second proviso and 23 (5)—"Resident but not ordinarily resident" and "non-resident" partners of resident firm—If bound to include in their total income the whole of their shares of the firm's income

Where the total income of a resident and registered firm which carried on business both within British India and elsewhere has been computed by including in it income, profits and gains accruing or arising to it without British India in accordance with the provisions of section 4 (1) (*b*) of Income-tax Act and is therefore apportioned among its partners for inclusion in their individual assessments under section 23 (5) (*a*) of the Act a "resident but not ordinarily resident" partner of a resident firm is not entitled to treat his proportionate share of the profits so included as profits accruing or arising to him outside British India so as to entitle him to the benefit of the second proviso to section 4 (1) of the Act and a "non-resident" partner of the same firm is not entitled to exclude from his total income such proportionate share of the profits of the said firm which accrue or arise to it without British India under section 4 (1) (*c*) of the Act.

Judgment of the High Court reported in I L R 1945 Nag. 328 affirmed.

Sir Roland Burrows, K C and *R P. Hills* for Appellants.

Millard Tucker, K.C. and *B. Sen* for Respondent

Their Lordships' Judgment was delivered by

LORD REID—The appellants in this case were, during the material time, partners of the firm of Rai Bahadur Bansilal Abirchand which carried on business both within British India and elsewhere Each appellant had a quarter share in the firm. The firm was a registered firm resident in British India within the meaning of the Indian Income-tax Act The first appellant was not ordinarily resident and the second appellant was not resident in British India within the meaning of that Act. A considerable part of the firm's income arose or accrued outside British India and was not brought into or received in British India The question in the present case shortly stated is whether the appellants are bound to include in their total incomes for the purpose of Indian Income-tax the whole of their shares of the firm's income or whether they are entitled to exclude a proportion of those shares corresponding to the proportion of the firm's income which arose or accrued outside British India.

The appellants were assessed to income-tax for the year 1939-40 by the Income-tax Officer, Nagpur, in amounts which included the whole of their shares of the firm's income for the previous year They appealed unsuccessfully to the Appellate Assistant Commissioner of Income-tax, Agra. They then appealed to the Income-tax Appellate Tribunal (Bombay Bench) This appeal was also unsuccessful and the appellants requested the Tribunal to state a case for reference to the High Court. The Tribunal made a joint reference to the High Court of Judicature at Nagpur by stating one case which covered the appeals of both appellants. The questions referred to the High Court were:

"(1) Where the total income of a resident and registered firm of Rai Bahadur Bansilal Abirchand has been computed by including in it income, profits and gains accruing or arising to it without British India in accordance with the provisions of section 4 (1) (*b*) of the Indian Income-tax (Amendment) Act, 1939, and is thereafter apportioned among its partners for inclusion in their individual assessments under section 23 (5) (*a*) of the Act, whether Seth Badridas Daga, who is a 'resident but not ordinarily resident' partner of the resident firm, is entitled to treat his proportionate share of the profits so included as profits accruing or arising to him outside British India so as to entitle him to the benefit of the second proviso to section 4 (1) of the Act?

(2) Where the total income of a resident and registered firm of Rai Bahadur Bansilal Abirchand has been computed by including in it income, profits and gains accruing or arising to it without

* P. C Appeal No. 87 of 1947. 20th December, 1948

1. I.L.R 1945 Nag 328.

British India in accordance with the provisions of section 4 (1) (*b*) of the Indian Income-tax (Amendment) Act, 1939, and is thereafter apportioned among its partners for inclusion in their individual assessments under section 23 (5) (*a*) of the Act, whether Seth Ramnath Daga, who is a 'non resident' partner of the resident firm, is entitled to exclude from his total income such proportionate share of the profits of the said firm which accrue or arise to it without British India, under section 4 (1) (*c*) of the Act?"

On 14th February, 1944, the High Court at Nagpur made an order[1] answering both these questions in the negative. The present appeal is against that order, leave to appeal having been granted by order of the High Court dated 25th October, 1945.

The decision of this case depends on the interpretation of certain sections of the Indian Income-tax Act, including amendments made by the Indian Income-Tax (Amendment) Act, 1939, and earlier amending Acts.

It will be convenient to begin with section 23 which deals with assessment. Some confusion arises from the fact that in the Act the words "assessment" and "assessee" are used in different places with different meanings. Section 2 (2) defines "assessee" as "a person by whom income-tax is payable," but the context in section 23 makes it clear that down at least to the middle of sub-section (5) (*a*) "assess" and "assessment" refer primarily to the computation of the amount of income and "assessee" means primarily a person the amount of whose income is being computed. The section requires the Income-tax Officer to do two things: first to compute or "assess" a person's total income, and then to determine the sum payable as tax Sub-sections (1) to (4) set out alternative methods of computation or "assessment." In the normal case the person whose income is being computed is the person who pays the tax and for that case these sub-sections also provide for the Income-tax Officer taking the second step and determining the sum payable as tax. But the case of a firm is specially dealt with by sub-section (5). This sub-section only comes into operation after the total income of the firm has been computed or "assessed" under one of the earlier sub-sections It draws a distinction between registered and unregistered firms In the case of a registered firm the firm does not itself pay income-tax and therefore the sub-section directs that the sum payable by the firm shall not be determined, but that each partner's share of the firm's income shall be included in the assessment or computation of the total income of that partner. Thereupon the sum payable by that partner as tax is to be determined on the basis of that assessment which includes his share of the firm's income.

It is now necessary to turn to section 4 (1) of the Act, which defines total income. The parts of that sub-section relevant to the decision of this case are:

> "Subject to the provisions of this Act, the total income of any previous year of any person includes all income, profits and gains from whatever source derived which
>
> (*a*) are received or are deemed to be received in British India in such year by or on behalf of such person or . . . .
>
> (*c*) if such person is not resident in British India during such year, accrue or arise or are deemed to accrue or arise to him in British India during such year:
>
> Provided . . that in the case of a person not ordinarily resident in British India, income, profits and gains which accrue or arise to him without British India shall not be so included unless they are derived from a business controlled in or a profession or vocation set up in India or unless they are brought into or received in British India by him during such year"

It was argued for the appellants that the provisions of section 4 limiting the liability of persons not resident or not, ordinarily resident in British India must be applied universally so as to qualify or even override any subsequent provision in the Act dealing with a particular kind of income which is so framed as to exclude this limitation. This argument neglects the opening words of section 4 "Subject to the provisions of this Act," and contradicts the principle that the Act must be read as a whole. In their Lordships' view the question in this case is whether the provisions of the Act which deal with the partnership income can be reconciled with an intention to exclude from the total income of partners not resident or not

1. I.L.R. 1945 Nag 328.

ordinarily resident in British India a part of their share of the firm's income in respect of income accruing to the firm from outside British India.

The second proviso to section 23 (5) (*a*) deals with partners not resident in British India It provides that the share of such a partner shall be assessed on the firm at the rates which would be applicable if it were assessed on him personally, and it makes no provision for any deduction from that share in respect of any part of the partnership profits having arisen outside British India. It is difficult to understand why no reference was made to any such deduction if it was intended that any such deduction should be made If no deduction is intended to be allowed in this case there is no reason to hold that any deduction is permissible in any other case of a partner not resident or not ordinarily resident in British India

If the appellants' contention is correct it would be necessary for the Income-tax Officer not only to determine the total income of each firm as he is directed to do by section 23 but also to determine what part of that income was such that if it were the income of a person not resident or not ordinarily resident in British India it would not be part of his total income within the meaning of the Income-tax Act. Without such a determination it would not be possible to assess the taxable income of a non-resident partner But there is nothing to require the Income-tax Officer to undertake this task

It may be that if those difficulties were overcome the relief sought by the appellants could be worked out satisfactorily in cases where the firm made profits both within and without British India, but great difficulties would be encountered in a case where a firm made profits in British India but incurred losses in its foreign business. It is not at all clear what the taxable income of a non-resident partner would be in such a case if appellants' contention were correct.

These are some of the difficulties which would be encountered if it were held that the operation of section 23 must be modified to meet the appellants' contention. This contention would require much to be written into the section which is not there, would complicate its operation and would lead to practical difficulties. Their Lordships are satisfied that this section cannot be so modified ; it must be taken as it stands. Moreover there are other sections such as section 16 (1) the terms of which are almost equally difficult to reconcile with the appellants' contention Their Lordships therefore hold that this contention is not well founded and that the decision of the High Court at Nagpur was correct.

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellants will pay the costs of the appeal.

V.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

Kuppuswami Asari .. *Appellant**

v.

Manickasari .. *Respondent.*

Hindu Law—Stridhanam property—Rule of succession—Whether affected by Hindu Law of Inheritance (Amendment) Act, II of 1929

The rule of succession to the stridhanam property laid down in the Mitakshara School of Hindu Law has not been in any way altered by the Hindu Law of Inheritence (Amendment) Act, II of 1929

Mahalakshmamma v. *Suryanarayana Sastri*, (1946) 1 M L J. 196 · I L R 1947 Mad 23, followed

Act II of 1929 is expressly limited both in its preamble and in sub-section 2 of section 1 of the Act to succession to the property of a male and it cannot be applied to a case where the question for decision is who are the stridhanam heirs of a Hindu lady

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*L P. A. No. 25 of 1947. 24th March, 1949.

Appeal against the judgment and decree of Lakshmana Rao, J, dated 25th February, 1947, in S A. No 2069 of 1945, on the file of the High Court.

G. Ramakrishna Aiyar and *P N Sundaresan* for Appellant.

T. R. Arunachalam for Respondent

The Judgment of the Court was delivered by

Viswanatha Sastri, J —The question that arises for decision in this case is whether the Hindu Law of Inheritance (Amendment) Act II of 1929 has any application to succession to the stridhanam property of a Hindu lady or whether the succession is governed by the ordinary rule of Hindu law unaffected by the provisions of Act II of 1929.

One Rajammal was the last owner of the property now in dispute. Her husband, Arunachala Asari had a sister and a sister's son from whom the plaintiff has purchased the property The defendants set up title of the paternal uncle's son of Arunachala Asari as heir to the property of Rajammal The question is whether the sister and sister's son of Arunachala Asari could be deemed to be stridhanam heirs of Rajammal in preference to paternal uncle's son of Arunachala. If the ordinary Hindu law of succession were to apply it is clear that Rajammal having died without issue, her husband and his sapindas would be the heirs to her stridhanam property The question is whether in finding out succession to stridhanam property of Rajammal we have to adopt the original rule of Hindu law regulating succession to stridhanam property and find out the husband's sapindas according to the ordinary rules of Hindu law or whether we have to incorporate the amendment introduced by the Amending Act II of 1929 in the table of inheritance prescribed by Hindu law and ascertain the sapindas of Arunachala on that basis This question has recently been considered by a Bench of this Court in *Mahalakshmamma* v *Suryanarayana Sastri*[1] Their Lordships held that the amending Act II of 1929 was expressly limited both in its preamble and in sub-section (2) of section 1 to succession to the property of a male and it cannot be applied to a case where the question for decision is who are the stridhanam heirs of a Hindu lady. Their Lordships relied upon the opinion of the learned editor of the 10th edition of Mayne's Hindu law and on the decision in *Sakuntalabai* v *Court of Wards*[2] and expressed their dissent from the decision of a single Judge of the Lahore High Court in *Mt. Charjo* v. *Dinanath*[3] and of the Bombay High Court in *Shamrao* v *Raghunandan*[4]. We respectfully agree with the reasoning of the learned Judges in the decision in *Mahalakshmamma* v. *Suryanarayana Sastri*[1] which we find has been referred to with approval in a subsequent decision of the Patna High Court in *Dulhin Talukraj Kuar* v. *Babui Bacha Kuar*[5].

The result is that the rule of succession to the stridhanam property laid down in the Mitakshara School of Hindu law has not been in any way altered by the Hindu Law of Inheritance (Amendment) Act (II of 1929) This is the only point that has been argued in this Letters Patent Appeal. The matter is covered by the previous decision of this Court and we see no reason for departing from it

In the result the Letters Patent Appeal is dismissed with costs

K.C *Appeal dismissed*

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1 (1946) 1 M L J 196 I.L.R 1947 Mad 23
2. I.L.R. (1942) Nag 629.
3. A I R 1937 Lah 186 (2)
4. I L R (1939) Bom 228
5 (1947) I L R. 26 Pat. 150

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BALAKRISHNA AYYAR.

Gannamani Ramanna as representing the General Body of creditors in I.P No. 20 of 1936, District Munsif Court, Tanuku . *Petitioner**

v.

Donga Suramma .. *Respondent.*

Provincial Insolvency Act (V of 1920), sections 4 and 53—Suit by defeated claimant to attached property against attaching decree-holder and judgment-debtor—Judgment-debtor becoming insolvent—Official Receiver made party—Suit not contested by the Official Receiver—Sale deed in favour of plaintiff found to be supported by consideration and not entered into to defeat creditors by all the Courts—Application under sections 4 and 53 of the Provincial Insolvency Act by the Official Receiver thereafter—Re-agitation of the question of the validity of the sale—Competency

In a suit by a defeated claimant to attached properties against the attaching creditor and the judgment-debtor the Official Receiver was made a party on the judgment-debtor's insolvency. The Official Receiver did not contest the suit and the plaintiff's claim was allowed by the trial Court which found that the sale in favour of the plaintiff was for valuable consideration and was not intended to defeat creditors of insolvent An appeal and a second appeal failed Thereafter the Official Receiver bestirred himself and filed an application under sections 4 and 53 of the Provincial Insolvency Act for a declaration that the sale deed in favour of the plaintiff was without consideration and was for defeating the claims of creditors of the insolvent On the question whether the Official Receiver could agitate the point over again,

Held, the question on which a new decision was now sought for arose out of the facts and contentions which had already been completely adjudicated upon in proceedings to which he was a party. Hence he could not be allowed to re-agitate the question of title before the Insolvency Court

Lahori Singh v *Official Receiver, Sialkot*, A I R. 1937 Lah 4, followed.

Petition under section 75, Provincial Insolvency Act, against the order of the District Court of West Godavari at Eluru, dated 14th November, 1946, in C M.A. No. 8/46 preferred against the order of the Court of the District Munsif of Tanuk, dated 29th October, 1946, in I A. No. 677 of 1943 in I.P. No. 20 of 1936.

T. Satyanarayana for Petitioner.

K. Bhimasankaram for Respondent.

The Court delivered the following

JUDGMENT:—The relevant facts are these. In O S. No. 121 of 1936, on the file of the District Munsif, Tanuku, the plaintiff, a creditor, obtained attachment before judgment of certain properties alleged to belong to the defendant. One Donga Suramma then intervened with a petition claiming that the properties belonged to her and asked for cancellation of the order of attachment. Her request was refused Thereupon, she filed a regular suit, O S No 389 of 1937, to establish her title to the properties and to this suit, both the attaching creditor and the defendant were made parties The defendant in O S. No. 121 of 1936 became insolvent and subsequently died Thereupon an application was made to add the Official Receiver as a party. In the affidavit filed in support of the application, the following recital occurs:

"Therefore, the Official Receiver, West Godavari, had to be included in his representative capacity as a third defendant in this suit in the place of the second defendant and the further proceedings had to be conducted It is therefore prayed that the Court may be pleased to add the Official Receiver, West Godavari, in his representative capacity as a third defendant."

This petition was allowed. But the Official Receiver did not contest this suit.

The Additional District Munsif, Tanuku, who tried this suit, found the transaction to be true and fully supported by consideration The learned District Munsif also negatived the contention of the creditor that the sale deed in favour of Donga Suramma had been entered into for the purpose of defeating the creditors

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* C. R. P. No. 1580 of 1947. 18th March, 1949.

of the insolvent. An appeal was filed; but it was dismissed A second appeal to this Court also failed Thereafter, the Official Receiver, who had been till then inactive, bestirred himself He filed an application under sections 4 and 53 of the Provincial Insolvency Act for a declaration that the sale deed in favour of Donga Suramma was executed without consideration and for defeating the claims of the creditors of the insolvent The objection was then put forward that it was not open to the Official Receiver to agitate the question over again This objection was upheld and the District Munsif dismissed the petition. There was an appeal from that order to the District Judge, West Godavari, who dismissed it

The present civil revision petition has been filed to revise this order. The principal contention urged before me is that questions arising under the Insolvency Act can be decided only by courts exercising powers under that Act and that the ordinary civil courts have no jurisdiction to do so. Therefore, the decisions rendered in O S No 389 of 1937 and the appeals therefrom, would not operate as *res judicata* In support of this contention reference was made to the decision in *Official Assignee, Bombay* v *Sundarachari*[1] This decision does no doubt seem at first sight to support the contention raised But even there, their Lordships do appear to contemplate that a decision given under section 53 of the Transfer of Property Act might well stand on a different footing Besides, there is one material difference here Rightly or wrongly, the Official Receiver was added in his representative capacity and this includes the one under which he is now acting After having remained *ex parte* and allowed the litigation to be fought out as though he had no interest in it he cannot now ask for a fresh trial on the same facts The question on which a new decision is now sought for arises out of the facts and contentions which have already been completely adjudicated upon in proceeding to which he was a party I do not therefore think that this petition should be allowed. I am strengthened in this view by the decision in *Lahori Singh* v *Official Receiver, Sialkot*[2]. The facts there were substantially similar to the facts here It was held there,

"Where therefore the question of title to certain property belonging to an insolvent was directly and substantially in issue in a previous suit between the parties in which the Official Receiver was also impleaded, and had been heard and finally decided by a Court of competent jurisdiction, it is not open to either party to re-agitate the question of title again before the insolvency Court."

The civil revision petition fails and is dismissed with costs.

K C

Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE RAJAGOPALAN

Kandi Parambath Elaya Nayan Veetil Thalakurussi Atchuthan Nair ... *Appellant* *

v

Vellilapalli Gopalan Nair ... *Respondent*

Mesne profits—Basis of right to recover.

After the passing of a final decree for sale of the mortgaged property the decree debt was scaled down under the provisions of Act IV of 1938 to a particular figure by the District Munsiff which on appeal was raised to a higher amount by the District Judge On an appeal against this appellate decree, it was set aside on the ground that the appellate court had no jurisdiction to entertain the appeal against the order scaling down the debt. Subsequent to that on an appeal against the amended decree, the High Court held that the amount due to the decree-holder was the same sum as that held to be due by the appellate Court in the infructuous appeal Pending the disposal of this appeal, the decree-holder had brought the property to sale in execution of the decree as amended by the appellate Court in that infructuous appeal and bought it himself and also obtained delivery of possession As soon as this decree was set aside by the High Court the judgment-debtor applied for restitution and mesne profits On a question as to the applicant's right to ask for mesne profits,

Held, it cannot be said that the possession of the decree-holder purchaser at the time he bought the property was unlawful entitling the judgment-debtor to claim mesne profits Apart from the question of restitution, when the material on record does not establish that the possession obtained

1. (1927) 53 M L J 209 I L R 50 Mad 776 2 A I R. 1937 Lah 4
* A A A O No 109 of 1947 16th March, 1949.

by plaintiff decree-holder was unlawful, the judgment-debtor defendant cannot claim any mesne profits.

Abdul Rasak Rowther v *Abdul Rahim Rowther*, (1945) 1 M L J 480, followed

Appeal against the order of the Court of the Subordinate Judge, South Malabar at Calicut, dated 12th July, 1946 in A.S No. 176/46 (R E P. No. 477 of 1942 in O S No 132 of 1936, District Munsif Court, Walluvanad)

D H Nambudripad for Appellant.

K Kuttikrishna Menon for Respondent

The Court delivered the following

JUDGMENT —On 11th August 1936, there was a preliminary decree to enforce the mortgage deed, dated 15th March, 1933, executed by the defendant-appellant in favour of the plaintiff-respondent in second appeal There was a final decree on 17th March, 1937, for the sale of the hypotheca. The defendant subsequently applied to have the decree debt scaled down under the provisions of the Madras Agriculturists Relief Act (IV of 1938). That application was allowed by the trial Court on 27th December, 1938 and the decree debt was scaled down to Rs 427-3-0. Against that order the decree-holder filed A S No 190 of 1939 to the District Judge who held that the decree debt ought to be scaled down to Rs 751-9-8 This was on 22nd March, 1938. Against the decree of the appellate Court in A S No 190 of 1939 the defendant filed a second appeal On 13th July, 1942, the High Court set aside the decree of the lower appellate Court in A S No. 190 of 1939 on the ground that the appellate Court had no jurisdiction to entertain the appeal against the order of the District Munsif scaling down the debt to Rs. 427-3-0 , Subsequent to that, the plaintiff appealed against the amended decree A S No 181 of 1942. Eventually, after the remand by the High Court, that appeal, A S No 181 of 1942, was allowed, and the Court held that the amount due to the decree-holder under the decree was Rs 751-9-8, the very sum that the appellate Court held in the infructuous A S No 190 of 1939 to be due to the decree-holder.

Pending the disposal of A S No 181 of 1942, in execution of the decree as it was amended by the decree in A S No 190 of 1939, the decree-holder brought the property to sale on 12th August, 1940 and purchased it himself The sale was confirmed on 19th September, 1940 and possession of the property was delivered to the plaintiff on 20th October, 1940.

It will be remembered that the decree in A S No 190 of 1939 was set aside by the High Court in second appeal on 13th July, 1942 The defendant followed it up with an application for restitution, out of which this second appeal has arisen. That application was filed on 4th September, 1942 The learned District Munsif dismissed that application and with that decision the learned Subordinate Judge, to whom the matter was taken on appeal, concurred Hence this second appeal

The application for restitution was dismissed by the trial Court on 11th August, 1945, that is after the final disposal of A S No 181 of 1942, which held that the correct amount due to the decree-holder under the decree was Rs 751-9-8, the very sum that was declared to be due to the decree-holder even in the decree in A S No 190 of 1939.

In paragraph 3 of his judgment, the learned District Munsif observed

> " There is one more difficulty which has cropped up in this case for the reason that admittedly after the respondent took possession of these properties the superior jenmi of the properties brought a suit O S No 57 of 1941 of this Court for sale of the properties for arrears of michavaram due to him and in execution of the decree in the said suit, the properties have been sold and purchased by a third party who has dispossessed the respondent "

This aspect of the case does not appear to have been considered by the learned Subordinate Judge It is clear that in any event the defendant cannot get restitution as such, in the sense that he can recover possession of the properties from the plaintiff-respondent. On the date the application came up for orders the plaintiff-respondent himself had lost possession, and it was a person with title superior both to the plaintiff and defendant in this suit that obtained the decree under which the respondent lost possession.

In the application which the defendant filed, in addition to the re-delivery of properties which he sought he asked for mesne profits The main basis for liability for mesne profits should be that possession was unlawful Here it was under a sale in execution of the decree as it was amended by the decree in A.S No. 190 of 1939 that the plaintiff obtained possession on 20th October, 1940. The decree in A S No 190 of 1939 was set aside ; but that still left intact a decree for Rs 427-3-0 which was the amount to which the decree debt in O S. No 132 of 1936 was scaled down by the learned District Munsif There was thus a decree for which execution could be levied, though in the application that the decree-holder filed he claimed the larger amount of Rs 751-9-8 As events eventually turned out he was all along entitled to this sum of Rs 751-9-8

The learned advocate for the appellant referred to the decision in *Shivbai* v. *Yesoo*[1] In that case, in 1906 a decree was passed *ex parte* against the defendant and in execution of that decree, the defendant's house was sold and purchased by the plaintiff decree-holder in 1910 Subsequently, the decree that had been passed *ex-parte* was set aside After a retrial the plaintiff obtained a decree in 1914 for about the same sum which had been decreed by the decree *ex parte* in 1906 In the meantime, the defendant applied to have the sale of the house which had been conducted in execution of the decree that had been passed *ex parte* set aside The learned Judges held that the previous sale of the house in execution under the previous decree which had been set aside should itself be set aside as being no longer based on any solid foundation, but the learned Judges imposed the condition in the circumstances of that case that the defendant should pay up the amount due from her under the second decree before restitution could be effected

The learned advocate for the respondent in appeal reiterated the arguments based on the decision in *Adbul Rasak Rowther* v. *Abdul Rahim Rowther*[2], which found acceptance in the courts below in this case The facts of that case were that a decree in a suit for contribution as it originally stood provided for payment to the decree-holder of a considerably larger sum than that payable under the decree as amended in pursuance of an appellate order passed on an application under section 19 of Madras Act IV of 1938 The application had been filed by a purchaser of the properties covered by the decree who had been as such impleaded in the suit as the sixth defendant On its dismissal the judgment-debtor filed a revision petition to the High Court and an appeal to the Sub-Court The appeal was allowed and the scaling down was directed The appeal, however, was incompetent and the effect of the amendment was to introduce an illegal curtailment of the decree-holder's claim Pending proceedings in the High Court as to the validity of the scaling down, the decree-holder took out execution on the amended decree A sale was held under this execution petition and it appeared that of the original decree, a sufficient amount remained to give legal support to the sale which was held under the amended decree. The High Court set aside the appellate order but allowed the judgment-debtor's revision petition, with the result that the decree was again amended, the same figures being restored which had been substituted as a result of the incompetent amendment It was under these circumstances that Wadsworth and Patanjali Sastri, JJ , held that the execution sale could not be held to be a nullity

The decision in *Shivbai* v *Yesoo*[1], cannot really help in determining the real question now, whether the plaintiff is liable for the mesne profits claimed If the principles laid down in *Shivbai* v *Yesoo*[1] are to be followed, there could be a conditional order, that is, an order for re-delivery of property on condition that the defendant judgment-debtor paid up the amount due under the amended decree in O S No 132 of 1936 If such a condition had been imposed possession of the decree-holder auction purchaser, could not be unlawful till the defendant discharged

1. (1918) I.L.R 43 Bom. 235. 2. (1945) 1 M L J 480

his obligations by payment If possession was not unlawful, there could be no question of any liability for mesne profits

Apart from the inapplicability of the principles laid down in *Shivbai* v *Yesoo*[1] to the facts of this case, I think the courts below were right in applying the principles laid down by this Court in *Abdul Rasak Rowther* v *Abdul Rahim Rowther*[2] There was a decree in O S No 132 of 1936 under which the defendant had to pay What that amount was, was ascertained on 27th December, 1938, to be Rs 427-3-0. That that was not correct should be obvious, because in competent proceedings the Court finally held that the amount due was really Rs 751-9-8 That at an intermediate stage the same figure was arrived at by the decree in O S No 190 of 1939 does not really affect the rights and liabilities of the parties, at any rate in determining the question, whether the possession of the plaintiff decree-holder obtained on 20th October, 1940, was unlawful True, on the date the property was sold on 12th August, 1940, the decree in A S No 190 of 1939 was not lawful in the sense the Court had no jurisdiction, but the liability of the judgment-debtor was still there to pay the amount of Rs 427-3-0 to which figure the decree debt was scaled down on 27th December, 1938 Even without taking into account at this stage the factor that the amount really due under the decree was finally fixed again at Rs 751-9-8, it should be obvious that at least for a portion of the amount for the recovery of which the decree-holder brought the property to sale on 12th August, 1940, he had the right to levy execution From this point of view again, it would be difficult to hold that the possession which the decree-holder eventually obtained on 20th October, 1940, was unlawful, though the decree in A S No 190 of 1939 was eventually set aside Except that in *Abdul Rasak Rowther* v *Abdul Rahim Rowther*[2], the decree-holder brought the property to sale for realising an amount smaller than what was eventually found to be due to him—in this case the decree-holder sought recovery of an amount which was eventually found to be due to him—there seems to be no distinction in the principles which should govern a claim for restitution with the consequential relief of mesne profits

To reiterate, apart from the question of restitution, when the material on record does not establish that the possession of the plaintiff decree-holder obtained on 20th October, 1940, was unlawful the defendant cannot claim any mesne profits

There was no finding in the Courts below on the question of liability for mesne profits, certainly there was none on the question of the quantum of mesne profits ; but since liability for mesne profits does not arise at all there is no point in asking for a finding on that issue from the Courts below

The appeal fails and is dismissed with costs

(Leave is refused)

V.P S — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR P V RAJAMANNAR, *Chief Justice* AND MR JUSTICE RAGHAVA RAO

The Mahalakshmi Textile Mills, Ltd , by its managing agents, S S N Lakshmanan and Co , by partner S S N Lakshmanan Chettiar *Appellant**

v.

A K RM M K Meyyappa Chettiar (died) and others *Respondents.*

Companies—Call money—Person to whom and the place at which the call money is to be paid not mentioned in resolution making the call and in the notices—Forfeiture on non-payment—Legality

It is not necessary that the persons to whom and the place at which the call is to be paid, should be mentioned in the resolution making the call or in the notices, making the call though these

1 (1918) I L R 43 Bom 235 2 (1945) 1 M L J. 480

* Appeal No 505 of 1945 4th March, 1949.

matters must be fixed by the Board, because the articles so provide In the absence of any evidence upon the point the Court is entitled to assume that these notices were sent out by the agents of the Company with the sanction of the Directors and that the Directors had in fact appointed the persons and the place to whom and at which the call is to be paid A forfeiture on non-payment of the call money cannot be attacked on the ground of any irregularity or illegality because that the particulars as to its payment were not mentioned in the resolution making the call

Dhunraj Keshrimal v *H H Wadia*, (1932) I L.R 57 Bom 413, followed

Premila Devi v *The Peoples Bank of Northern India, Ltd*, (*in liquidation*), I L R. (1938) Lah 1 (P.C), referred

In re *Bengal Electric Lamp Works, Ltd*, I L R (1942) 1 Cal 132 commented upon

Appeal against the decree and judgment of the Court of the Subordinate Judge, Mathurai, dated 9th July, 1945 in O S No 44 of 1944

A Krishnaswami Aiyar, K. Subrahmanyam and *Alladi Kuppuswami* for Appellant.

S Venkatesa Aiyangar for Respondents

The Judgment of the Court was delivered by

Raghava Rao, J —An interesting question of company law is raised for determination by this appeal. The material facts which are more or less beyond the pale of controversy may be briefly stated

The plaintiff, a shareholder of the defendant, which is a limited company, fell into arrears in respect of the third and fourth instalments of Rs 1,250 each of the total share amount of Rs 5,000 payable by him on his 50 shares of the face value of Rs 100 each, having duly paid the amounts of the first and second instalments of Rs 1,250 each, payable along with the application for shares and at the time of the allotment thereof respectively There was a meeting of the Directors of the company held on 31st October, 1928, as shown by the entries, Exhibits D-4 and D-5, in the minutes book at which, firstly, it was resolved that the first call (*i e*, the call in respect of the third instalment) made as proposed in the circular letters, Exhibit D-2 series, should be confirmed and, secondly, the Managing Directors were authorised to make the second call (*i e*, the call in respect of the fourth instalment) before 5th December, 1928, requiring the amount of that call to be paid by 25th December, 1928 It is the case of the defendant company that thereafter, as shown by Exhibits D-3 and D-3 (*a*), the blank printed form of the call notice maintained by it and the counterfoil of the notice actually issued, notice was duly sent to the plaintiff in respect of the first call on 30th March, 1928 and that, similarly, as shown by Exhibits D-6 and D-6 (*a*), a similar printed form of the call notice and a similar counterfoil respectively, notice was duly sent to the plaintiff in respect of the second call on 4th December, 1928 The plaintiff did not comply with the notices and make the payments There were further notices, Exhibit D-8 series, which also proved fruitless The company thereupon resolved by Exhibit D-9 on 2nd December, 1938, to issue further notices to defaulting shareholders intimating to them its intention to forfeit their shares on default of payment within the further time to be given. Accordingly on 30th July, 1940, notice (Exhibit D-10) was issued by the company to the plaintiff, demanding the payment of Rs. 2,500 for the first and second calls with interest at nine per cent per annum on 31st August, 1940 and intimating forfeiture on default Although the plaintiff received this notice, he did not respond On 18th January, 1941, the Directors resolved, as shown by Exhibit D-11 (*a*) the entry in the minutes book, that final notice should be given to the defaulters that payment should be made by 30th April, 1941, or, else that the shares would stand forfeited Exhibit D-12 is the notice issued to the plaintiff, giving him intimation of the resolution and demanding payment. In response to this notice the plaintiff sent to the managing agents of the company a hundi, Exhibit D-14, on 23rd April, 1941, for Rs 2,500, and along with the hundi also paid a sum of Rs 500, leaving a balance of Rs 2,000 still to be paid The balance not having been paid till 11th May, 1943, there was a resolution of forfeiture passed by the company on that date (Exhibit D-17) Intimation of the forfeiture was given to the plaintiff by letter, dated 22nd May, 1943 (Exhibit D-18). The hundi, Exhibit D-14, and Rs. 500 were also returned to the plaintiff along with

a covering letter, Exhibit D-19 Thereupon, notices passed between the parties, Exhibits D-20 and D-20 (*a*) and Exhibits D-21 and D-21 (*a*), the plaintiff challenging and the company maintaining the validity of the forfeiture The suit out of which this appeal arises is the sequel to these notices The plaintiff craves in his plaint a declaration of the invalidity of the forfeiture and an injunction in restraint of a sale or re-allotment of the shares or any other dealing with them by the company

The Court below found (1) that Exhibit D-2 series, the circular letters and the resolution at the meeting Exhibit D-4, in respect of the first call, were defective, in that they did not fix the amount of the call or specify the person to whom or the place at which it was to be paid, as required by Article 40 of the Articles of Association , (2) that the resolution Exhibit D-5 in respect of the second call, did not, while fixing the time for payment specify the amount to be paid and the person to whom or the place at which it was to be paid, and was therefore defective for want of conformity to the same article ; (3) that the notices said to have been issued by the company to the plaintiff in respect of the two calls on 30th March, 1928 and 4th December, 1928, were not proved to have been served on the plaintiff or even posted, and that there was no proof, in fact, of how the notices were sent to the plaintiff, (4) that the further notices, Exhibit D-8 series, of 1931 and 1932 were defective, in that, while mentioning the total amount as being Rs 2,500 they did not, as required by Article 42 of the Articles of Association, contain particulars concerning the place at which or the person to whom the amount was to be paid , (5) that the resolutions Exhibits D-9 and D-11 (*a*) could not be regarded as resolutions for calls under Article 40 ; and (6) that the notices, Exhibits D-10 and D-12 were defective in the particulars required to be mentioned by Article 42 in notices for call amounts On these findings the Court below held the forfeiture of shares made by the defendant by Exhibit D-17 to be illegal and invalid. It also held that there was no waiver on the part of the plaintiff of his right to complain of the irregularity of proceedings on the part of the defendant The parties were at issue in the Court below also on one subsidiary matter which we may dismiss from consideration after just adverting to it, *viz*, whether the hundi, Exhibit D-14 and the Rs 500 were accepted by the defendant as an unconditional payment as contended by the plaintiff or only as a conditional payment as contended by the defendant The Court below upheld the defendant's case in this regard and found that it was open to the defendant to treat the plaintiff as a defaulter, even though the defendant did not send the hundi to the plaintiff's agent at Rangoon for encashment On this last mentioned subsidiary matter no question arises on this appeal, as the respondent has accepted the finding recorded by the Court below.

The questions arising on the arguments advanced before us in the appeal are (1) whether the forfeiture of the plaintiff's shares by the defendant company is illegal and invalid , and (2) whether there has been on the part of the plaintiff any waiver of the illegality and the invalidity by reason of his conduct We do not feel called upon to say anything on the latter question ; for, assuming that there was no waiver, the appellant is, in our opinion, entitled to succeed on the ground that there was sufficient warrant for its forfeiture of the plaintiff's shares In connection with the former question, we may observe *in limine* that we fully realise that a forfeiture ought not to be lightly favoured and that a party thereby aggrieved is entitled to rely on any technicality of rule or regulation to invalidate it The first submission of Mr Venkatesa Aiyangar, the learned advocate for the respondent, in connection with this question, is that the notices for call amounts said to have been issued by the defendant to the plaintiff are not proved by the evidence on record, and that for want of notices duly conforming to the requirements of Article 42 of the Articles of Association the forfeiture made by the company must be regarded as illegal and invalid. This is a contention which the learned Subordinate Judge in the Court below has accepted We consider that, in so accepting, he was unreasonable to a decree which we are constrained to discountenance in no mistakable terms in his appreciation of the evidence on record The learned Subordinate Judge makes the criticism, which we cannot accept, that there is no knowing whether the blank spaces of the printed notice forms were filled up and notices were duly

posted He makes the point which, in our opinion, is not of much substance, that the clerk who is said to have informed D W 1 of the despatch of notices has not been examined Notwithstanding the abstention of the clerk from the witness box, commonsense warrants the presumption, which we are prepared to raise, that the notices were duly posted in the ordinary course of business Notwithstanding, again, the interested and of course uncorroborated denial by the plaintiff of his receipt of the notices, the common course of human affairs warrants the further presumption, which we are prepared to raise, that the notices were duly received by the plaintiff His conduct in keeping quiet after his admitted receipt of Exhibit D-8 series and Exhibit D-10 which he has produced into Court, quite apart from his conduct in sending in response to Exhibit D-12, the hundi, Exhibit D-14, and the sum of Rs 500 fortifies us in our conclusion that he must have received the prior notices suggested by Exhibits D-3 and D-3 (*a*) in regard to the first call and by Exhibits D-6 and D-6 (*a*) in regard to the second, which he is apparently suppressing, as, if produced, they will be found to contain all the particulars required by Article 42 of the Articles of Association of the company Asked in cross-examination why he did not pay the calls as demanded in Exhibit D-8 series, P W 1 states in reply that he did not, thinking that he might pay if D W 1 went to him and personally asked him to pay The conduct of the plaintiff has been such that we have no hesitation in the circumstances in accepting and acting upon the evidence of D W 1 and holding that there is no substance in the respondent's complaint that notices of the kind required were not duly despatched to him or served on him. We accordingly overrule the first submission of Mr Venkatesa Aiyangar

Mr. Venkatesa Aiyangar has next contended that the resolutions passed by the Directors at their meeting of 31st October, 1928, one confirming Exhibit D-2 series in relation to the first call and the other authorising the Managing Directors to make the second call, are invalid as not fulfilling the requirements of Article 40 of the Articles of Association He complains that there is no proof that the particulars required by Articles 40 and 42 were fixed by the Directors themselves, whether in connection with Exhibit D-2 series, confirmed though they may have been by Exhibit D-4, or in connection with Exhibit D-5 authorising the managing Directors to make the second call Says the learned advocate, Exhibits D-4 and D-5 do not at all refer to such particulars and therefore negative any fixation of the particulars by the Directors themselves and not by the managing agents In support of his submission, the learned advocate placed strong reliance on a decision of the High Court of Bengal reported in In re *Bengal Electric Lamp Works, Ltd* [1] and attacked a decision of the High Court of Bombay to the contrary reported in *Dhunraj Keshrimal* v *H H Wadia* [2] In a conflict between the two decisions, counsel urged that the former has to be preferred, founded as it is on a decision of the Judicial Committee reported in *Premila Devi* v *The Peoples Bank of Northern India, Ltd. (in liquidation)* [3], which is subsequent in date to the Bombay decision and prior to the Calcutta decision. That there is a conflict between the decisions of the two High Courts is undeniable ; but we cannot, after the most anxious and careful consideration that we have bestowed on the matter, agree that the Privy Council decision in *Premila Devi* v *The Peoples Bank of Northern India, Ltd (in liquidation)* [3], invalidates the decision of the Divisional Bench of the Bombay High Court rendered by Beaumont, C J and Blackwell, J , or contains anything to support the criticism made of it by Lort Williams, J , in the Calcutta case

In the Bombay case Beaumont, C.J , observes at page 425 of the report .

"It is true that these matters must be fixed by the Board, because the articles so provide, but I think we must presume that the agents did their duty and took instructions from the Board , otherwise they would not have been justified in signing 'by order of the Board' "

At page 428 of the report, Blackwell, J , observes

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1 I L R (1942) 1 Cal 132
2 (1932) I L R. 57 Bom 413
3 I.L R (1938) Lah 1 (P.C).

"I am of the opinion that it is not necessary that the persons to whom, and the place at which, the call is to be paid, should be mentioned in the resolution making the call . . . ."

and at page 429, the learned Judge further observes :

" . . . in the absence of any evidence upon the point the Court is entitled to assume that these notices were sent out by the agents of the company with the sanction of the directors, and that the directors had in fact appointed the persons and the place, and that is the assumption which I make "

With these observations we respectfully agree The learned Judges deal exhaustively with the English case-law on the point and rely in particular on the judgment of Jessel, M R, in *Johnson* v *Lyttle's Iron Agency*[1] They point out that the Article of the Company which they had to deal with was similar to the one which Jessel, M R, in the English case had to deal with We may observe that in the present case also, as in the Bombay case and in the English case before Jessel, M R, Article 40 does not prescribe that by means of a formal resolution to be passed by the Directors the particulars should be fixed or appointed We hold, like the Bombay judges, that before the prescribed notice is issued to the shareholder in default it will do if the particulars are, however informally, fixed by the Directors and the notices issued with particulars so fixed with the sanction of the Directors The Court below has attempted to distinguish the Bombay case from the present by observing that, there, the words " By order of the Board " were to be found in the signature part of the notice. We are inclined to think that this distinction attempted by the learned Subordinate Judge is rather unsubstantial Evidence of the appointment of the particulars by order of the Board could always be adduced, even though there should be no such words in the signature part of the notice issued by the managing agents Likewise even where such words occurred, it would be open to the party impeaching the validity of the notice to show that there was, in fact and in truth, no appointment of the particulars by the Board The matter is one of evidence, and the presumption is in favour of such appointment in the absence of evidence one way or the other Moreover, if the existence of the words " By order of the Board " in the Bombay case is not merely an accident of fact, but an element which enters into the essence of the reasoning—which we think it is not—there is no reason why we may not presume in the present case that such words would be found in the notices, if produced A presumption of that kind is not, in our opinion, ill-drawn against the party suppressing the notices But it is not necessary for us to go so far, as on broad principle we consider the Bombay decision sufficiently in point

Turning next to the Calcutta case, we find that what happened there was that Lort Williams, J, held on the facts that the Directors had failed to appoint the place at which and person to whom the call was payable, that therefore the resolutions and notices of calls were invalid and that there could be no forfeiture of the shares for non-payment of such calls The learned Judge sets forth the substance of the decision of the Chief Justice of the Bombay High Court at page 145 in the following words

"With regard to the decision of Sir George Jessel, M R, in the case of *Johnson* v *Lyttle's Iron Agency*[1], the learned Chief Justice seemed to think that his judgment was reversed by the Court of Appeal only upon the ground that the notice for final payment was inaccurate, and therefore the forfeiture founded on the notice was bad Further, he observed that none of the judges in the Court of Appeal expressed dissent from the views of the Master of the Rolls as to the construction of Table A, except that James, J, expressed the tentative view that the time for the payment of the call could not properly be fixed by a mere verbal direction to the Secretary, and that it ought to be fixed by a formal resolution of the directors, and the learned Chief Justice thought that the case was a direct authority for the proposition that under such Articles it is not necessary for the resolution making the call to specify the time for payment, and *a fortiori* it was not necessary to specify the person to whom or the place where the call was to be made "

Then the learned Judge proceeds to criticise the view of the learned Chief Justice on the ground that His Lordship did not give sufficient weight to the observations of the Lords Justices in *Johnson* v *Lyttle's Iron Agency*[1] about the necessity

1 (1877) 5 Ch D 687.

or strict adherence to the provisions of the contract between the company and the shareholders. Lort Williams, J., then proceeds to observe that no forfeiture of property could be made, unless every condition precedent had been strictly and literally complied with To this last observation of the learned Judge we have no exception to take, but the question still remains whether his criticism of the view of the Chief Justice of Bombay is correct We think not His criticism is only in general terms and does not attempt to show specifically how or where exactly the Chief Justice's view of Jessel, M. R 's judgment or James, L J 's judgment in *Johnson* v *Lyttle's Iron Agency*[1], goes wrong

We have finally to ascertain what precisely the Privy Council ruling in *Premila Devi* v. *The Peoples Bank of Northern India, Ltd (in liquidation)*[2], decides and to consider how far it supports In re *Bengal Electric Lamp Works, Ltd* [3] and invalidates *Dhunraj Keshrimal* v *H H Wadia*[4] The substance of the decision is set forth accurately in the headnote which, so far as relevant to the consideration of the point under discussion, may be reproduced as follows .

"A scheme of arrangement, sanctioned by the Court under section 153 of the Indian Companies Act is binding upon the creditors, shareholders and the company alike Its terms can thereafter only be varied by order of the Court after the variation has been approved at meetings of the creditors and shareholders

It is not, therefore, possible for the company, its directors or shareholders whether by resolution or ratification or otherwise to alter dates fixed by a sanctioned scheme for calls on unpaid capital A resolution of directors requiring payment of calls on dates at variance with a sanctioned scheme is an attempt to do something *ultra vires* of the company

A purported forfeiture of shares for non-payment of calls in accordance with such a resolution is inoperative and void and the creditors, in a winding up, are entitled to have the names of shareholders which have been removed from the register of members by reason of an invalid forfeiture restored "

It will be seen from this that there is nothing decided by this case which can be held to conflict with *Dhunraj Keshrimal* v *H H Wadia*[4], but Mr Venkatesa Aiyangar has contended that there is the following passage of two paragraphs in the judgment of the Privy Council beginning at page 18 and running into page 19 which assists his contention

" This may seem to be somewhat technical, but in the matter of the forfeiture of shares, technicalities must be strictly observed And it is not, as is sometimes apt to be forgotten, merely the person whose shares are being forfeited who is entitled to insist upon the strict fulfilment of the conditions prescribed for forfeiture. For, the forfeiture of shares may result in a permanent reduction of the capital of a company It will suffice to take the present case as an example If the forfeitures are upheld, the appellants remain liable, no doubt, for the whole 25 per cent called up in March 1932, and in January 1933 But they will escape liability altogether in respect of the uncalled 25 per cent and this is a matter that vitally affects the creditors These creditors cannot be deprived of their right to have this 25 per cent made available for payment of their debts without due cause

The creditors are, therefore, entitled to see that the power of forfeiting shares is exercised strictly. Where the power of a company to forfeit shares has arisen, the articles of association usually contain provisions as to the sending of notices and the like that may be regarded as being inserted merely for the protection of the shareholder affected Such provisions may properly be regarded as being directory only and capable of being waived by the individual shareholder But no waiver by him can confer upon the company or its directors a power of forfeiture that they do not possess, as for example, a power to forfeit shares for non-payment of calls that are not yet due."

It seems to us that this passage has no relevancy to the point under discussion. We are not satisfied on a consideration of Articles 40 and 42 and of the evidence on record in the present case that there was any irregularity, much less illegality, committed by the company in declaring the forfeiture of the plaintiff's shares ; nor does the question of waiver fall to be considered in this view of the matter The facts of the case before the Privy Council in *Premila Devi* v *The Peoples Bank of Northern India, Limited (in liquidation)*[2], are altogether different from those of the present case, and there is no principle of law exigible from that decision which affects the conclusions which we have reached on the evidence

The appeal is accordingly accepted, and the suit dismissed with costs of the appellant here and in the court below

V P S ——— *Appeal allowed.*

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1 (1877) 5 Ch D 687
2 I.L R (1939) Lah. 1 (P C)
3 I L R (1942) 1 Cal 132
4 (1932) I L R 57 Bom 413

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. P. V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE RAJAGOPALAN

Kota Ananda Krishna Chetty .. *Petitioner* *

v

Messrs M K and Company *alias* Mahomed Kasim and Company and another .. *Respondents*

Madras Buildings (Lease and Rent Control) Act (XV of 1946) *section* 7 (3) (*a*) (*ii*)—*Owner of non-residential building in occupation of residential building in which he was carrying on his business—Right to get possession of his own non-residential building for carrying on his own business*

The fact that a landlord is in occupation of a residential building in which he is carrying on his business is not sufficient to prevent him from obtaining possession under section 7 (3) (*a*) (ii) of the Madras Buildings (Lease and Rent Control) Act, of a non-residential building of his own for carrying on his own business It is wrong to think that if an owner of a non-residential building is able to carry on his business at any place—it did not matter where—he would not be entitled to recover possession of his non-residential building to carry on his own business

The essential condition laid down in that section which must be satisfied before a landlord can be denied his right to get back possession of his own building is that he was occupying for the purpose of a business which he is carrying on in a non-residential building which is his own or to the possession of which he is entitled

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H R A No 544 of 1948 on the file of the Small Cause Court, Madras, and to quash the order, dated 11th November, 1948, made therein by the Third Judge, Small Cause Court, Madras, and to allow the petitioner to execute the order for eviction of the Court of the Second Additional Rent Controller, Madras, dated 21st February, 1948, in L Dis No 4324 of 1947 House Rent Control.

V Radhakrishnayya and *S Ramaswami Aiyangar* for Petitioner

S Ramachandra Aiyar for Respondents

The Order of the Court was made by

The Chief Justice—The petitioner is admittedly the owner of a non-residential building in China Bazaar Road, and the respondent is his tenant He applied to the Rent Controller, for an order of eviction on the ground that he required it for the purpose of carrying on his business as a diamond merchant The respondent *inter alia* contended that the petitioner was in occupation of a building in Neelakanta Mehta Street, Thyagarayanagar, where he was carrying on his business, and therefore he was not entitled to the relief he sought The Second Additional Rent Controller, on the evidence, found that the petitioner was in occupation of a portion of a residential house in Thyagarayanagar, and that he *bona fide* required the premises for his own business He found, therefore, that the petitioner was not occupying a non-residential building for the purpose of the business which he was carrying on, and in accordance with section 7 (3) (*a*) (ii) of Madras Act XV of 1946 he directed the respondent to put the petitioner in possession of the premises The respondent appealed to the Court of Small Causes at Madras. The learned Judge of the Court of Small Causes allowed the appeal and dismissed the petitioner's application for eviction

The only ground for his decision which appears from his order is that it was clear from the petition itself that the petitioner was doing his diamond business in No. 32, Neelakanta Mehta Street, Thyagarayanagar, and though it was a rented building, he was entitled to maintain his possession of the same till he was evicted in due course of law The learned Judge evidently fell into an error in assuming that if the petitioner was able to carry on his business at any place—it did not matter where—he would not be entitled to recover possession of his non-residential building to carry on his own business He overlooked the essential condition laid down

* C M P. No 946 of 1949. 4th April, 1949.

in section 7 (3) (*a*) (ii) which must be satisfied before the landlord can be denied his right to get back possession of his own building, namely, that he was occupying for the purpose of a business which he is carrying on in a non-residential building which is his own or to the possession of which he is entitled The Rent Controller, on the evidence, expressly found that the petitioner was in occupation of a portion of a residential building and therefore this condition was not satisfied The learned Judge did not upset this finding He appears to have been under the impression that if the petitioner was in occupation of any building in which he was able to carry on business, his petition must be dismissed This is an obvious error of law apparent on the face of the record

Mr Ramachandra Ayyar for the respondent invited our attention to *Ismail Dada* v *Bai Zuleikabai*[1], *Tompkin* v *Rogers*[2] and another Irish case None of these decisions is of any assistance, as those decisions turn on the construction of enactments not in *pari materia* and on facts not exactly similar to the facts in the present case There is nothing in these decisions inconsistent with the view which we are inclined to take, namely, that the fact that a landlord is in occupation of a residential building in which he is carrying on his business is not sufficient to prevent him from obtaining possession of a non-residential building of his own for carrying on his own business under section 7 (3) (*a*) (ii) of the Act In this view, it is unnecessary to deal with another question raised by Mr Radhakrishnayya, the learned counsel for the petitioner, that even assuming that 32, Neelakanta Mehta Street, was a non-residential building, the petitioner cannot be deemed to be "entitled to" its possession

The order of the Court of Small Causes, Madras, is therefore quashed The rule *nisi* will be made absolute The respondent will have time till 4th May, 1949, to put the landlord in possession of the building The petitioner will get the costs of this application from the respondent

V S —— *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE GOVINDA MENON

Velicheti Achutaramayya and others *Appellants**

v

Velicheti Satyanarayana and others *Respondents.*

Will—Construction of—Hindu family—Testator bequeathing to four groups of sons and their respective descendants—Interest created in the groups

A testator executed a will by which he bequeathed his properties to his wife for her life and after her death to his three sons and the son of his predeceased eldest son in the following words —

"That after her death (testator's wife) my sons (1) *N*, (2) *C*, (3) *N*, (4) my eldest son's son *S*, the male heirs surviving in their families shall divide the property in equal shares with reference to good and bad qualities and enjoy the same as of right "

On the question whether on a construction of the will the division of the properties after the widow's death among the existing descendants should be *per capita* or *per stirpes*,

Held The intention of the testator was that on the death of his wife the property should be taken by each of the four groups consisting of his sons as were alive and the respective descendants of each of them as well as the son of the predeceased son This was the only intention that could be attributed to the testator The fact that the names of two sons were not mentioned and the fact that the predeceased son's son was specifically mentioned was sufficient indication of the testator's intention that the property should be enjoyed by his descendants in four groups That each of his son's respective descendants could constitute groups legally capable of holding, acquiring and inheriting property could not be disputed and therefore each of these groups got a right vested in it by the will, so that these separate families got a vested interest in the properties on the death of the testator himself and they were entitled to get possession of them when the widow died Section 119 of the Succession Act would not be against this method of construing the will

Case-law reviewed

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1 I L R (1944) Bom 361 2 90 L J K B 591

* S A No 987 of 1947 6th April, 1949.

Appeal against the decree of the Court of the Subordinate Judge, Narasapur, in A S No 40 of 1945 preferred against the decree of the Court of the District Munsif, Narasapur, in O S. No 98 of 1944

G C Venkatasubba Rao and *Ch Suryanarayana Rao* for Appellants

A Sambasiva Rao for Respondents

The Court delivered the following

JUDGMENT —On 14th December, 1907, one Atchayya executed a will Exhibit D-1, by which he bequeathed his properties to his third wife Buchi Venkamma for her life and after her death to his three sons and the son of his predeceased eldest son in the following words

> "that after her death, my sons (1) Narasayya, (2) Chinna Venkayya, (3) Nagayya, (4) my eldest son the late Bapanna's son, Satyanarayana the male heirs surviving in their families shall divide this property in equal shares with reference to good and bad qualities and enjoy the same as of right "

On the date of the will Narasayya's sons, the present first and second defendants were alive Chinna Venkayya's sons, defendants 3, 4 and 5 were also alive but none of them were mentioned in the will On the 29th December, 1943, Buchi Venkamma died and thereafter the properties should have come into the possession of the legatees under the will

The suit out of which this second appeal arises was filed by Satyanarayana, the son of the eldest son of Atchayya for partition and recovery of possession of his 1/4 share in the properties left by the grandfather under Exhibit D-1 The only question that was seriously canvassed in the courts below was with regard to the share which the plaintiff is entitled to The contesting defendants put forward the plea that on a true and proper construction of Exhibit D-1 what was contemplated by the testator was that when his widow Buchi Venkamma died the property should be divided *per capita* among such of his sons and grandsons as were alive on that date In other words, the contention amounts to this that the will created an interest in all the grandsons in equal shares and not on a stirpital basis Both the lower courts have repelled this contention and held that the plaintiff is entitled to 1/4 share and the present second appeal is by defendants 3 to 7, the children of Chinna Venkayya questioning the correctness of this expression of opinion by the lower courts

It has to be remembered that the property which was the subject-matter of the bequest was not the self-acquired property of the testator Atchayya, but he came to have absolute rights of disposition over the same as a result of a partition between himself and his sons It is nobody's case that after the partition, all the sons and their descendants or any two or more of them and their descendants constituted the member of a joint family In the absence of any such evidence and even contention put forward by the defendants we have to take it that the father on dividing the properties between himself and his sons divided them in such a way that each of the sons was separate from the others If we bear in mind this aspect of the case the solution to the problem that confronts the court is made easier.

Mr. G C Venkatasubba Rao, for the appellants, in a learned argument invited my attention to very many decisions and contended that the principle deducible from them ought to be applied in the construction of this will One need hardly add that the will was not prepared or drafted by anybody conversant with legal terms It is a devise executed by an ordinary individual in a village and we have to ascertain his intentions by the notions and customs prevalent in the part of the country he lived and the law by which he is governed

The learned advocate for the appellants brought to my notice various English cases, namely, *Blackler* v *Webb*[1]; *Butler* v *Stratton*[2], *Dowding* v *Smith*[3], *Williams* v. *Yates*[4] and *Kekewich* v *Barker*[5] The substance of these decisions is to the effect

1. (1726) 2 P Wms 384 24 Eng Rep 777.
2. (1791) 3 Bro C C 367 29 Eng Rep 587
3. (1891) 3 Beav 541 . 49 Eng Rep 213
4. (1834) C P Cooper 177 47 Eng Rep. 454
5. 88 L T 130

that if there is a bequest in general terms like this, namely "to *A*, *B* and the children of *C* equally" then in such a case *A* and *B* together with the children of *C* take the property *per capita* and that there can be no division between *A*, *B* and the children of *C* in three equal shares The decision of the Court of Appeal in In re *Stone Baker* v. *Stone*[1] and of Swinfen Eady, J, in In re *Richards Davies* v *Edwards*[2], are also relied upon to show that if the word "equal" has been used in the wills the division should be on a *per capita* basis I do not think that in construing a will of an ordinary agriculturist in a mofussil district in the Madras Province prepared without the aid of any persons qualified to give legal assistance, such as a solicitor or a lawyer, the principles which are so well known in the English Courts and which have been laid down in the cases above mentioned should be strictly applied In the well-known case of *Mahomed Shumsul Hooda* v *Shewukram*[3], their Lordships of the Judicial Committee observed as follows

> "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property".

This principle has been very often reiterated by the Judicial Committee in subsequent decisions also It is sufficient for our present purpose to refer to *Radha Prasad Mullick* v *Ranee Mani Dassee*[4] Very recently in *Lalta Baksh Singh* v *Phool Chand*[5], the Judicial Committee again re-affirmed the above proposition and observed at page 397 referring to the decisions in *Narasimha Apparao* v *Parthasarathi Apparao*[6] that the primary duty of a court is to ascertain from the language of the testator what were his intentions, when a will has to be construed They further state that in doing so courts are entitled and bound to bear in mind other matters than merely the words used Their Lordships referred to the surrounding circumstances also The decision in *Bhagabati Barmanaya* v *Kalicharan Singh*[7], is also instructive in this sense that it is stated there,

> "the rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country Rules of construction are rules designed to assist in ascertaining intention and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied"

Such being the case I do not think that I shall be justified in importing the principles of law enunciated by eminent English Judges in the cases referred to by Mr. G C Venkatasubba Rao in the opening of his argument in construing the will.

It seems to me that the testator wanted that on the death of his third wife the property should be taken by each of the four groups consisting of such of his sons as were alive and the respective descendants of each of them as well as the son of the predeceased son This is the only intention that can be ascribed or attributed to a testator like the executant of Exhibit D-1 The fact that the children of Narasayya and Chinna Venkayya were not mentioned in the deed by names and also that the son of Bapanna, the deceased son, was specifically mentioned is sufficient indication of the testator's intention that the property should be enjoyed by his descendants in four groups If this is so each of these groups which was capable of holding property at the time of his death were devisees of the property under the will That each of his sons and respective descendants could constitute groups legally capable of holding, acquiring and inheriting property cannot be disputed and therefore it seems to me that each of these groups got a right vested in it by the will, Exhibit D-1, so that these separate families got a vested interest in these properties on the death of Atchayya and they are entitled to get possession of them when Buchi Venkamma died I do not find any difficulty in construing the will in this way Section 119 of the Indian Succession Act, if properly understood, is not against this method of construing the will

1. (1895) 2 Ch D 196
2. (1910) 2 Ch D 74
3. (1874) L R 2 I A 7 at 14 (P C)
4. (1908) 18 M L J 287 L R 35 I A 118 I L R 35 Cal 896 (P.C.)
5. (1945) 2 M L J 393 (P C)
6. (1913) 26 M L J 411 L R 41 I A 51 : I L R 37 Mad 199 (P C).
7. (1911) 21 M L J 387 L R 38 I A 54 : I L R 38 Cal 468 (P C)

In these circumstances I am satisfied that both the lower courts have arrived at a proper decision on the construction of this document This second appeal therefore fails and is dismissed with costs No leave

K C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE MACK

Ponnammal Ammal *Petitioner**

v

Modern Stores, Tirunelveli through partner Mahadeva Iyer and others *Respondents*

Practice—Trial of case—Ruling as to admissibility of evidence—Proper form and procedure

A ruling as regards admissibility of evidence should be as brief as possible and once the ruling has been given, there should be no interruption in the trial and the trial court should proceed with the trial to judgment without interruption. In its judgment the court should incorporate fuller reasons, if need be, for holding particular evidence to be inadmissible It is not proper to give a lengthy judgment as to admissibility of evidence and then post the suit for further hearing

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order in O S No. 202 of 1947 of the District Munsif Court, Tirunelveli, dated 24th June, 1948.

P. N Appuswami Aiyar for Petitioner

S V Rama Aiyangar, R Ramasubbu Aiyar and *T Venkatadri* for Respondents

The Court delivered the following

JUDGMENT —Petitioner is the second defendant in a small cause suit filed by the Modern Stores, Tirunelveli, to recover about Rs 1,400 in respect of cloth and other goods supplied to her brother the third defendant The first defendant is the son of the second defendant The third defendant who had a power of attorney from his sister according to the plaintiff-shop, on the strength of this authority made those purchases for the marriage of his own daughter, the first defendant. In the suit defendants 2 and 3 endeavoured to evade liability, second defendant alleging that her brother had exceeded his powers and acted in these purchases for himself and so on It is clear that subsequent to the marriage misunderstandings broke out between brother and sister which sought a solution in the present suit

This revision petition seeks to revise a rather curious finding pronounced by the learned District Munsif after plaintiff's evidence was completed as regards the admissibility of evidence relating to some private settlement of accounts as between the second defendant and the third defendant which the former desired to advance in evidence The District Munsif heard elaborate arguments and without giving an immediate ruling as regards admissibility reserved judgment and after three days' consideration delivered an order embodying the substance of the pleadings, the issues and then lengthy reasons for holding that the evidence the second defendant sought to let in was inadmissible He pronounced this order on 24th June, 1948 and adjourned the suit to 29th June, 1948 In the meantime the learned advocate for the second defendant filed a petition for stay which the learned District Munsif was wrong in granting and this revision petition was filed to revise the finding of the learned District Munsif on this question of admissibility of evidence The suit was stayed pending disposal of this petition

The procedure adopted by the learned District Munsif has to be deprecated. The trial of a suit should not be held up in this manner and a long ruling given

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* C R P No 1001 of 1948 5th April, 1949

in the middle of the trial by an order setting out the pleadings, issues and so on, as in a judgment and then posting the suit for further hearing A ruling as regards admissibility of evidence should be as brief as possible and once the ruling has been given, there should be no interruption in the trial and the trial court should proceed with the trial to judgment without interruption In its judgment the Court should incorporate fuller reasons, if need be, for holding particular evidence to be inadmissible *Prima facie* the order passed by the learned District Munsif is rather an extraordinary one, reading, as it does, like a judgment, but with no finding on the issues and ending up with a mere ruling as regards admissibility of some evidence.

I see no grounds for any interference in revision, it being apparent that defendants 2 and 3 are seeking in this suit to resolve some misunderstanding between themselves which arose subsequent to the purchase of these goods from the plaintiff-shop Liability has to be determined by the relationship which existed between the parties *vis-a-vis* the shop at the time supplied these goods The petition is dismissed with costs of the first respondent with a direction to the District Munsif to take this suit now to as speedy a conclusion as possible

K S *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE HORWILL

Herbert Richard Farrington *Petitioner**

v

D Munisami and others *Respondents*

Tort—Duty towards trespasser—Owner of land laying traps to catch trespassing pigs which damaged his potato crop—Neighbour's cow straying into field, falling into trap and getting killed—Owner of land, if liable

The only exception to the general law that a person is under no duty towards a trespasser are (1) that he cannot do something which is dangerous to a trespasser if he knows or has reason to believe that the trespasser is already on, or may be on, his property and (2) that he cannot do anything to lure on to his land and kill animals who would keep outside his land but for the allurement

In order to protect his potato crop from trespassing pigs the defendant laid traps and left some openings in the hedge near the traps Plaintiff's cow strayed into the land and fell into the trap and was killed In a claim for damages,

Held, the owner of the property will not be liable in damages to the owner of the trespassing animal for injury to the animal merely because he had taken no precautions to protect the trespassing animal against injury It cannot be said that the defendant lured the cow into the trap, and therefore liable

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Ootacamund, in S C S No 117 of 1945

K R Krishnaswami Aiyar and *S P Subramaniam* for Petitioner

O T G Nambiar and *V K Ramanathan* instructed by *King and Partridge* for Respondents

The Court delivered the following

JUDGMENT —The facts as they would appear from the judgment of the Subordinate Judge of Ootacamund are that the third defendant had erected a hedge round his field and that, despite this protection, pigs had been entering the field and causing damage to the potato crop In order to protect the crop against pigs, the third defendant had laid a number of traps round the perimeter of his field and near the traps had cut open the hedge, presumably in order that pigs which came there with the intention of entering the field, would enter through these gaps rather than elsewhere, in which case they would be likely to fall into the traps The plaintiff, a neighbour, kept a cow There is no evidence that the defendants knew of the existence of the plaintiff's cow One would have expected that the

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* C R P No 849 of 1947 8th April, 1949.

plaintiff would have known the existence of the gaps in the hedge, though there is no definite finding by the learned Subordinate Judge on that point One morning, it was found that the plaintiff's cow had wandered through a gap in the hedge separating the plaintiff's compound from the defendant's land and had fallen into the trap near the gap and had been killed Plaintiff thereupon filed this suit, which was dismissed

The question is, what duty, if any, was cast upon the defendants with regard to trespassing animals In *Ponting* v *Noakes*[1], the plaintiff's horse put his head across the hedge separating its master's land from the defendants' land and ate the leaves of a yew tree growing on the other side of the hedge, as a result of which the horse died It was argued that this yew tree was a nuisance and that the defendants were consequently liable to the plaintiff in damages It was held that there was no nuisance and that no liability lay on the defendants of protecting animals that might trespass upon their land, even though the yew tree was within easy reach of animals on the other side of the hedge A most important case is *Deane* v *Clayton*[2] in which the defendant had attempted to protect the hares in his grounds by implanting spikes at the bases of trees bordering his neighbour's land. The plaintiff, who was shooting on the neighbour's lands, was accompanied by his dog ; and the dog, in pursuit of a hare, crossed the boundary into the neighbour's lands and ran against one of the spikes and was killed In that case there was a difference of opinion between the learned Judges, two holding that the plaintiff was liable in damages and the other two holding the other way We do not know what eventually happened in that case , but an almost precisely similar case came before the Courts in *Jordin* v *Crump*[3] where the learned Judges followed the reasoning of Gibbs, C J , in *Deane* v *Clayton*[2], who was in favour of passing judgment against the plaintiff, and the learned Judges held that the defendant was entitled to protect himself and his land against trespassing animals, even though he knew that his neighbour's dogs might be killed as a result of the trespass This case was approved of and followed in *Ponting* v *Noakes*[1].

The learned advocate for the petitioner, while not denying the general principle that the owner of a land is entitled to protect his land and crops growing thereon against trespassers, argues that the present case comes within that category of cases where the defendant had laid a trap, which he was not permitted in law to do In particular he relies on *Townsend* v *Wathen*[4] That was a case in which the owner of a land, in order to rid himself of dogs and other vermin, constructed a number of traps in his grounds and baited those traps with fish and highly flavoured meat, with the result that dogs passing along the highway were drawn into the land and consequently trapped and killed The owner of one such dog brought a suit against the defendant , and it was held that the defendant was liable, because no distinction could be drawn between forcibly taking a dog into the field and killing it and attracting it into the trap by some luring bait, into which the dog would be drawn by following its natural instincts It is argued that the case here under consideration is similar in principle to *Townsend* v *Wathen*[4] Mr O T G Nambiar points out that since the hedge was the third defendant's, which he was under no obligation to erect, his responsibility was no greater than if they had erected no hedge at all It seems to me, however, that a distinction can be drawn, because in this case the cow could enter only by a particular opening in the hedge ; and if he did so, it was highly probable that he would fall into the trap. However, the fundamental distinction between the present case and *Townsend* v. *Wathen*[4] is that in that case the intention of the third defendant was to lure dogs into his grounds in order that they should be killed ; but here there is no reason to believe that the third defendant even knew of the existence of the cow, still less that he lured, or intended to lure, the plaintiff's cow—or even pigs for that matter—into the trap. The most that

1 (1894) 2 Q B 281
2 (1817) 7 Taunt 489 · 129 E R 196
3 (1841) 8 M and W 782 · 151 E R 1256.
4 (1808) 9 East 277 · 103 E R 579

can be said is that he should have known, if he had stopped and thought about it, that if pigs could enter by the openings in the hedge and fall into the trap, cows and other animals might do the same From the cases cited before me, however, it seems that the only exception to the general law that a person is under no duty towards a trespasser are (1) that he cannot do something which is dangerous to a trespasser if he knows or has reason to believe that the trespasser is already on, or may be on, his property and (2) that he cannot do anything to lure on to his land and kill animals who would keep outside his land but for the allurement. It may be the nature of a cow to wander here and there in search of pasture , and in so doing it might well walk through the gap in the hedge , but it does not seem to me that its being able to do so is the same thing as saying that the third defendant lured the animal into his field It is conceded that if a person negligently left the gate of his premises open and a cow came through that gate and caused damages, the owner of the cow would be liable , and I do not think that the owner of the property in such a case would be liable in damages to the owner of the trespassing animal for injury to the animal, merely because he had taken no precautions to protect the trespassing animal against injury

In the circumstances I find myself in agreement with the lower court and accordingly dismiss this petition with costs

K S ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE MACK

Nallıboyina Ganga Bhavanamma and others .. *Petitioners* *

v.

Kethu Surayya and another *Respondents*

Civil Procedure Code (V of 1908), Order 47, rule 1 and Order 33, rules 5 and 15—Review of dismissal of pauper petition after its rejection because court-fee was not paid even after several extensions of time —Maintainability—Court-fee paid on review being allowed—Refund when review found not maintainable

An application to sue as a pauper though rejected on 23rd June, 1945, was ultimately dismissed on 21st July, 1945, because court-fee was not paid though the petitioner was given more than one extension of time within which to pay the requisite court-fee This was subsequently reviewed on an application under Order 47, rule 1, Civil Procedure Code on the petitioner paying half the court-fee on the review petition and full court-fee on the plaint In revision,

Held None of the conditions mentioned in Order 47, rule 1 were present in the case The order of dismissal as passed in the case was really not one contemplated by the Code and as the review application could not be brought within the scope of Order 47, rule 1 it was not maintainable

Court-fee paid on the plaint in pursuance of the illegal order allowing the review petition can be refunded but not the half court-fee paid on the review petition as the fact that it is found to be not maintainable will not justify a refund of the court-fee paid on it

Obiter · Strictly, the rejection of an application to sue in *forma pauperis* is under the code intended to be penalised under Order 33, rule 15, Civil Procedure Code and there is no statutory support for the practice which has grown up of giving pauper applicants after the rejection of their petitions to sue *in forma pauperis* time to pay court-fee and allowing them in fact to sue, first paying the costs of those opposing their pauper application

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Munsif Court, Vijayawada, dated 12th February, 1946, in C M P No. 2522 in O P No 49 of 1944

K Krishnamurthi for Petitioners

K Ramaseshan for Respondents

The Court delivered the following

JUDGMENT —Petitioners are respondents 9, 13 and 15 to 19 in a petition filed by two brothers for permission to sue them in *forma pauperis* They seek to revise an order passed by the District Munsif of Bezwada who allowed a review petition, I A No 2522 of 1945, filed under Order 47, rule 1, Civil Procedure Code,

* C R P No 1361 of 1946 12th April, 1949.

which resulted in the pauper petition after having been rejected on 23rd June, 1945, and ultimately dismissed on 21st July, 1945, on their failing to pay the requisite Court fee, being registered as a suit on payment of the Court fee ultimately on 12th February, 1946

It is regrettable that neither learned advocate was instructed about the nature of the suit and in consequence they have no notion whatsoever as regards the contemplated plaint, the alignment of parties or the cause of action On referring to the original plaint, I find that the plaintiffs are two brothers who recently attained majority The suit they contemplate is one to set aside a sale deed in favour of the 8th defendant of the year 1939 executed by their brothers who are the first and second defendants and the husband of the seventh defendant whose children were defendants 3 to 6 The eighth defendant subsequently sold them to defendants 9, 13 and 15 to 19 who are the present petitioners The other members of the family of the petitioners in the pauper petition made no appearance giving clear indication that this suit is one of a familiar type

I come now to the main point for consideration, namely, the maintainability of this review petition, I A No 2522 of 1945 under Order 47, rule 1, Civil Procedure Code The record shows that the pauper petition was substantially, though not explicitly, rejected on 23rd June, 1945, by a finding that the petitioners had ancestral property more than sufficient to cover the Court-fee The petition was posted for payment of Court-fee on 7th July, 1945, time was extended till 14th July, 1945, and finally the petition was dismissed on 21st July, 1945 Then on 21st August, 1945, this review petition was filed which sought in substance merely to extend the time given for payment of Court-fee The District Munsif held that half the Court-fee was payable on the review petition and directed that if the petitioners paid the proper Court-fee on the review petition and also the full Court-fee payable on the plaint within a week, the review petition would be allowed This Court-fee having been paid on 9th February, 1946, the District Munsif allowed the review petition and the suit was registered on payment of these Court-fees

The procedure adopted by the District Munsif is obviously irregular. Order 47, rule 1 is only applicable in cases of decrees or orders contemplated by the Code of Civil Procedure by aggrieved persons who from the discovery of new and important matter or evidence, which, after the exercise of due diligence was not within their knowledge or could not be produced by them at the time when the decree was passed or on account of some mistake or error apparent on the face of the record or for any other sufficient reason seek a review None of these conditions are satisfied in the present case In the first place, Order 33, Civil Procedure Code, which regulates pauper suits makes no provision for a court extending time for payment of Court-fee when it rejects an application for permission to sue as a pauper under any of the clauses of Order 33, rule 5 As a matter of practice, and of grace, it has been however usual for courts to give a short time for payment of Court-fee when rejecting such application. The learned advocate for the respondents has argued on the basis that this review petition was maintainable as one to review the dismissal of the petition for failing to pay Court-fee in time He has urged that on 21st July, 1945, the petitioners only had a portion of the Court-fee they were called upon to pay and in fact the argument he advances is merely one for extending indulgence which has already been unduly stretched Order 33, rule 15 makes specific provision for applicants whose pauper petitions are rejected to file subsequent suits They are at liberty to do so in the ordinary manner in respect of such right provided, they first pay the costs, if any, incurred by the Provincial Government and by the opposite party opposing the pauper application. In fact, strictly, the rejection of an application to sue *in forma pauperis* is under the Code intended to be penalised under Order 33, rule 15, and I am really unable to see any statutory support for the practice which has grown up of giving pauper applicants after the rejection of their petitions to sue *in forma pauperis* time to pay court-fee and allowing them in fact to sue first paying the costs of those opposing

their pauper application I do not, however, propose to say anything to upset the existing practice which appears to have developed out of a feeling of charity towards *bona fide* pauper suitors except to say that a court is under no legal obligation at all to give time to pay Court fee when it rejects a pauper petition, though in special cases such a concession may perhaps be granted The normal procedure contemplated by the Code is when a petition is rejected to leave the petitioner to his remedy under Order 33, rule 15, Civil Procedure Code

The order, therefore, sought to be reviewed, namely, dismissal of the pauper petition after its rejection because Court-fee had not been paid in time despite several extensions is really not one contemplated by the Code It is quite impossible in any event to bring this review petition within the scope of Order 47, rule 1 of the Civil Procedure Code I hold in the result that the review petition which the learned District Munsif allowed was not maintainable, and that the order that he passed requiring deficit Court-fee on such a petition and full Court-fee on the plaint being paid by a certain date as a condition precedent to the pauper petition itself being allowed is one nowhere contemplated under Order 33, and vitiated by material irregularity in the exercise of jurisdiction The petition is allowed and the pauper petition will stand rejected As regards the Court-fee paid by the petitioners in the lower court on this illegal order it is equitable that they should receive a refund of the Court-fee they paid on the plaint There are, however, no grounds for refunding them half the Court-fee they paid on the review petition they filed under Order 47, rule 1, Civil Procedure Code The fact that it is found to be not maintainable will not justify a refund of the deficit Court-fee paid on it With these directions, the petition is allowed with costs

V S ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR JUSTICE VISWANATHA SASTRI

Vemuri Parandhamiah *Appellant**

v

R Narasimha Rao and another *Respondents*

Companies Act (VII of 1913), section 235—Scope—Misfeasance proceedings under—If can be ordered in the case of a company which is wound up voluntarily

The language of section 235 of the Companies Act is general and applies to all the three modes of winding up of a company contemplated by section 155 of the Act, *viz* by Court or voluntarily or subject to the supervision of the Court Accordingly, the Court has power to initiate misfeasance proceedings even in the case of voluntary liquidation either against the managing director or a liquidator

Quaere Whether an order initiating such proceedings is appealable as a "judgment" within the meaning of clause 15 of the Letters Patent

Per Viswanatha Sastri, J —There is no justification for controlling or limiting the operation of section 235 by reference to section 216 of the Act

On appeal against the judgment and order of the Hon'ble Mr Justice Bell dated 7th October, 1948, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No 1490 of 1948

K V Rangachari for Appellant

N Suryanarayana, R Rajagopala Aiyar, K Krishnamurthi and *G Suryanarayana* for Respondents

The Court delivered the following

JUDGMENTS *Satyanarayana Rao, J* —This is an appeal against the judgment of Bell, J, in a misfeasance proceedings under section 235 of the Indian Companies Act

* O S Appeal No 67 of 1948 14th April, 1949

directing that the appellant's conduct as managing director of the company should be examined under section 235 of the Act and that the conduct of the second respondent as official liquidator of the company now in voluntary liquidation should be similarly examined under the said section

Sri Vijayavada Motor Transport Company Limited was incorporated as a private limited company under the Indian Companies Act on 17th November, 1944. On 26th November, 1944, the Board of Directors appointed the appellant as its managing director The company commenced its business on 1st December, 1944, and the appellant continued as its managing director until 14th June, 1947. On that date, the company went into voluntary liquidation and the second respondent who was the president of the board of directors was appointed liquidator. There were some prior proceedings relating to the winding up of this company which have been referred to in the course of the arguments but which are not very material for the purpose of the disposal of this appeal The present application was filed by one R Narasimha Rao under sections 216 and 235 of the Indian Companies Act for an enquiry against the appellant and the second respondent, i e, the ex-managing director and the liquidator with reference to certain charges of misfeasance, breach of trust, malfeasance and non-feasance, particulars of which were set out more fully in the affidavit filed in support of this application The application was resisted by the appellant and the second respondent on the ground that as the company is under voluntary liquidation and was not wound up by an order of the Court, misfeasance proceedings under section 235 of the Companies Act could not be initiated and that section 235 has no application at all to the facts of the present case This objection was overruled by the learned Judge and he directed an enquiry Against this order, the present appeal has been preferred by the ex-managing director

On behalf of the respondent, a preliminary objection was taken regarding the maintainability of the appeal The decision of this question turns mainly upon a proper interpretation of section 202 of the Indian Companies Act As we are, however, of opinion that the appeal should fail on merits, it is unnecessary to consider the preliminary objection and express an opinion upon it

The main objection taken on behalf of the appellant is that section 235 of the Companies Act does not apply to the case of a company which was wound up voluntarily Reference was made before the learned Judge and also before us to section 216 of the Act which enables a liquidator or contributory or a creditor to apply to the Court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls, staying of proceedings or any other matter, all or any of the powers which the Court might exercise if the company were being wound up by the Court It was contended on behalf of the respondents before the learned Judge that apart from section 235 of the Act which, according to them, applies directly even to the case of a voluntary winding up, at least by virtue of section 216 of the Act, the power of the Court to initiate the present proceedings under section 235 even in the case of a company which was wound up voluntarily is attracted by the above section

Part V of the Companies Act relates to "winding up" and there are three modes indicated in section 155 of the Act of winding up of a company The winding up may be by the Court or voluntary or subject to the supervision of the Court. Clause (2) of section 155 provides that

> "The provisions of this Act with respect to winding up apply, unless the contrary appears, to the winding up of a company in any of these modes"

The group of sections beginning with sections 162 to 198 relate to winding up by Courts Sections 203 to 220 relate to voluntary winding up Sections 221 to 226 relate to winding up subject to supervision of the Court Then follow the group of sections under the heading of "supplemental provisions" and it is in this group that section 235 of the Act occurs These supplemental provisions, it would be seen from a perusal of the sections, apply to all cases of winding up unless there is

something in the subject or context to exclude the applicability of a particular section Section 235 begins by stating

"Where in the course of winding up a company, it appears that any person who has taken part in the formation or promotion of the company etc"

The learned advocate for the appellant wants the Court to read after the word "where" and before the words "in the course of winding up of a company" the words "the Court" and in that event the section would read as "where the Court in the course of winding up a company" By so reading the learned advocate wants to restrict the applicability of the section to the only case of winding up of a company by an order of Court I am, however, unable to read into the section words which are not there The expression "in the course of winding up a company" refers to all the three modes in which a company can be wound up, and therefore the course of winding up a company might have arisen by any of the modes indicated in section 155 of the Act The same section (section 235) uses the word "liquidator," whereas in the group of sections relating to winding up by Court, reference was made to official liquidator appointed under section 175 of the Act and section 177 of the Act directs that the Official Liquidator should be described by the style of Official Liquidator of a particular company in respect of which he is appointed and not by his individual name The official liquidator derives his appointment from the Court, whereas the liquidator appointed in the case of a voluntary winding up derives his authority from the share-holders The word "liquidator" in section 235 is used in a comprehensive sense so as to take in not only the Official Liquidator but also other liquidators such as a liquidator appointed in voluntary winding up There is no reason, nor is there any indication of a contrary intention either in the language of the section (section 235) or in the scheme of the Act to exclude its applicability to the case of a company which was wound up voluntarily. Clause (2) of section 155 expressly makes the provisions relating to winding up of a company applicable to winding up of a company in any of the three modes indicated in clause (1) unless there is a contrary intention In the absence of a contrary intention in the section, it is difficult to accept the contention urged on behalf of the appellant that the scope of the section should be restricted to the case of winding up of a company by a Court My examination of the scheme of the Act and also the language of the section without reference to any precedent or authority has led me to the conclusion that the language of section 235 is general and applies to all the three modes of winding up of a company contemplated by section 155 of the Act This is also the opinion of text writers, Palmer's Company Law, page 453, (18th edition), dealing with section 276 which corresponds to section 235 of the Indian Act, Palmer's Company Precedents, Vol 2, pages 782 and 800, and Lindley, page 941 referring to the decision in *Rance's case*[1]

It is therefore unnecessary for me to refer to the contention that even apart from the language of section 235, the power of the Court to initiate misfeasance proceedings even in the case of voluntary liquidation either against the managing director or a liquidator can be enforced by applying section 216 of the Act In my view, therefore, the Court has ample jurisdiction to entertain the present application and the appeal therefore should be dismissed with costs of the first respondent.

Viswanatha Sastri, J—The facts of the case and the relevant statutory provisions have all been stated in the judgment of my learned brother just now delivered and it is unnecessary for me to refer to them again Mr N Suryanarayana, the learned counsel for the respondent, took a preliminary objection that no appeal lay agains the order of Bell, J Section 202 of the Companies Act makes an order or decision given in the matter of the winding up of a company by the Court appealable in the same manner and subject to the same conditions in and subject to which appeals may be had from any order or the decision of the same Court in cases within its ordinary jurisdiction The argument of Mr Suryanarayana is that on a proper

1 6 Chancery Appeal, 104

construction of this section, no appeal would lie from an order of a single Judge of this Court made for the winding up of a company unless the order appealed from is a "judgment" within the meaning of clause 15 of the Letters Patent The contention of the learned advocate for the appellant on the other hand is that there is a right of appeal against all orders which decide a dispute between parties in the course of the winding up of a company and that the words "appeals shall be had in the same manner, etc , etc " in section 202 merely regulate the procedure to be followed in the presentation and hearing of the appeals, *e g* , the time within which the appeal should be filed, the necessary papers to be filed with the appeal, the Court-fee payable and so on The decision in *Mulk Raj* v *Official Liquidator, Peoples Bank*,[1] which considered the previous decisions of the Lahore High Court supports the contention of the appellant There being no right of appeal unless expressly given by statute, the terms of section 202 of the Companies Act must be examined to find in what cases a right of appeal is given Under that section, the right of appeal is to be had in the same manner and subject to the same conditions as from orders of this Court in the exercise of its ordinary jurisdiction Unless, therefore, an order of a single judge of this Court in the course of the winding up amounts to a "judgment" within the meaning of clause 15 of the Letters Patent it is reasonable to contend that an appeal would not lie against his order to this Court It may be that the word "manner" occurring in section 202 of the Companies Act is capable of the interpretation that it relates merely to the procedure to be followed in the preferring and hearing of appeals as held by the Lahore High Court But there are the additional words "subject to the same conditions in and subject to which appeals may be had" in section 202 to which also effect must be given. They do not give a general right of appeal but only a limited right of appeal under the conditions specified in the section It was for this reason that the Calcutta High Court in *Madan Gopal Daga* v *Sachindra Nath Sen*[2], in construing section 202 held that so far as Chartered High Courts were concerned, an order made in the winding up of a company, in order to be appealable, must be a "judgment" within clause 15 of the Letters Patent. Though this view was generally affirmed by Rankin, C J , in *Levy Bros & Knowles, Ltd* v *Subodh Kumar Day*[3], still, in the course of his judgment, the learned Judge expressed the view that any order which deprived the appellant of a substantial and important right, though it might not come strictly within the definition of 'judgment' in clause 15 of the Letters Patent, was yet appealable I am unable to reconcile the different parts of the judgment in this case Either section 202 of the Companies Act incorporates the limitation on appealability contained in clause 15 of the Letters Patent or it does not There is no *tertium quid* If the view of the Calcutta High Court in *Madan Gopal Daga* v. *Sachindra Nath Sen*[2] is to be followed, then the question arises whether the order now under appeal which merely directs an enquiry into the conduct of the director and liquidator under section 235 of the Companies Act is a "judgment" within the meaning of clause 15 of the Letters Patent Having regard to the exposition of the meaning of the word 'judgment' contained in the decision of this Court in *Tuljaram* v *Alagappa Chettiar*[4] it would be difficult to hold that the order in question which does not terminate or put an end to any proceeding before the learned Judge of this Court is a 'judgment' and therefore appealable I, however, find that in a decision of a Bench of this Court in *Chockalingam* v *Official Liquidator*[5], it has been held, relying on the opinion of Messrs Sircar and Sen, that an order under section 196 of the Companies Act directing the public examination of directors is appealable under section 202 of the Companies Act The case, no doubt, related to an appeal against an order of a District Judge in the course of the winding up of a company and there is no discussion of the question As my learned brother has indicated, it is not necessary on this occasion to express a final opinion on the

1 A I R (1938) Lah 659 (F B)
2 (1927) I L R 55 Cal 262
3 (1927) 31 C W N 894
4 (1910) 21 M L J 1 I L R 35 Mad 1
5 (1943) 2 M L J 499 : I L R. 1944 Mad. 540

question whether an order of the kind with which we are now concerned is appealable as a 'judgment' within the meaning of clause 15 of the Letters Patent I agree with him that the appeal must fail on the merits

The argument of the appellant's counsel is that section 235 of the Companies Act has reference only to a winding up by the Court and has no application to a voluntary liquidation Section 235 is part of a fasciculus of sections headed "Supplemental provisions" beginning with section 227 An examination of section 227 and the provisions following it would show that they apply both to a voluntary winding up and a winding up by or subject to the supervision of the Court The object of section 235 is to facilitate recovery by the liquidator of the assets of the Company improperly dealt with or retained by the directors or other officers or in respect of which they have become liable to account by reason of any misfeasance or breach of trust In order to avoid expenditure by way of Court-fees and also to minimise the delay likely to occur if regular suits were instituted, section 235 provides a cheap and expeditious remedy for realisation of the assets of a Company under liquidation. I see nothing either in the language of the section or the reason of the rule that makes it inapplicable to a case of a voluntary liquidation. The words of section 235 are perfectly general and apply to a voluntary liquidation.

The further contention of the appellant's counsel is that section 216 governs the powers of the Court in the course of a voluntary liquidation and that section confers only a very limited power on the liquidator or contributory, namely, "the power of enforcing calls, staying of proceedings, or any other matter," the other matter being, according to the learned advocate, *ejusdem generis* with the previously enumerated topics Therefore, it is argued that the present application by a shareholder for the examination of the director and liquidator on a misfeasance application is not maintainable I cannot agree with this contention Having regard to the specific mention in section 216 of such wholly and dissimilar topics as enforcing calls and staying of proceedings, it would be, in my opinion, a misapplication of the doctrine of *ejusdem generis* to hold that the words "any other matter" following the specified categories refer only to matters similar in their nature to the enumerated topics The enumerated topics do not belong to the same genus The circumstance that the general words follow two specified topics of a distinct and dissimilar nature in no way derogates from the general application of the general words in the section No case has been cited to us in which it has been held that misfeasance proceedings could not be ordered against directors and liquidators in the course of a voluntary liquidation The decision in *Muzaffar Hussain* v *Hakim Rai*[1] relied on by the learned advocate for the appellant merely held that in a voluntary winding up, the extraordinary powers of the Court to order the public examination of a director or other officer of the company under section 196 of the Companies Act could not be invoked by the voluntary liquidator and it is only the Official Liquidator that could apply under section 196 The actual decision in the case has no bearing on the point now under consideration There is no doubt an observation of Mahajan, J, in the course of the judgment with reference to the interpretation of section 216 in these terms

> "As I read the section 216 in plain terms, by it powers have been given to the Court at the instance of a voluntary liquidator to enforce calls, stay proceedings or help him in any other matter, which can only mean matters similar to the enforcing of calls, etc These words can only be read *ejusdem generis* with the enforcing of calls, and the matters following it"

The analysis of the provisions of the Act made by my learned brother in the course of his judgment clearly shows that there is no justification for controlling or limiting the operation of section 235 by reference to the provisions of section 216

Though no Indian decision deciding the point now under consideration has been cited to us, text books of authority in England have answered the question

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1 (1947) A.I R 1947 Lah. 283.

in favour of the respondent as my learned brother has shown in his judgment. See also in In re *Home and Colonial Insurance Co* [1]

I agree, therefore, that this appeal fails and should be dismissed with costs of the first respondent.

K S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SOMASUNDARAM.

L Papayyaswamy .. *Petitioner**

Indian Penal Code (XLV of 1860), sections 465 and 471—Accused posting outside Madras application with forged documents addressed to the Madras Public Service Commission—Offence where committed—Jurisdiction

Where the accused posts at Vizagapatam along with his application for admission to a competitive examination to the Madras Public Service Commission some documents which were forged, intending to use them as genuine, the real user of the documents comes in only when the Madras Public Service Commission looks into the application and considers it, as it is open to the petitioner to withdraw the application even before it is considered by the Commission Where the matter has been considered by the Madras Public Service Commission the offence of using such forged documents as genuine is committed at Madras and the Presidency Magistrate's Court would have jurisdiction to try the same

Petition under sections 435 and 439 of the Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Fifth Presidency Magistrate of the Court of Presidency Magistrates Egmore, Madras dated 17th February, 1949 in C C No 1128 of 1948

Vepa P Sarathi and *E H Bagiratha Rao* for Petitioner

The Crown Prosecutor (*S Govind Swaminathan*) on behalf of the Crown.

The Court made the following

ORDER :—This is a petition to quash the charge on the ground that the Court has no jurisdiction The facts of the case are these

The petitioner has been prosecuted for having used three documents along with his application to the Madras Public Services Commission for admission to a competitive examination The three documents are said to be forged documents. They were posted at Vizagapatam on 17th July, 1947, along with his application and received in the office of the Public Services Commission on 21st July, 1947. After examining eight prosecution witnesses the lower Court has framed charges against the petitioner for the offences under section 465 and section 465 read with section 471, Indian Penal Code

It is contended by the learned counsel for the petitioner that these documents along with the application having been posted at Vizagapatam the offence of using forged documents is complete at Vizagapatam and therefore the only Court which has territorial jurisdiction for trying the petitioner for the offences of which he is charged is the Court at Vizagapatam and not the fifth Presidency Magistrate's Court at Madras

The question really is where were these documents used There is no doubt that the petitioner intended to use these documents as genuine before the Madras Public Services Commission and with that object he posted his application along with the forged documents at Vizagapatam The real user of the documents comes in only when the Madras Public Service Commission looks into the application and considers it It is open to the petitioner to withdraw his application even before it is considered by the Public Services Commission Then it cannot be said that he used the forged documents with the Madras Public Services Commission as genuine In this case he has not done so As stated already the real

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1 (1930) 1 Ch 102

* Cr R C. No 348 of 1949 (Cr R P No 298 of 1949) 23rd March, 1949

user comes in only when the application is considered by the commission, at Madras and it has been considered there The offence of using forged documents as genuine is, therefore, committed at Madras I hold that the Presidency Magistrate's Court has jurisdiction to try the petitioner for the offences charged

The petition is dismissed.

V.P S. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE VISWANATHA SASTRI.

The Goripalayam Durga, at Madura, through its present Manager, Sheik Ibrahim Sahib .. *Appellant**

v

P Kesavaswamy Iyer (deceased) and others .. *Respondents.*

Res judicata—*Suits for grant of patta and recovery of rent under the Madras Estates Land Act—Decisions in—Limits to their binding nature—Prior suit for rent claiming extra charge for water drawn from landholder's tank—Dismissal* in limine—*Liability of tenant for water rate as 'rent' not decided—Subsequent suit by landholder for subsequent years claiming water rate as part of the rent—If barred by* Res judicata

With reference to suits for grant of patta and recovery of rent under the Madras Estates Land Act, if the terms and conditions of the tenancy generally are decided for a particular year in a litigation between the landlord and tenant, the decision would bind the parties in future years also, unless fresh circumstances intervene or there is an alteration in the law governing the rights of parties The case, however would be different if the former decision was based on facts and circumstances, special or peculiar to the year, with respect to which the prior decision was rendered

The rule that a decision would be *res judicata* even if it is not specific and express but is necessarily implied in the decree can have no application to a case where, the court in the former suit has expressly left undecided the issues that arose for decision in the later suit

Where a Collector dismisses the previous suit for rent *in limine* on the sole ground that the landholder not having complied with the statutory requirements entitling him to an enhancement of rent, could not sue for the water rate which he had not hitherto collected, and declines to go into the question whether the tenant would be liable for the water rate as rent, the decision in that suit cannot operate as *res judicata* in a subsequent suit by the landholder against the same tenant claiming water rate as part of the rent for subsequent years

Appeals against the decree of the District Court, Madura, in A S No 155, etc , of 1945, preferred against the decree of the Deputy Collector, Melur, at Madura in S S No 284, etc , of 1944

S K Ahmed Meeran for Appellants

T. L Venkatarama Aiyar for Respondents

The Court delivered the following

JUDGMENT —These four second appeals arise out of four suits, two of which were instituted by two ryots for the grant of patta under section 55 of the Madras Eastates Land Act for Fasli 1353 and two by the landholder against the same two ryots for arrears of rent due for fasli 1351 to fasli 1353 under section 77 of that Act The ryots were the appellants in all the four appeals preferred to the District Judge of Madura from whose decision the landholder has preferred these four second appeals The main question which arose for determination in all these four suits and appeals was whether the landholder was entitled to levy a charge for water drawn by the ryots from the tank of the Landholder for cultivating dry lands comprised in their holdings with wet crops It has been found by the learned District Judge that the *solum* of the tank vested in the landholder ; that the water stored in the tank became his and that for water drawn from the tank by them, the ryots were liable to pay water rate to the landholder On this finding the landholder would be entitled to claim the water rate as part of the " rent " within the meaning of section 3 (2) (ii) of the Madras Estates Land Act The learned District Judge, however, disallowed the landholder's claim for water rate on the ground

* S.A. Nos. 760, 761, 908 and 909 of 1946. 18th February, 1949.

that it was barred by *res judicata* by reason of the prior adjudication in two suits for rent for fasli 1344 between the same parties The former judgment is marked as Ex P-4 The learned Judge made it clear at the same time that the bar of *res judicata* was confined only to the holdings covered by patta Nos 7 and 13 with which alone the former suits were concerned The contention of Mr Ahmed Meeran, the learned advocate for the appellant, is that the decision of the lower appellate Court on the question of *res judicata* is erroneous

The facts connected with the previous litigation and the nature and effect of the prior adjudication have now to be stated The landholder brought S S. No. 806 of 1936 and 808 of 1936 in the Court of the Deputy Collector, Melur Division against the two ryots with whom we are now concerned, claiming arrears of rent due on the holdings for faslis 1342 to 1344 both inclusive The tharam assessment or the dry rate payable in respect of the holdings was paid by the ryots but they disputed their liability to pay the extra charge claimed by the landholder for water drawn from his tank by the ryots for cultivating wet crops on their dry lands. During the pendency of these two suits, the two applications (M P Nos 74 and 75 of 1936) were filed by the landholder before the same Collector under section 30 (2) of the Madras Estates Land Act for enhancement of rent due on the lands in pattas Nos. 7 and 13 on the ground that he had effected an improvement to these lands by allowing water from a tank which he had maintained in a good condition, to be taken to those dry lands for the cultivation of wet crops and thereby caused the production of these lands to be increased M P Nos 74 and 75 of 1936 related to faslis 1342 and 1343 and were evidently filed to meet the objection of the ryots that the landholder was, in effect, claiming an enhancement of rent in the two suits filed by him for recovery of a water rate, which he had not been collecting before, and that the landholder should have followed the procedure prescribed by section 30 of the Madras Estates Land Act Whatever be the reasons which led to the filing of M P Nos 74 and 75 of 1936, they were dismissed by the Collector on 17th November, 1936 on the ground that the improvements on the basis of which the enhancement was claimed, had not been registered in conformity with section 32 (1) (*a*) of the Act The order of the Collector is marked Ex P-3. On 1st December, 1936, the Collector dismissed the suits for arrears of rent filed under section 77 of the Estates Land Act (S S Nos 806 and 808 of 1936) by a judgment marked as Ex P-4 (which omitting unnecessary portions) ran as follows .

"These suits are therefore concerned only with the claim for the charge for water supplied to these dry lands The decision on these suits clearly depends directly on the disposal of the petitions (M P Nos 74 and 75 of 1936) The enhancement of rent claimed in these petitions having been refused, I cannot see how the same enhancement can be claimed in the suits The plaintiff's vakil withdraws the plaint in these suits with respect to faslis 1342 and 1343 in view of the decisions given in M P Nos 74 and 75 of 1936 Yet he affirms that the very same charge for water which he claims for fasli 1344 and which was refused in M P Nos 74 and 75 of 1946 is not an 'enhancement of rent' but is 'rent'. I cannot see the difference in the two cases—if the charge for water is admitted to be an enhancement of rent during the faslis 1342-1343, the same charge made under the same circumstances, must necessarily be also an enhancement of rent for fasli 1344 and it cannot be claimed in these suits, in view of the orders on M P Nos 74 and 75 of 1936 Therefore, there is no necessity to go into the issues framed in the suits The suits are dismissed with costs"

I confess my inability to understand or appreciate the reasoning of the Deputy Collector which resulted in the dismissal of the suits for rent without even a consideration of the issues raised in the case

In the suits which have given rise to the present appeals, the plea of the landholder is that he is entitled to the water rate claimed by him as part of the "rent" lawfully payable by the ryots and this is not a case of "enhancement of rent" within the meaning of sections 30 to 32 of the Madras Estates Land Act. It may be stated at the outset that the landholder's claim is supported by the decision of this Court in *Madura Kallalagar Devastanam v. Subbiah Ambalam*[1] But the contention of the respondent, accepted by the learned District Judge, is that the claim is barred by *res judicata* by reason of the prior decision in S S Nos 806 and 808 of

1 (1940) 1 M L J. 160.

1936 . I am unable to agree The issues framed in the prior suits have not been exhibited in the present case, but the main contest between the parties was, whether or not, the tenants were liable to pay the water rate claimed by the landholder. The Collector declined to go into this question for the reason that, in his view, the landholder's claim constituted an enhancement of rent by reason of an improvement which had not been registered under section 32 (1) (*a*) of Act I of 1908. He therefore dismissed the suits *in limine* without taking any evidence at all This view of the Collector was erroneous in law There was no need for a landholder, claiming in addition to the *tharam* assessment a water rate, on the ground that the water from his tank had been drawn by the ryot for cultivating dry lands with wet crops to get an order for enhancement of rent from the Collector under section 32 of Act I of 1908 But it is argued that the decision dismissing the landholder's previous suits nevertheless constitutes *res judicata* The decision on a preliminary point on which a suit fails may be *res judicata* in regard to that point itself in a subsequent suit whose subject matter is the same But, as observed by Ramesam, J ,

> "There can be no *res judicata* laying down a wrong rule of law between parties for future guidence also " *Narayana* v *Subramanian*[1]

With reference to suits for grant of patta and recovery of rent under the Estates Land Act, if the terms and conditions of the tenancy generally are decided for a particular year in a litigation between the landlord and tenant, the decision would bind the parties in future years also, unless fresh circumstances intervene or there is an alteration in the law governing the rights of parties The case would, however, be different if the former decision was based on facts and circumstances, special or peculiar to the year, with respect to which the prior decision was rendered—See *Venkatanarasimha* v *Venkataratnam*[2], *Maharajah of Jeypore* v *Ramamurthy*[3] *Narayana* v *Subramanian*[1] Strong reliance has been placed by Mr T L Venkatarama Aiyar, the learned advocate for the respondent, on the decision of the Full Bench in *Bayyan Naidu* v *Suryanarayana*[4] for the proposition that when the Collector dismissed the former suit for rent filed by the landholder, he must be deemed to have held by implication that the tenant was not chargeable with water rate in respect of his user of the water of the landlord's tank It is quite true, that a decision would be *res judicata* even if it is not specific and express, provided it is necessarily implied in the decree For instance, a decree which necessarily involves a finding on an issue in the affirmative or the negative, even though no specific finding was recorded on it, would be *res judicata* in a subsequent suit This rule, however, can have no application, where, as here, the Court in the former suit has expressly left undecided the issues that arose for decision in the later suit As observed by the Judicial Committee

> " it would be a contradiction in terms to say that the Court had finally decided matters which it expressly left untouched and undecided" —See *Parsottam Gir* v *Narbada Gir* [5]

The Collector dismissed the previous suit for rent *in limine* on the sole ground that the landholder not having complied with the statutory requirements entitling him to an enhancement of rent, could not sue for the water rate which he had not hitherto collected He declined to go into the question whether the tenant would be liable for the water rate as " rent " I consider that the view of the learned District Judge that the decision of the Collector in the previous suits operated as *res judicata* is incorrect.

I therefore reverse the decrees of the lower appellate Court and remand the appeals to the same Court for the passing of appropriate decrees in the four suits after determining the amount of water rate payable by the ryots The Court-fee

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1 (1937) 1 M L J 233 I L R 1937 Mad 364 at 374 (F B)
2 (1914) 32 M L J 63
3 (1933) 65 M L J 684 I.L.R 57 Mad 73
4 (1912) 23 M L J 543 37 Mad 70 (F B).
5 (1899) L R 26 I A 175 : 21 All 505 at 514 (P C)

paid by the appellants in these four second appeals will be refunded. There will be only one set of costs in S A. No 760 and 908 of 1946 and another set of costs in S A Nos 761 and 909 of 1946 payable by the respondent to the appellant (Leave refused).

V S. — ——— *Decrees reversed and appeals remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

K. Perumal Mudaliar . *Appellant**

v

The Province of Madras, represented by the Director of Industries and Commerce .. *Respondent.*

Government of India Act (1935), *section* 175—*Contract by correspondence—Contents necessary to make it a valid one under section* 175—*Contract entered into by Superintendent of Soap Institute with the permission and approval of the Director of Industries who was authorised to enter into a contract on behalf of Government—Validity*

Even if no formal document may be necessary in the case of a contract by the Government and it might be entered into by correspondence, the correspondence embodying the contract must *ex-facie* show that the contract was entered into by the Government or on behalf of the Government

As groundnut oil was required for use in the Government oil factory at Calicut, the Superintendent of the Kerala Soap Institute wrote to a merchant at Coimbatore asking him to quote his lowest rate for supplying a certain quantity for prompt supply On the merchant offering to supply the oil at a particular rate, the Superintendent of the Institute wrote back to him accepting the offer and directed the merchant to supply the oil within a certain time The oil was not supplied as agreed upon within the time prescribed The Government filed a suit for damages against the merchant. On a contention raised in defence that the contract which afforded the cause of action to the plaintiff was not valid as it did not comply with the provisions of section 175 of the Government of India Act,

Held The correspondence showed that the terms of the contract were negotiated between the Superintendent and the merchant and that the contract was concluded only between them Though the Superintendent might have obtained the permission of the Director of Industries who alone was authorised to enter into a contract on behalf of the Government, it cannot be said that the contract was entered into by the Director of Industries The contract was hence invalid and the suit based upon the same was not maintainable

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in O S No. 49 of 1943, dated 2nd July, 1945.

C R Pattabhiraman, R Ramasubba Aiyar and *V Ramaswami* for Appellant.

The Government Pleader (*K Kuttikrishna Menon*) for Respondent.

The Judgment of the Court was delivered by

Subba Rao, J.—The only point that arises in this appeal is whether the suit contract is valid, and whether it complies with the provisions of section 175 of the Government of India Act, 1935

The defendant is a merchant carrying on business in Coimbatore The Government required groundnut oil for use in the Government Oil Factory at Calicut. The superintendent of the Kerala Soap Institute wrote Ex P-1 dated 12th May, 1942, to the defendant asking him to quote his lowest rate for supplying 40 tons of expeller quality groundnut oil for prompt supply. The defendant by his letter, Ex P-2 dated 15th May, 1942, offered to supply 40 tons of expeller groundnut oil at the rate of Rs 369 per nett ton of 2,240 lbs, if barrels were supplied by the Superintendent He agreed to deliver the said oil within three months after acceptance The defendant received the letter, Ex P-9, dated 21st May, 1942, from the Superintendent of the Kerala Soap Institute, wherein the latter stated that he tested the sample of oil received and accepted the offer of the defendant. He also informed the defendant that the oil agreed to be delivered should be sent

* Appeal No 50 of 1946. 28th March, 1949.

within three months, and that the bulk supplied should be exactly similar to the sample On 21st May, 1942, the Superintendent again wrote a letter to the defendant asking him to supply the groundnut oil, particulars whereof were given in that letter, within three months as agreed upon between the parties For one reason or other—it is not necessary to go into that question—the defendant did not supply the oil agreed upon between the parties within the time prescribed.

The Government purchased the oil from a third party, and filed the suit for recovery of damages, the difference between the price at which the defendant agreed to sell and the price for which they later on purchased from the third party. The defendant *inter alia* contested the suit on the ground that the contract which afforded the cause of action to the plaintiff was not valid, as it did not comply with the provisions of section 175 of the Government of India Act, 1935 The learned Subordinate Judge held that the contract was valid, and that it also complied with the provisions of section 175, as the Superintendent, who called for the tender and accepted it took the sanction of the Director of Industries

Section 175 (3) of the Government of India Act, 1935, reads as follows :

> " Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise "

It is not disputed that the Director of Industries was authorised by the Government to enter into a contract on its behalf The learned counsel for the appellant raised two contentions before us (1) that under section 175, sub-section (3) the contract between the Government and the other party must be embodied in a formal document, and (2) that even though the contract with the Government might be entered into by correspondence, the correspondence must show *ex facie* that the contract was entered into by the Government or the person authorised by the Government to enter into the contract

The learned counsel for the appellant relied upon a long list of decisions in support of his contention Though the result of those decisions are different, the principles laid down therein will equally apply to the present case *Municipal Corporation, Bombay* v *Secretary of State for India*[1] turns upon the construction of section 30 of the Government of India Act of 1919 The provisions of section 30 are similar in effect to that of section 175 of the Government of India Act, 1935 Sub-section (2) of section 30 of that Act reads .

> " Every assurance and contract made for the purpose of sub-section (1) of this section shall be executed by such person and in such manner as the Governor-General in Council by resolution directs or authorises and if so executed may be enforced by or against the Secretary of State in Council for the time being "

It is unnecessary to state the facts in that case At page 706 after quoting the section, Mirza, J , observes

> " It is conceded by Mr Coltman that the terms of this section are mandatory and not merely directory It will be observed that a paramount condition laid down in this section for such a contract is that the contract should be on behalf and in the name of the Secretary of State in Council "

He further expressed his opinion that section 30 contemplated a formal deed or instrument in which the contract was set out as being on behalf and in the name of the Secretary of State in Council He relied upon the words

> " that the contract should be on behalf and in the name of the Secretary of State in Council "

as giving an indication that the contract must be embodied in a formal document.

The next decision cited by the learned counsel is reported in *Krishnaji Nilkant* v *Secretary of State*[2] That decision also construes and expresses the scope of section 30 of the Government of India Act The learned Judges accepted and followed the

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1. (1932) I.L.R. 58 Bom 660 2 A I R 1937 Bom 449

decision reported in *Municipal Corporation, Bombay* v *Secretary of State for India*[1] In *Secretary of State* v *Bhagwandas*[2], the question again arose for consideration Though the learned Judges in that case held that the provisions of section 30 were mandatory, they took the view that the contract with the Government might be entered into by letters, provided that the correspondence was carried on on behalf of and in the name of the Secretary of State or that the said contract finally concluded by correspondence was executed by a person authorised by resolution in that behalf In *Secretary of State* v *G T Sarin and Co* [3], Tek Chand, J, held that as the contract in that case was entered into by an Officer Commanding a Depot, not being one authorised by the Governor-General in Council under the provisions of section 30 (2) of the Government of India Act to enter into contracts on behalf of the Secretary of State, the contract sued upon was *ultra vires* and could not be enforced against the latter It is not necessary to multiply cases except to cite a decision of this Court reported in *Sankara Mining Sandicate, Ltd, Nellore* v *Secretary of State for India in Council*[4] In considering section 30 (2) of the Government of India Act, Leach, C J, observed at page 147

> "With regard to the contention that a valid contract had been entered into by the Local Government with the appellant company and consequently the appellant company is entitled to a decree for specific performance, we have seen that by reason of section 30 (2) of the Government of India Act, 1919, contracts have to be executed by the person and in the manner directed by the Governor-General in Council and until they are so executed they cannot be enforced by or against the Secretary of State in Council"

In that case the Governor-General in Council prescribed the rules governing the execution of contracts with the local Government, and they required a formal lease to be executed by the Collector These observations are in accord with the interpretation put upon that section by the other decisions we have already noticed.

From a consideration of the aforesaid decisions two principles emerge (1) that the contract by the Government or on behalf of the Government must be embodied in a formal document, and (2) that even if no formal document is necessary, the correspondence embodying the contract must *ex facie* show that the contract was entered by the Government or on behalf of the Government So far as the first proposition is concerned, there is a conflict of authority, and it is not necessary in this case to attempt to resolve it Assuming that no formal document is necessary we are convinced that in this case neither the Government nor the Director of Industries, who had been authorised by the Government, entered into a contract with the defendant The learned Government Pleader argued that the Superintendent of the Kerala Soap Institute entered into this contract with the defendant with the permission of the Director of Industries, who was authorised by the Government to enter into a contract He relied upon the evidence of P W 1, the Superintendent of the Kerala Soap Institute, who says that he had obtained the permission of the Director of Industries for calling for quotations and for making the purchase. He also says that

> "The Director used to be informed about the progress in respect of the contract"

This evidence itself disclosed that the contract was not entered into by the Director himself but by the Superintendent with the permission of the Director of Industries. In paragraph 2 of the plaint the Government in clear and unambiguous terms states the persons between whom the contract was concluded and also the terms of the contract The plaintiff says that the defendant by his letter, dated 15th May, 1942, made a definite offer and that the Superintendent of the Kerala Soap Institute, Calicut, accepted the said offer The correspondence, Exs P-1, P-2, P-9 and P-10, also disclosed that the terms of the contract were negotiated between the Superintendent and the defendant, and that the contract also was concluded between the Superintendent and the defendant In view of the aforesaid facts

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1. (1932) I L R 58 Bom. 660
2. A I R 1938 Bom 168.
3. (1929) I L R 11 Lah 375
4. (1938) 2 M L J 141.

it would be impossible to accept the contention of the learned Government Pleader that the contract was entered into with the Director of Industries.

As the contract was invalid, the suit based upon the same was clearly not maintainable The learned counsel for the appellant has no objection for the giving of the decree in favour of the plaintiff for a sum of Rs 254-11-0 being the cost of the empty iron drums and the Railway freight and cart hire. So, that portion of the decree of the lower Court will stand

The decree of the lower Court is otherwise set aside, and the appeal is allowed with costs throughout

V S *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE RAGHAVA RAO.

Vasavattula Sarabhamma .. *Petitioner**

v.

Vasavattula Peda Veeranna and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 7, rule 10—Court cancelling stamp on plaint and returning it for presentation to proper Court—Presentation to proper Court—Duty of that Court to give credit for fee levied

Where a Court after receiving a plaint and cancelling the stamp affixed thereto returns the plaint for presentation to the proper Court, under Order 7, rule 10 of the Code, the latter Court to which the plaint is presented is bound to give credit for the fee already levied by the former Court. But it is necessary that the plaint returned for presentation and the plaint as presented to the proper Court must be substantially, if not *verbatim et literatim,* the same

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Kakinada, in C M P No 112 of 1947 in O S No 106 of 1946.

V Suryanarayana for Petitioner.

Respondent not represented

The Court delivered the following

JUDGMENT —In this case I was at first inclined to think that the lower Court's order required a reversal, but on a careful comparison and contrast instituted by me between the allegations and reliefs of the plaint as originally filed in the District Munsiff Court of Peddapuram and the allegations and reliefs of the plaint as presented to the Sub-Court at Cocanada on return by the former Court, I am satisfied that there are substantial and material points of difference between the two plaints which preclude the application to the present case of the ruling of the Full Bench reported in *Visweswara Sarma* v *Nair*[1] on which strong reliance was placed by Mr V Suryanarayana the learned advocate for the petitioner

The question which arose for decision in the Full Bench case was whether, where a Court after receiving a plaint and cancelling the stamp affixed thereto returns the plaint for presentation to the proper Court under Order 7, rule 10, Civil Procedure Code, the latter Court to which the plaint is presented is bound to give credit for the fee already levied by the former Court The unanimous answer given by the three learned Judges, Sir Charles Arnold White, C J , Munro and Sankaran Nair, JJ , is in the affirmative That this ruling is applicable only to cases in which the *same plaint* is presented to the proper Court, as was originally presented to the Court without jurisdiction, is unmistakably clear from what all the three learned Judges expressly say Says the Chief Justice at page 572 of the report

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* C R P No 1256 of 1947. 8th April, 1949.

1. (1911) 21 M L J 1005 : I L R 35 Mad 567 (F B).

"The plaint presented to the Small Cause Court, is *the same plaint* as that which was presented to the City Civil Court and returned by that Court under Order 7, rule 10 of the first schedule to the Civil Procedure Code"

Sankaran Nair, J, observes to the same effect in the opening part of the judgment at page 574 of the report by referring to the plaint later presented to the Small Cause Court as being *the same plaint* as had been earlier presented to the City Civil Court Munro, J, at page 573 refers to the plaint as presented to the Small Cause Court as being *the plaint as returned* by the City Civil Court

What I have therefore to decide is whether the plaint returned for presentation and the plaint as presented to the proper Court are in the present case substantially, if not *verbatim et literatim* the same, as required for the application of the Full Bench ruling I am of opinion that they are not For, it is not, as Mr. Suryanarayana would contend, that defendants 1 and 2 and 7 to 10 who figured in the original plaint simply disappeared from the plaint at the stage of its presentation to the Sub-Court at Cocanada If all that happened was that these defendants disclaimed any interest in the suit property in their written statements filed in the Peddapuram Court, and that therefore the plaintiff deleted their names from the plaint before its presentation to the Sub-Court, Mr Suryanarayana would perhaps be right in his submission that credit should be given to him for the court-fee paid on the plaint as originally filed in the Court of the District Munsiff by the Sub-Court to which the plaint was presented later I am saying "perhaps," because, I have a doubt in my mind whether the only changes permitted to the plaintiff before presenting the returned plaint to the proper Court are not such as are necessitated by the order of return for presentation to the Court. If the changes allowed are not merely such, but more, it seems to me that the test of the *same plaint* laid down by the Full Bench ruling may not be receiving the full effect that it ought to receive However that may be, as pointed out by the learned Subordinate Judge in his order under revision and borne out by my own comparison and contrast of the two plaints, there are substantial changes made in the allegations part as well as in the causes of action part of the plaint before it came to be presented to the Sub-Court The gist of the action in the original plaint is that

"the first defendant failed to vacate the land and in collusion with the other defendants who also forcibly kept possession to themselves, prevented the plaintiff and her new lessees from taking possession"

The allegation is that

"the plaintiff's new lesssee consequently failed to pay the intended advance of Rs. 500 and gave up the lease itself"

and that

"cause of action arose on *1st July*, 1945".

The plaint as presented to the Sub-Court, on the other hand, says that the cause of action against the defendant therein (defendants 3 to 6 of the original plaint) arose on or about *1st May*, 1945, that they

"trespassed and began their enjoyment preventing the plaintiff from taking possession"

Nothing is said in the Sub-Court plaint about the new lessees or their failure to pay the intended advance of Rs 500 under the proposed lease in their favour or their abandonment of that lease, such as we find said in the District Munsiff's Court plaint. In these circumstances I find it difficult to hold that the learned Subordinate Judge erred in insisting upon a fresh court-fee over the plaint as presented to his Court without giving credit for the amount of court-fee already paid on the plaint as filed in the Court of the District Munsiff of Peddapuram

I accordingly dismiss this revision petition, but, as the respondents have not appeared, without costs

V P S. *Petition dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Bombay).

PRESENT:—LORD UTHWATT, LORD OAKSEY AND SIR MADHAVAN NAIR.

Government of the Province of Bombay *Appellant**

v

Pestonji Ardeshir Wadia and others *Respondents.*

Civil Procedure Code (V of 1908) section 80—Strict compliance with provisions of—Necessity—Notice of suit by trustees—Death of one trustee—Appointment of new trustees—Suit by the new trustees along with the remaining trustee without fresh notice—Competency—Civil Procedure Code, section 11, Explanation IV—Claim by grantee against Government in prior suit to non-agricultural assessment on lands granted to him—Government admitting introduction of survey settlement in the area and inviting decision on the construction of grant—Suit decreed against Government—Subsequent suit in respect of later years to recover non-agricultural assessment—Plea in defence that non-agricultural assessment was not leviable as survey settlement had not been introduced in the villages—Question as to introduction of survey settlement, admitted in the prior suit, if operates as res judicata *in the later litigation*

The provisions of section 80, Civil Procedure Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government

Where after the trustees of a trust had issued a notice of suit under section 80, Civil Procedure Code, one of them dies and two others are appointed in his place and they along with the trustee whose name had been included in the notice already served on Government file a suit against the Government without issuing a fresh notice, the suit would be incompetent as the condition precedent to the filing of the suit is not fulfilled in asmuch as there was no notice given specifying the name and addresses of the plaintiffs as required by section 80, Civil Procedure Code

There was a grant in 1848 by the Government of Bombay to A of two named villages in exchange for a Government grant of Rs 4,000 per annum which was being enjoyed by him In 1916 the Government of Bombay imposed non-agricultural assessment on those lands acting under section 48 (2) of the Bombay Land Revenue Code, 1879 Thereupon in 1918, the trustees of the trust created by the original grantee in respect of the villages filed a suit for a declaration that on the construction of the grant in favour of the original grantee, they were the owners of the villages and were entitled to the non-agricultural assessment levied by the Government This suit proceeded upon the admission of the Government that "in 1885 survey settlement was introduced in the villages under the provisions of section 216 of the Bombay Land Revenue Code" and it was ultimately decided by the Privy Council that the grant was one of the villages concerned and that by section 48 (2) of the Revenue Code the non-agricultural assessments were merely in substitution of the former assessments and that the plaintiffs were entitled to be credited with the amounts so assessed upon the lands in question In a subsequent suit by the trustees to recover the non-agricultural assessment from Government for subsequent years the Government pleaded in defence (contrary to their admission in the prior suit) that the survey settlements had not been introduced in the villages under the Code of 1879 and that hence no non-agricultural assessment was properly leviable On a contention that the question whether a survey settlement had or had not been introduced was *res judicata* in that the Government with due diligence not only might but ought to have raised the question in the prior suit as being one which, if decided in their favour, would have involved the dismissal of the suit,

Held, the question was not directly put in issue between the parties to the suit because of the admission in the suit, and because the Government chose to admit certain facts for the purpose of getting a decision on an important question of law, it is impossible to say that the suit involved a decision as to the facts In the circumstances, Explanation IV to section 11, Civil Procedure Code cannot be used to preclude the Government from raising the point

J M Pringle and *J M R Jayakar* for Appellant

Sir Thomas Strangman, S P Khambatta and *V R Desai* for Respondents

P V Subba Rao for addded parties

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR—These are consolidated appeals from a judgment and two decrees of the High Court of Judicature at Bombay, dated 3rd April, 1941, confirming in the first appeal (A No 211 of 1938) the decree of the First Class Subordinate Judge of Thana dated 30th April, 1938, in Suit No 207 of 1936 (hereinafter called the "Vile Parle suit" from the village to which it related) and in the second appeal (A No 216 of 1938) reversing the decree of the same date of the said Subordinate Judge in Suit No 115 of 1934 (hereinafter called the "Juhu suit" from the village to which it related)

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* P C Appeal No 17 of 1947 11th January, 1949.

These appeals arise out of two suits which were brought against the Secretary of State for India now represented by the Province of Bombay, hereinafter called the Government (appellant in the first and respondent in the second of these appeals —defendant), by Pestonji Ardeshir Wadia (respondent 1 in the first of these appeals and appellant in the second—plaintiff 2) and the other trustees of a trust (plaintiffs) created by one Nowroji Jamsetji Wadia with respect to two villages "Juhu" and "Vile Parle" for the recovery of non-agricultural assessment collected by the Government from certain lands in those villages

By a grant in 1848, the Government granted to Nowroji, the two villages, "Vile Parle" and "Juhu," which are situated in the island of Salsette These have now become prosperous residential suburbs of Bombay Shortly stated, the grant after reciting that the grantee had prayed that a Government grant of Rs 4,000 per annum which he had enjoyed might be exchanged for a grant of villages in Salsette, stated that the two named villages "are hereby assigned to you and your heirs in perpetuity" This statement was followed by a description of the boundaries of the villages with a detailed statement of the land revenue paid by the occupant owners amounting to Rs 4,679-1-8 From this was deducted "the amount of your inam" It was then stated that the difference along with the value of some trees, amounting in all to Rs 700, be paid by the grantees annually The Privy Council was called upon to construe the meaning of this grant in a litigation in 1918 between the successors of the grantee and the Government of Bombay in *Bomanji Ardeshir Wadia* v *Secretary of State for India*[1] to which fuller reference will be made later. The Board decided that by this grant the grantee had become the owner of the villages with the obligation of making an annual money payment to the Government

In 1879, the Bombay Legislature passed an Act (Act V of 1879) called the Bombay Land Revenue Code Section 48 (1) of the Act declares that —

"the land revenue leviable on any land under the provisions of the Act, shall be assessed or shall be deemed to have been assessed as the case may be with reference to the use of the land (A) for the purpose of agriculture, (B) for the purpose of building, and (C) for a purpose other than agriculture or building"

Section 48 (2) provides,

"where land assessed for use for any purpose is used for any other purpose, the assessment fixed *under the provisions of this Act* shall, notwithstanding that the term for which such assessment may have been fixed has not expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as the Provincial Government may prescribe in this behalf" (the italics are by their Lordships)

Acting under this provision the Government began to levy non-agricultural assessment on all the lands in the two villages except as mentioned in the plaints

The suits from which these appeals arise relate to the recovery of the assessment from the Government on the ground that Nowroji became the full owner of the said villages and as such is entitled to the amount recovered by the Government from those villages The claim in the "Vile Parle suit" relates to the years from 1932-33, while the claim in the "Juhu suit" relates to the years from 1922-23. The substantial defence of the Government in the appeals is that survey settlements have not been introduced into either of these two villages under the Act and as no such settlement was introduced, no non-agricultural assessment is properly leviable and the plaintiffs cannot claim the right to recover the non-agricultural assessment. The determination of the dispute involves the decision of the quesion whether, prior to the levy of the non-agricultural assessment, an agricultural assessment had been fixed under the Bombay Land Revenue Code of 1879, such being under section 48 (2) a pre-requisite for the fixing of a non-agricultural assessment This is the main question for the decision before the Board.

Besides the above question which is common to both suits, certain other questions had also to be decided by the trial Court These were (1) in the "Vile Parle suit"—whether the above question has become *res judicata* by reason of the decision

1. (1928) L R 56 I A 51 . I L R 53 Bom 230 (P C)

of the Privy Council in *Bomanji Ardeshir Wadia* v. *The Secretary of State for India in Council*[1], (*supra*), (2) in the "Juhu suit"—(a) whether the Government is estopped from raising their present contention that there was no survey settlement under the Code of 1879, (b) whether the suit is incompetent by reason of plaintiffs' failure to serve notice on the Government (defendent) complying with the provisions of section 80, Civil Procedure Code, (c) in case the plaintiffs succeed, what is the period for which they are entitled to recover the non-agricultural assessment *i e*, whether it is three years only under article 62, Limitation Act, as contended for by the Government, or 12 years under Article 131 as contended for by the plaintiffs. No question of limitation arises in the "Vile Parle suit."

The "Juhu suit" was heard first. The chief question regarding the survey settlement in the two villages being common, the evidence recorded in the "Juhu suit" was by the consent of parties agreed to be read in the "Vile Parle suit". The trial Court delivered a consolidated judgment in the "Juhu suit" and a formal one in the "Vile Parle suit"

All the above questions were decided in favour of the plaintiffs and the suits were decreed by the trial Court The Government appealed, and the plaintiffs (trustees) filed cross-objections in both suits.

In appeal, A No. 211 of 1938, the High Court confirmed the trial Court's decision in the "Vile Parle suit" with a slight variation, and in A No 216 of 1938 reversed its decision in the "Juhu suit" The ground of the reversal was that the notice which had been served on the Government did not comply with the provisions of section 80, Civil Procedure Code The suit being held incompetent, the other points which arose in the case were left undecided by the High Court, though opinions in favour of the Government's contentions were expressed in the judgment In the result decrees were passed dismissing the Government's appeal in reference to "Vile Parle", giving the trustees, having regard to their cross-objections, liberty to raise the question which they had raised regarding two of the items in Exhibit 149, in execution, and allowing the Government's appeal in reference to Juhu.

The Government have appealed to His Majesty in Council in the "Vile Parle" case (*i e*, in the first appeal before the Board) and the plaintiffs (trustees) have appealed in the "Juhu" case (*i.e*, in the second appeal before the Board)

All the questions enumerated above have been raised for decision before the Board, but the questions 2 (*a*) and 2 (*c*) in the "Juhu" appeal will have to be decided only if the decision of the High Court on the question of "notice" to the Government, *i e*, question 2 (*b*), is set aside by the Board

In the course of hearing of the appeals on 2nd December, 1947, their Lordships intimated to Counsel that since the villagers in the two villages in the possession of non-agricultural land therein and paying non-agricultural assessment were interested in the appeals, it was desirable that some such villagers should be brought on record and appear at the hearing. Two villagers one from "Juhu" and another from "Vile Parle"—have now been added in the respective appeals by Order in Council dated 5th August, 1948 Through their learned Counsel Mr. Subba Row they generally support the Government.

Their Lordships will first consider the appeal in the "Juhu suit" (*i e*, the second appeal before the Board)

As already stated, this suit along with the other, the "Vile Parle suit," was decreed by the trial Court but the decree in this suit was reversed on the ground that notice which had been served on the Government did not comply with the provisions of section 80, Civil Procedure Code That section states that

1. (1928) L R 56 I A 51 I L R 53 Bom 230 (P C).

"No suit shall be instituted against the Crown . . until the expiration of two months next after notice in writing has been delivered to or left at the office at . .

(c) in the case of a suit against a Provincial Government, a Secretary to the Government or the Collector of the District, and

delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left".

The notice in the suit was served on the Provincial Government in October, 1933 By that time, the two villages granted to Nowroji Jamsetji Wadia, the original grantee, had become vested in two trustees of the Wadia trust created in 1853, by the trust settlement of Nowroji Wadia The notice intimated that the trustees intended to institute a suit against the Government. One of the trustees died on 2nd December, 1933 On 25th January 1934, the present plaintiffs 2 and 3 were appointed trustees in the place of the deceased trustee, and the suit was filed on 28th April, 1934, by these plaintiffs along with the first plaintiff whose name had been included in the notice already served on the Government It will be observed that no notice had been served on the Government on behalf of the plaintiffs 2 and 3 Under section 80, Civil Procedure Code, the notice must state among other things the name, place and residence of the plaintiff The singular includes the plural It was contended that as no such notice was served on the Government on behalf of plaintiffs 2 and 3 the suit was not maintainable This argument did not find favour with the trial Court but was accepted by the High Court In the course of his judgment, Sir John Beaumont, the learned Chief Justice, with whom Macklin, J agreed, observed as follows

"I have no doubt whatever that where there are three plaintiffs, the names and addresses of all of them must be given The learned trial Judge was of that opinion but he held that the real plaintiff was the Wadia trust and that as a notice had been given on behalf of the Wadia trust, section 80 was sufficiently complied with But that view of the matter seems to me clearly to be wrong. The trust is not the plaintiff, and there is no power under the Code for trustees to sue in the name of their trust as members of a firm may sue in the name of the firm The plaintiffs were and were bound to be the three trustees and as no notice was given specifying their names and addresses the condition precedent to the filing of the suit was not fulfilled",

Their Lordships fully concur with the above view The provisions of section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government In the present case it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit Their Lordships have not been shown any provision in the Code enabling the trustees to sue in the name of the trust For these reasons the suit against the Government must be held to be incompetent and the appeal fails No further question therefore arises for decision in this appeal

Their Lordships will now take up for consideration the appeal in the "Vile Parle suit" (i e, the first appeal before the Board)

The first point for decision in this appeal is whether the main question which their Lordships have to decide has become *res judicata* by the decision of the Board in *B A. Wadia* v *Secretary of State for India*[1] It is not contended that the decision of this question has become *res judicata* in the "Juhu suit," as admittedly the decision was given in the "Vile Parle suit" The argument is confined to this appeal

In 1916, the Government imposed on lands in the "Vile Parle" village non-agricultural assessment under the Bombay Land Revenue Code, 1879, section 48 (2). Thereupon, in 1918, the trustees of the Wadia trust filed suit No 4 of 1918 for a declaration that on the true construction of the deed of grant executed by the Government in favour of their predecessors they were the owners of the "Vile Parle" village and were entitled in whole or in part to the non-agricultural assessment

1 (1928) L R 56 I A 51 I L R 53 Bom 230 P C).

levied thereon by the Government and for ancillary relief It was decided by the Privy Council (1) that the grant of 1848 was not merely an assignment of Rs. 4,000 per annum out of the revenues of the villages, but was a grant of the villages subject to the conditions attached (2) that by section 48 (2), Land Revenue Code, the non-agricultural assessments were merely in substitution for the former assessments, and the appellants were entitled to be credited with the amount so assessed upon the land occupied by the sutidars (occupant owners).

It is not now disputed that the construction put upon the grant by the Board is binding on the parties to this appeal. From the judgment of the trial Court in that case, it appears that the suit proceeded upon the admission

> "that in 1885 survey settlement was introduced in the villages under the provisions of section 216 of the Code"

It is contended by the plaintiffs (trustees) that so far as "Vile Parle" is concerned the present suit should be decided against the Government on the ground of *res judicata.* In the present litigation, the Government first stated in their written statement paragraph 6 that "Juhu is a surveyed and settled alienated village", afterwards the paragraph was amended and it was stated that "Juhu" and "Vile Parle" have not been surveyed and settled under the Revenue Code of 1879, this giving rise to the main point for decision in the present suits.

It is argued that

> "in the case of the Vile Parle suit the question whether a survey settlement had or had not been introduced was *res judicata* in that the Government with due diligence not only might but ought to have raised the question in the suit of 1918, as being one which, if decided in their favour, would have involved the dismissal of the suit"

It is clear that the question was not directly put in issue between the parties to the suit because of the admission to which their Lordships have referred. In support of the argument reliance was placed on Explanation IV of section 11, Civil Procedure Code, which runs as follows

> "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit"

It is no doubt true that this matter might have been raised and if raised a decision on it might have resulted in the dismissal of the suit against the Government but the question is, ought this matter to have been raised by the Government? Their Lordships think it is impossible to say that the Government ought to have raised it, because of the admission made in that case It is obvious that the most important question with which the Government was concerned was the construction of the grant namely, whether it was not merely an assignment of the revenue or whether it amounted to a grant of the proprietorship of the villages to the grantee. Assuming that the Government had raised the point and succeded in proving that no non-agricultural assessment was leviable they would not have obtained—unless the Court went out of its way to pronounce on the construction of the grant—a decision as to the true construction of the grant If the Government chose to admit certain facts for the purpose of getting a decision on an important question of law it is impossible to say that the suit involves a decision as to the facts. In the circumstances their Lordships think Explanation IV cannot be used to preclude the Government from raising the point It may be noted that the non-agricultural assessment claimed in the present suit is subsequent to the period claimed in the suit of 1918.

The next question is whether a survey settlement as to agricultural land was introduced into the two villages under the provisions of the Act of 1879 prior to the levy of non-agricultural assessment The non-agricultural assessment was introduced in "Vile Parle" in 1916, and in "Juhu" in 1923

The facts found or not disputed are briefly these. At the time of the grant there was no survey settlement in these villages Before the survey the land assessment was recovered by converting "rice into rupees" The rate was fixed by the Government every five years The survey settlement was first introduced by Act I of 1865, described as

"An Act to provide for the survey, demarcation, assessment and administration of lands held under Government, in the Districts belonging to the Bombay Presidency "

The Act came into force on 21st July 1865, and remained in operation until it was repealed by the Land Revenue Code, 1879, which came into force on 30th June 1879 In fixing the land assessment the Government began survey operations in 1860—even before the Act of 1865 was introduced. As a result of the operations carried out by the officer appointed for the purpose the Government by a resolution on 25th May, 1876, sanctioned the rates in the two suit villages amongst others "experimentally for one year" The details of the land revenue were worked out on the basis of the experimental rate but the assessment was not levied during the currency of the Act The details were rightly worked out only by 1886 The effect of the assessment was to increase the revenue by about Rs 3,000 In 1886, after the new Act had come into force, the Government announced to the grantees that a settlement had been introduced and since then recoveries had been made according to that settlement until the introduction of the non-agricultural assessment in these villages It will be observed that the work of the survey settlement started under the Act of 1865 was completed in 1886 under the new Act of 1879 It is not disputed that the Government continued to levy this assessment from 1886 onwards for something like fifty years The Courts in India have rightly drawn special attention to this fact which is of considerable importance in deciding this appeal.

To appreciate the arguments advanced before the Board it is necessary to refer to certain relevant provisions of the Acts I of 1865 and V of 1879, relating to survey settlement The provisions of Act I of 1865 are as follows

"*Section* 25 —It shall be lawful for an officer in charge of a survey to assess to the land revenue, under such general and local rules as may be in force in the survey under his charge, all lands cultivated or uncultivated, and whether hitherto assessed or not, provided that such assessment shall not be levied for more than one year, until the sanction of the Governor-in-Council shall have been obtained thereto "

"*Section* 28 —It shall be lawful for the Governor-in-Council, from time to time, to lay down rules for the administration of the Survey Settlements, not at variance with any provision of this Act, and to declare existing settlements and all assessments, imposed according to section 25 . fixed for any period not exceeding thirty years The expiration of period so guaranteed shall from time to time be published by authority of Government in the *Government Gazette* "

Section 49, which is a special provision relating to "alienated villages" is as follows

"The provisions of this Act shall not, except for the purpose of defining village boundaries, be applied to alienated villages Provided that it shall be competent to the Governor-in-Council to extend by notification in the *Government Gazette* all or any of the provisions of this Act to every such village, on application made, in writing by the holder thereof, and further, to apply the provisions of this Act to all Government lands situated in alienated villages "

Alienated village is defined in section 2, clause (*e*) as:

"a village held and managed by private individuals, exempt from payment of land revenue, or under Act II or VII of 1863 of the Council of the Governor of Bombay, or under a grant or lease fixing the Government demand in perpetuity "

It may be mentioned that the trial Court treated these villages as *not* alienated villages under this definition, for reasons given by the Judge which are not now material, but having regard to the conditions of this grant these seem to fall within the latter part of the definition . "or under a grant or lease fixing the Government demand in perpetuity." However, under section 3 (19) of the Act of 1879, the villages are clearly "alienated villages" and the arguments before the Board have proceeded on that basis.

The relevant portions of Act V of 1879 are as follows section 2 saved pending proceedings commenced under the Act of 1865, and directed that thenceforth they should be conducted under the Act of 1879

" . . . And all rules prescribed, appointments made, securities furnished, powers conferred, orders issued, and notifications published under any such enactment, and all other rules (if any) now in force and relating to any of the matters hereinafter dealt with, shall (so far as they are consistent with this Act) be deemed to have been respectively prescribed, made, furnished, conferred, issued, and published hereunder.

And all proceedings now pending, which have been commenced under any enactment hereby repealed, shall be deemed to have been commenced under this Act, and shall hereafter be conducted in accordance with the provisions of this Act"

By section 3 (19), now (20), "alienated" means "transferred in so far as the rights of Government to payment of the rent or land-revenue are concerned, wholly or partially, to the ownership of any person."

Section 48 (1) and (2) have already been referred to. Sections 65 and 66 provide for the fixing and levy of altered assessments under section 48, in unalienated land. Sections 95 to 117 make up Chapter 8 "Of Survey Settlements and the Partition of Estates" Sections 100 and 101 authorised the officer in charge of the survey to fix assessments

Section 102 (in Chapter 8) provided

"The assessment fixed by the officer in charge of a survey shall not be levied without the sanction of Government It shall be lawful for the Governor-in-Council to declare such assessments, with any modifications which he may deem necessary, fixed for a term of years not exceeding thirty in the case of lands used for the purposes of agriculture alone, and not exceeding ninety-nine in the case of all other lands"

Section 214 empowered the Governor-in-Council to make rules to carry out the purposes and objects of the Act Rule 89, made under the provisions of section 214, provided as follows

"(1) Notification of Survey Settlement

Rule 89 When a Survey Settlement shall have received the sanction of Government under section 102, Land Revenue Code, a notification shall be published in the district or portion of a district to which the settlement extends, in the form of Appendix J and the period for which the assessments have been fixed shall be notified in the *Bombay Government Gazette*

When the settlement is introduced into a portion of a taluka already partially settled, the guarantee will be restricted to the unexpired portion of the period for which the assessments in the first settled portion of the taluka were fixed"

* * * * * *

Appendix J was in the following terms

"Appendix J (Referred to in rule 89)

Notification determining the period of Settlement

The Governor of Bombay in Council having sanctioned the Survey Settlement introduced by the Superintendent of Revenue Survey and Assessment, under the provisions of the Bombay Land Revenue Code, 1879, into the taluka of the district, the following notification is published for the information of the landholders and village officers in the said taluka

Duration of Settlement

1 The survey rates as fixed under this settlement will remain in force without increase, for a period of years, commencing from . . and extending to ."

Section 103 (in Chapter 8)

"When in the case of lands used for the purposes of agriculture alone, Government shall have sanctioned the assessments fixed by the officer in charge of the survey, it shall be the duty of the said officer or of the Collector, or Assistant or Deputy Collector publicly to announce, or to cause to be announced, the assessment fixed on each survey number

The said officer, or the Collector, or Assistant or Deputy Collector shall, at a reasonable time beforehand, cause public notice to be given in such manner as he shall deem fit, of the time at or about which the assessments will be announced as aforesaid

If the holder or other person interested in any holding do not appear in person or by agent, he shall be subject, nevertheless, to the same liabilities as if he had attended

When the assessments have been announced in the manner provided in the first clause of the section, the survey settlement shall be held to have been introduced."

Section 216 (Chapter 14)

"Save as is otherwise provided in section 111 and hereinafter in this section, the provisions of Chapters 8 to 10 of this Act shall not be applied to any alienated village, except for the purposes of fixing the boundaries of any such village and of determining any disputes relating thereto

* * * * * *

But it shall be lawful for the Governor-in-Council, on an application in writing being made by the holder of any such village to that effect, to authorise the extension of all or any of the provisions of the said chapters to any such village."

In support of his contention that there was no non-agricultural assessment because there was no pre-existing assessment fixed under the provisions of the Code of 1879 (*i e*, any survey settlement) Mr. Pringle, learned counsel for the appellant, urged two main grounds, these being :

(1) It has not been proved that there was any application in writing by the holder of the villages, and authorisation by the Governor-in-Council for such extension as required by section 216,

(2) nor has it been proved that there was any sanction of the Government to an assessment fixed under the Code as required under section 102. The learned counsel also argued that the levy of experimental rates santioned in 1876 under Act I of 1865 cannot be considered as proceedings now " pending " within the meaning of section 2 of Act V of 1879 The Courts in India dealt with the above points in different ways

The trial Court held that since the villages were *not* " alienated villages " within the meaning of Act I of 1865, the survey settlement proceedings could be made under section 49, without an application from the holder, that the proceedings under Act I of 1865 were pending at the time of the introduction of the Code in 1879; that under section 2 of the Code such proceedings which had been commenced under the repealed Act should have been deemed to have been commenced under the Code, that thereafter all that remained to be done under the Code was to announce the assessment under section 103 of the Code, that this announcement of the settlement made in 1886 (which will be referred to presently) was obviously made under section 103 of the Code ; that the provision that application in writing should be made by the holder under section 216 of the Code to make a survey in an "alienated village " would not apply when proceedings had commenced under Act I of 1865 on the assumption that the villages were unalienated, and that assuming that such a course was necessary it cannot be presumed that the proper procedure was not followed.

The learned Chief Justice after stating that the suggested survey settlement was made in 1886 under the later Act of 1879, examined the provisions of the Act, the various rules and the definite references to an assessment having been made in 1886, and stated

" The question seems to me to turn primarily on what inferences the Court ought to draw from the facts which I have mentioned "

Then he drew attention to the fact that the Government continued to levy the assessment from 1886 onwards for something like fifty years, and never suggested that agricultural assessment had not been properly introduced into these villages, and that he must draw all proper inferences against the Government

So far as the application in writing required under section 216 from the grantees is concerned, he stated that

"We must presume that such an application was made, and has been either lost or destroyed The original, of course, would be in Government custody, but nobody, suggests that Government is suppressing anything The evidence is that Government has in fact not got any such application at the present time and the grantees admit that they have not got any copy of it But a letter may easily be lost or destroyed in the course of fifty years "

Dealing with the question of " sanction " he expressed the following opinion

" So far as Government sanction is concerned, as I read rule 89 and section 102, it is not necessary that Government's sanction for introduction of survey settlement should be notified in the *Gazette*, unless the sanction goes on to fix an assessment for a specified number of years But the mere sanction, without fixing any number of years, could, I think, be published by displaying a notice in the form given in the rules in a prominent place in the locality, *e g*, the Collector's office, and it seems to me that at this distance of time we must presume that this was done "

The learned Chief Justice also expressed his opinion

" We must presume further that all the necessary steps were taken under section 103 to announce the settlement "

It cannot be disputed that announcement of the settlement was made to the grantees

Their Lordships will now consider the arguments advanced by the appellant's learned counsel. The survey settlement was actually made in 1886 From the provisions of Act V of 1879, it will be seen that an "alienated village" can be brought within the provisions of the Act if there is an application in writing by the holder to extend the provisions to his village, and an authorisation of such extension by the Governor-in-Council If there is such an application and authorisation then the Government could direct a survey and empower the officer in charge of the survey to fix an assessment; but under section 102 no assessment can be levied without the sanction of the Governor-in-Council. Under rule 89 such sanction has to be notified The Governor-in-Council, besides sanctioning the levy of the assessment, can declare that it shall be lawful for a term of years. In this connection it will be remembered that the assessments in these cases are unfixed assessments, the levies being "experimental" rates for one year only. Under section 103 of the Act, when the assessments have been announced in the manner prescribed in the first clause of the section, the survey settlement shall be held to have been introduced. Whether the announcement of the settlement made to the grantees in 1886 can be said to fall properly within these provisions is the broad question for consideration in the present appeals.

On the evidence, the Courts in India have found that an announcement of the survey settlement was openly made to the grantees in 1886. This must obviously be taken to be the announcement required under section 103 of the Act. Whatever doubt there may be whether an application under section 216 of the Act was made, or whether "sanction" was granted under section 102 of the Act and notified according to the rules, there cannot be any doubt whatever that an announcement was made to the grantees that a survey settlement was made in the suit villages, or that the Government continued to levy the rates for something like fifty years without themselves suggesting any legal difficulty in the way

Under section 48 (2) of the Act of 1879 it is only when an assessment has been fixed "*under the provisions of this Act*" (Act V of 1879) that the Provincial Government can introduce non-agricultural assessment, *i.e*, "altered" assessment under the Act. The burden of proving that a survey settlement under the Act has been made lies on the plaintiffs, that is to say, they have to prove that an application in writing under section 216 of the Act to extend the provisions of Chapter 8 to their villages was made to the Government, and that the Governor-in-Council authorised such extension, and that sanctiom under section 102 of the Act was granted and was notified as required by the rules These the plaintiffs have failed to prove by direct evidence. It is true that the Government have shown by examining the *Gazettes* from 1871 to 1917 that there is no record of any sanction, and that they have not got with them any application made by the grantees, but the circumstances of the case are so strong that their Lordships think that they are justified in inferring from them that they have discharged their burden, these circumstances being, as already mentioned, the fact that these assessments have now continued for about fifty years and—what is more important—that an announcement of the introduction of the survey settlement was made to the grantees in 1886

As regards the application, which will presumably contain on it after acceptance an endorsement by the Governor-in-Council authorising the survey settlement of villages, their Lordships hold, agreeing with the High Court, that it may have been lost or destroyed in the course of fifty years Mr. Pringle's objection is not so much to the presumption that is drawn that the application should be held to have been made—indeed he concedes (for arguments' sake) it might be reasonable —as to the absence of record to show authorization by the Governor-in-Council It is true that an actual form has been provided by the rules in which the authorization by the Governor-in-Council is given, but it is to be noticed that there is no requirement that the authorization should be notified in the *Gazette* The authorization may well have been endorsed on the application made by the party to initiate proceedings. Passing orders by endorsing them on the applications made to them is not an unfamiliar method of disposal by Government. It was further

argued that the learned Chief Justice has overlooked the required authorization, but that he must have had it in his mind is clear because, referring to " the application in writing by the grantee *Khot* " in the course of his judgment, he says " if there is such an application Government can accept it . . ." The acceptance by Government would include the required authorization by the Government.

As regards the sanction, their Lordships think that rule 89 read with section 102 of the Act would require notification of the sanction in the *Gazette* only in cases where the assessment has been fixed for a term of years. In cases like the present, where rates have been sanctioned without fixing a term, their Lordships think, as held by the High Court, that a sanction is published

> " by displaying a notice in the form given in the rules in a prominent place in the locality, *e g*, in the Collector's office"

and this fact also can well be presumed to have taken place at this distance of time. Further—from the undisputed evidence which shows conclusively that the grantees were formally told that a settlement had been made—which must obviously be held to have been done under section 103 of the Act—it may well be held that all the necessary preliminary steps required to make a valid settlement have been taken by the Government Section 114, Evidence Act, entitles a Court to presume :

> " the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case "

Illustration (*e*) says

> " the Court may presume " (*e*) that judicial and official acts have been regularly performed "

While section 114, Evidence Act, states the general maxim that all acts are presumed to have been rightly and regularly done, illustration (*e*) draws attention to a special application of the maxim with particular reference to judicial and *official acts*. It is impossible to think that the officers of the Government would be likely to levy an assessment unless instructed to do so by the Government. The fact that plaintiffs have not been able *at this distance of time* to prove by direct evidence that their predecessors-in-title made an application under section 216 of the Act, or that the Government granted " sanction " is not enough to displace the presumption that all official acts should be considered to have been regularly performed. Their Lordships cannot think that the Government would have neglected to take the necessary steps to make a valid assessment

From the above circumstances, their Lordships conclude that a survey settlement was introduced in the suit villages under the provisions of the Act of 1879, and that the levy of the non-agricultural assessments by the Government was legal. It is not disputed that if the villages in question have come under the survey settlement the plaintiffs (trustees) are entitled to the non-agricultural assessment recovered by the Government

In the view that their Lordships hold that the imposition of the non-agricultural assessment under the provisions of Act V of 1879, in the manner indicated above, is valid, no need arises for considering the further question whether the view of the trial Court that the procedings were validly commenced under Act I of 1865, and under section 2 of the Act of 1879, were carried over as " pending " to be completed under the Code (as they were completed by assessments in 1886) is right.

For the reasons given above, their Lordships will humbly advise His Majesty that these appeals should be dismissed There will be no order as to the costs of these appeals, but the costs as between solicitor and client of the villagers who were added as respondents will, in accordance with the terms of the Order in Council, be paid by the Government.

Solicitor for Appellant : *Solicitor, High Commissioner for India.*

Solicitors for Respondents . *T. L Wilson & Co*

Solicitors for added Parties : *Stanley Johnson & Allen.*

V.S. ——— *Appeals dismissed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR P V. RAJAMANNAR, *Chief Justice*, MR JUSTICE VISWANATHA SASTRI AND MR JUSTICE RAGHAVA RAO

Sankaranarayanan Iyer .. *Appellant**

v

Sri Poovananathaswami Temple, Koilpatti, through Executive Officer and others . *Respondents*

Hindu Law—Religious and charitable trusts—Suit on behalf of by de facto *trustee for recovery of property belonging to the idol or mutt held adversely to the trust by a stranger—Maintainability*

So long as an action for recovery of property belonging to a trust held adversely by a stranger is for the benefit of the real owner, namely, the idol or the mutt, and the person bringing the action is the only person who is in the management of the affairs of the idol or the mutt for the time being, and is therefore its *de facto* trustee, there is no reason why such person should not be allowed to maintain the action on behalf of the idol or the mutt

Vedakannu Nadar v *Ranganatha Mudaliar*, (1938) 2 M L J 663 and *Atmaram Rao's Charity* v *Packiri Mohammed*, (1944) 1 M L J 35, overruled

Naurangi Lal v *Mahanth Ram Charan Das*, (1930) I L R 9 Pat 885 and *Mahadeo Prasad Singh* v *Karia Bharti*, (1934) 68 M L J 499 L R 62 I A 47 I L R 57 All 159 (P C), relied on.

Subramania Gurukkal v *Srinivasa Rao*, A I R 1940 Mad 617, approved

Case-law reviewed and discussed

Per *Viswanatha Sastri, J* —It is necessary that Courts should prevent the power of *de facto* trustees to file such suits from being abused or exercised fraudulently or collusively to the detriment of the trust by persons professing to act on behalf of and in the interest of the idol or mutt. When there is a lawful shebait, dharmakarta or head of a mutt, he alone can bring the suits necessary for recovering possession of the property of the institution and otherwise protecting its interests and he alone is the proper person to represent it in a suit filed against the mutt, temple or idol as the case may be.

Appeal against the order of the Court of the Subordinate Judge, Tuticorin, dated 8th February, 1947, in A S No 117 of 1946 preferred against the decree of the Court of the District Munsiff, Koilpatti, dated 27th June, 1946, in O.S. No 15 of 1945.

A Sundaram Aiyar for Appellant.

V Ramaswami Aiyar for Respondents

The Court (*Mr Justice Mack*) made the following

ORDER OF REFERENCE TO A FULL BENCH —This appeal brings into prominence a conflict of decisions as regards the maintainability of suits filed by so-called *de facto* trustees for recovery of possession of property alleged to belong to the trust or institution concerned The learned District Munsiff following the decision in *Atmaram Rao's Charity* v *Packiri Mohammed*[1], by Horwill, J, who followed *Vedakannu Nadar* v *Ranganatha Mudaliar*[2], a bench decision by Abdur Rahman and Venkatasubba Rao, JJ, dismissed the present suit holding that a suit by a *de facto* trustee was not maintainable The learned Subordinate Judge has remanded the suit following another line of decisions holding that if the plaintiff-Devasthanam were to prove that it is a *de facto* trustee and is in possession and management of the other properties of another Devasthanam it can maintain this suit Subsequent to the bench decision in *Vedakannu Nadar* v *Ranganatha Mudaliar*[2] there is a decision by Wadsworth, J, in *Subramania Gurukkal* v *Srinivasa Rao*[3] in which this bench decision is nowhere considered and in which it was clearly held following two other decisions, *Appasami Pillai* v *Ramu Thevar*[4] and *Kasi Chetty* v *Devasikamony Nataraja Dikshitar*[5], that a suit by a *de facto* trustee was maintainable

Prior to the bench decision, *Vedakannu Nadar* v *Ranganatha Mudaliar*[2], there appears to have been a wealth of authority to support the position that a *de facto* trustee who was in actual possession and was administering the trust in the interests of the institution was entitled to file a suit to recover possession of the trust property from persons into whose hands it had gone wrongfully There are two Privy Council decisions which appear to lend support to this legal position One is *Mahadeo Prasad Singh* v *Karia Bharti*[6], which laid down that as the plaintiff was in actual possession of the Math he could maintain the suit for its benefit

* A A O No 208 of 1947 — 14th March, 1949.

1 (1944) 1 M L J 35
2 (1938) 2 M L J 663
3 A I R 1940 Mad 617
4 (1931) 61 M L J 887.
5 (1913) M W N 181
6 (1934) 68 M L J 499 · L R 62 I.A 47 : I L R 57 All 159 (P C).

In *Mahant Ram Charan Das* v *Naurangi Lal*[1], their Lordships of the Privy Council observed at the commencement of their judgment that they were not concerned with any right of title because both the courts below have found that the plaintiff is the person in actual possession of the Math and as such entitled to maintain a suit to recover possession of the property not for his own benefit but for the benefit of the Math It is true that this right was not in dispute and was not specifically decided by their Lordships but they gave their seal of approval to the findings of the courts below

This conflict of decision was considered by Chandrasekhara Aiyar, J , on whose reference the matter was placed before a Full Bench and considered in *Zakka Pattabhirama Reddi* v *Balarami Reddi*[2] In the case as reported Chandrasekhara Aiyar, J , was of opinion that the position in *Vedakannu Nadar* v. *Ranganatha Mudaliar*[3], conflicted with *Kasim Sahiba* v *Sudhindra Thirthaswami*[4] Unfortunately the Full Bench did not resolve this conflict of opinion as it was unnecessary for the disposal of that particular appeal The learned Chief Justice in the last paragraph of his judgment assumed for the purpose of that case that a *de facto* trustee can alienate trust property when he acts *bona fide* for the benefit of the trust but did not specifically decide that point

The result is that there is a conflict of decisions still unresolved which greatly embarrasses courts which are called upon to adjudicate suits filed by so-called *de facto* trustees In *Vedakannu Nadar* v *Ranganatha Mudaliar*[3] it was held that the *de facto* trustee as such had no *locus standi* to maintain an action on behalf of the trust even if the action is taken to have been instituted for the benefit of the trust and that his position was that of an intermeddler or a wrongdoer (unless on the facts of each case a presumption can be raised in his favour of being a trustee *de jure*). A *de facto* trustee has no place in the English law Courts which only recognise either *de jure* trustee or a trustee *de son tort*. We find in Lewin on Trusts (14th Edition page 184) that if a person by a mistake or otherwise assumes the character of trustee, when it really does not belong to him he becomes a trustee *de son tort* The position of a *de facto* trustee appears to have been evolved in a series of Indian cases As it appears to me *de facto* trustees may include trustees *de son tort* and also trustees of another description, intermediate between the strictly *de jure* trustee and the trustee *de son tort*, who are not devoid of legal rights and whose right to sue on behalf of the trust appears to depend on the facts of each particular case.

The facts of the present case may briefly be set out The appellant is the 4th defendant who purchased the suit property from the first defendant who in turn purchased it from one Amavasai Paradesi on 13th May, 1940 It is common ground that this Paradesi was at that time the trustee of the temple to which this property belonged The second temple, Sri Poovananathaswami temple by its trustee filed the suit on the basis of a compromise decree Exhibit P-1, dated 30th July, 1938, passed in a suit between the two temples which provided that Amavasai Paradesi should remain in management of the first temple during his lifetime, or till he became disabled, and that then the property should devolve on the second temple According to the plaint this Paradesi disappeared in 1942 The second temple by its trustee claiming to have entered into possession of the first temple's property under Exhibit P-1 seeks to set aside the alienations made by Amavasai Paradesi on the ground that they were not binding on the first temple

It is desirable that this conflict of decisions, as regards the maintainability of suits by *de facto* trustee should be resolved by a reference to a Full Bench for the guidance of all courts in the Presidency. The papers will accordingly be placed before the Chief Justice for orders

(In pursuance of the above order of reference to the Full Bench, dated 16th November, 1948, by Mack, J), the Court delivered the following

JUDGMENTS *The Chief Justice*—This case was referred to a Full Bench because Mack, J , before whom it originally came for disposal, considered it desirable that the conflict of decisions as regards maintainability of suits by *de facto* trustees should be resolved by reference to a Full Bench for the guidance of all courts in the Presidency. The appeal arose out of a suit filed for the recovery of possession of certain property alleged to belong to Sri Swarnamalai Kadiresan Swami Temple and alienated by one Amavasai Paradesi as its trustee to the first defendant on 13th May, 1940, under a sale deed and under an othi deed The plaintiff was described as Sri Puvananda Swami, through its Executive Officer, C. S Pillai The plaintiff's right was in the main based upon the terms of a consent decree passed in O S No 64 of 1937 on the file of the court of the District Munsif of Koilpatti, which was a suit filed by the plaintiff Devasthanam against Amavasai Paradesi and others for possession of the site of Swarnamalai temple and other temples attached to it It is not necessary to advert in detail to the terms of this razinama decree and the validity of the decree, because the learned Subordinate Judge did not go into the merits of the plaintiff's case.

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1. (1933) 64 M L J 505 . L R 60 I.A 124 • I L R 12 Pat. 251 (P C)
2. (1944) 2 M L J 326
3. (1938) 2 M L.J 663
4. (1895) I.L R 18 Mad. 359.

Though it was not specifically pleaded, the plaintiff urged before the trial Court an alternative basis for its claim, namely, that even though the compromise decree did not confer any title on it, the plaintiff Devasthanam was entitled to file the suit as a *de facto* trustee The learned District Munsif, following the ruling in *Atmaram Rao's Charity* v *Packiri Mohammed Rowther*[1] held that a *de facto* trustee was in no better position than a trespasser and therefore was not entitled to sue for possession of the alienated property But on appeal, the learned Subordinate Judge held that in the absence of a *de jure* trustee, a *de facto* trustee could maintain a suit for possession on behalf of the trust, and he expressed his conclusion in the following manner

> " I therefore find that if plaintiff Devasthanam were to prove that it is a *de facto* trustee and is in possession and management of the other properties of the Devasthanam it can maintain this suit "

The decree of the lower Court was set aside and the suit remanded for disposal on all the issues It was against this order that the appeal was preferred by the fourth defendant who was a transferee from the first defendant

Enough has been said to indicate that the scope of the reference to the Full Bench is very restricted We are not asked to define who can be described as a *de facto* trustee Apparently, the learned Subordinate Judge wanted the trial Court to go into the question if the plaintiff in this case can be treated as a *de facto* trustee It will be seen from an examination of some of the decided cases that the right of a person other than a *de jure* trustee to maintain a suit for possession of trust properties cannot be decided in the abstract and depends upon the facts of each case

Before discussing the main question, we may briefly dispose of two subsidiary questions raised by the appellant, which, however, do not directly arise on the reference It was first urged that the plaintiff never pleaded any alternative case based upon its rights as a *de facto* trustee, and all the allegations in the plaint amounted to an assertion of ownership of the suit properties by the plaintiff Devasthanam in its own right and not as trustee of the Swarnamalai temple Though this contention is not without force, we think it is too late in the day to allow this objection to prevail In both the Courts below, and before Mack, J , it was evidently assumed without dispute that the plaintiff Devasthanam sought to maintain the suit also as a *de facto* trustee This point did not come as a surprise on the appellant, and we are convinced that no injustice has been caused to him by reason of defective pleading The second point pressed by the appellant was that the temple or the idol, which must be deemed to be in law the plaintiff, cannot be a trustee of another temple or idol This is again a point which has not been referred to us, and if the appellant desires, he may raise it if and when the case goes back to the trial Court for fresh disposal

At the outset, it must be made clear that the question which falls for decision in this case is concerned with charitable and religious trusts or endowments, which are explicitly excluded from the class of trusts to which the Trusts Act of 1882 has application This fact must be borne in mind, because what little there is of conflict is, in my opinion, almost entirely due to an attempt to apply rules governing private trusts to public charitable and religious endowments

In the case of a Hindu temple, the property vests in the idol, which is a juristic entity From its very nature, the idol can act and assert its right only by a recognised human agency known as a shebait, or dharmakarta, and sometimes called trustee (See *Jagadindranath Roy* v *Hemanta Kumari Debi*[2] and *Pramathanath Mullick* v *Pradyumna Kumar Mullick*[3]) But such a manager, by whatever term he is designated, is not the person in whom the legal title vests as in a trustee Likewise, the head of a mutt, even though he may have the right to a part of the

1 (1944) 1 M L J 35

2 (1904) L R 31 I A 203 I L R 32 Cal 129 (P C)

3 (1925) 49 M L J 30, L R 52 I A 245 : I L R 52 Cal 809 (P C)

usufruct of the properties belonging to the mutt, is not a trustee in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense, for maladministration. " Called by whatever name, he is only the manager and custodian of the idol or the institution " (Vide *Vidyavaruthi* v *Balusami Iyer*[1]) The same conception obtains even in respect of Muhammadan religious endowments, and neither the *sajjadanashin* nor the *mutavalli* is a trustee in the technical sense (See *Vidyavaruthi* v. *Balusami Aiyar*[1]) As their Lordships of the Judicial Committee point out,

> " It was in view of this fundamental difference, between the judicial conceptions on which the English law relating to trusts is based and those which form the foundations of the Hindu and the Muhammadan systems, that the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope the rules of law applicable to wakf and Hindu religious endowments "

It is because of this peculiarity that the worshippers, the Advocate-General, a prospective shebait, and only persons interested in the temple or mutt, are allowed to institute a suit for the enforcement of the rights of the temple or the mutt They are allowed to bring a suit for declaration that an alienation by a shebait or a manager is not valid, though of course actual possession of the properties may not be recovered by any of them

In several cases decided by Courts in India including this Court, it was held or assumed as the basis of the decision that " a *de facto* trustee ", that is, a person other than a manager or the head of an institution who could establish a legal title to his office, could maintain a suit to recover properties belonging to the idol or the institution, on behalf of the idol or institution, provided that such a person was able to prove that he was in exclusive possession of the office of manager or head of the institution, though he may not be able to establish his legal title to it. Ramesam, J , summed up the result of these decisions as follows in *Appasami Pillai* v *Ramu Tevar*[2]

> " It has been held in several cases that a *de facto* trustee can maintain a suit to recover trust properties A *de facto* manager of a trust should be allowed to maintain a suit which is for the benefit of the trust in spite of some defect in his title as trustee "

The rights of such *de facto* managers to maintain a suit for the enforcement of the rights of the idol or institution were recognised in *Moideen Bibi Ammal* v *Rathnavelu Mudali*[3], *Benarsi* v *Altaf Husain*[4], *Md Ibrahim* v *Sundaram Chetti*[5] and *Kasi Chetti* v *Srimathu Devasikamani Nataraja Dikshitar*[6] In the last mentioned case, it is clear that the decision was based not on any prior possession in the *de facto* trustee, because the alienation was before such trustee came on the scene, but because he was in possession of the mutt and its properties

The only decision which took a contrary view is the decision of Venkatasubba Rao and Abdur Rahman, JJ , in *Vedakannu Nadar* v *Ranganatha Mudaliar*[7] The learned Judges held that a *de facto* trustee as such had no *locus standi* to maintain an action on behalf of the trust even if the action was taken to have been instituted for the benefit of the trust He was really no better than a trustee *de son tort*, unless on the facts of each case a presumption could be raised in his favour of being a trustee *de jure* The leading judgment was delivered by Abdur Rahman J He came to the conclusion that a trustee *de facto* was really no other than what is known to law as a trustee *de son tort*, and his position did not improve by describing him to be a trustee *de facto* As a trustee *de son tort*, he could not be held to confer a right on himself to maintain suits on behalf of the trust, even if they were taken to have been instituted for the benefit of the trust It is quite evident that the learned Judge discussed the question entirely from a conception familiar to us in English law, and in the law of private trusts. A trustee is either a lawful trustee, in which case the title to the property concerned would vest in him, or he is an

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1 (1921) 41 M L J 346 L R 48 I A 302 : I L R. 44 Mad 831 (P C)
2 (1931) 61 M L J 887 (893)
3 (1926) 51 M L J 598.
4 (1921) 63 I C 171
5 A I R 1926 Mad 1066
6 (1913) M W N 181
7. (1938) 2 M L J 663

intermeddler, a person who has come into possession of trust property without legal title, and therefore a wrongdoer, a trustee *de son tort* This doctrine is always applied with reference to a property as such In whom does the title to a property vest ? If it is trust property, then it must vest in the *de jure* trustee That is the foundation of the doctrine How inapplicable and foreign this conception is to the case of Hindu and Muhammadan religious endowments, will be apparent, if the nature of such endowments is borne in mind In the case of these endowments the so-called trustee is not really a trustee, in the technical sense, in whom the property is vested He is really a manager (even in cases where he also has a beneficial interest in the usufruct) and the title always is vested in the idol or the institution In either case, the analogy is to that of an individual having a manager to carry on the administration of his affairs and properties Viewed in this light, the position reduces itself to this In some cases, the manager has a rightful claim to the office of manager, in other cases, his only claim is that he is in actual possession of the office " *De facto* " means, "by the title of possession ", in antithesis to " *do jure* " *i e*, " by the title of right " So long as an action is for the benefit of the real owner, namely, the idol or the mutt, and the person bringing the action is the only person who is in management of the affairs of the idol or the mutt for the time being, there is no reason why such person should not be allowed to maintain the action on behalf of the idol or the mutt In deference to the opinion expressed by the two learned Judges in *Vedakannu Nadar* v *Ranganatha Mudaliar*,[1] we would have dealt at greater length with their reasoning, but we think such a course unnecessary, in view of two decisions of the Judicial Committee, which unfortunately do not appear to have been brought to their notice

The first of these is *Mahant Ram Charan Das* v *Naurangi Lal*[2] The suit was for recovery of 70 acres of land belonging to the Paliganj math One Rampat Das was the Mahant in 1909, when he executed a permanent lease of about 70 acres of land, and in 1911 he executed a sale deed of the land, subject to and with the benefit of the lease Neither the lease, nor the sale, was executed for legal necessity, nor was it for the benefit of the Math Rampat Das died in July 1913, and on his death, one Sant Das took possession of the Math, claiming to be the Mahant But, on 20th February, 1916, by registered deed, he surrendered all his rights to the plaintiff, who was then the Mahant of another Math at Ramdih Baga The plaintiff claimed that as Rampat Das had died without leaving behind him any disciple, he as the Mahant of Ramdih Baga Math, was entitled to take possession of the Paliganj Math and the properties appertaining to it He therefore instituted a suit against the lessee and the purchaser for possession of the 70 acres alienated by Rampat Das Though the plaintiff rested his right to maintain the suit on title also their Lordships observed that they were not concerned with any question of title, because both the Courts below has found that the plaintiff was

> "the person in actual possession of the Paliganj Math and as such entitled to maintain a suit to recover property not for his own benefit but for the benefit of the Math "

To understand the implication of these observations of their Lordships, it is useful to refer to the judgment of the High Court in *Naurangi Lal* v. *Mahant Ram Charan Das*[3] from which it is clear that the competency of the plaintiff to maintain the suit was directly in issue Fazl Ali, J , after referring to the description by the learned Subordinate Judge of the plaintiff, as the *de facto* Mahant of Paliganj, an expression which he characterises as not very happy, disposed of the objection regarding the *locus standi*, of the plaintiff to bring the suit in the following words :

> " in my opinion, it is enough for this purpose to show that the plaintiff is not claiming the property in suit as his own property but as the property of the Math or the idols installed in the Math or and that he being in the actual possession of the Math is as competent to maintain the suit as any person who may sue as the next friend of the idols or the judicial person known as the Math "

It is this view that was confirmed by their Lordships

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1 (1938) 2 M L J 663

2 (1933) 64 M L J 505 L R 60 I A. 124 I L R 12 Pat 251 (P C).

3 (1930) I L R 9 Pat 885

The next decision in *Mahadeo Prasad Singh* v *Karia Bharti*[1] is more instructive. In that case, a suit was brought for recovery of possession of a village alleged to appertain to a Math at Kanchanpur The plaintiff claimed to be its lawful Mahant, having been installed as such upon the death of one Rajbans Bharti, who was admittedly a Mahant and who had sold the village to the defendants without necessity The alienees denied that the plaintiff had been installed as Mahant and pleaded that the suit was not therefore maintainable The learned Judges of the High Court held that although the plaintiff had not been installed as Mahant, he had been *de facto* Mahant, and as such, he could maintain the suit The competency of the plaintiff to maintain the suit was again questioned before their Lordships of the Judicial Committee, who accepted the finding of the trial Court and the High Court that the plaintiff was neither the chela of Rajbans, the previous Mahant, nor appointed to be the head of the institution , and also accepted the finding that the plaintiff, though not duly installed, was in fact the Mahant of the Math On these findings, their Lordships answered the question whether the plaintiff could maintain the suit to recover the property, thus,

> " There can be little doubt that Karia (plaintiff) had been managing the affairs of the institution since 1904, and has since the death of Rajbans been treated as its Mahant by all the persons interested therein The property entered in the revenue records in the name of Rajbans was, on his death mutated to Karia, and it is not suggested that there is any person who disputes his title to the office of the Mahant In these circumstances their Lordships agree with the High Court that Karia was entitled to recover for the benefit of the Math the property which belonged to the Math and is now wrongly held by the appellants They are in no better position than trespassers As observed by this Board in *Mahant Ram Charan Das* v *Naurangi Lal*[2] a person in actual possession of the Math, is entitled to maintain a suit to recover property appertaining to it, not for his own benefit, but for the benefit of the Math "

Though the question was not actually decided it was apparently assumed in *Iswar Ram Chandra* v *Bengal Duars Bank*[3] that the two decisioms were authority for the position that a person in possession of a temple or Math was entitled to maintain an action to recover the properties belonging to the temple or math In the face of these two decisions of the Privy Council, it is impossible to accept *Vedakannu Nadar* v *Ranganatha Mudaliar*[4] as laying down the correct law on the point With respect to the learned Judge, we do not agree with Horwill, J , that in spite of these two decisions, the decision in *Vedakannu Nadar* v *Ranganatha Mudaliar*[4] should be considered to be good law (*Vasudeva Rao* v *Packiri Mohammed Rowther*[5]) It may not be accurate to say that, in the Privy Council cases above referred to,

> " there was no question about who should hold office or as to who was the person entitled to bring the suit "

It is quite clear that the competence of the persons who brought the suit was expressly challenged

The rationale of the rule permitting " a *de facto* trustee " in possession and management of a temple or a Mutt to bring a suit for the recovery of properties belonging to the institution and to take such other action as may be necessary in the interests of the trust can be stated thus in the words of Wadsworth, J , in *Subramania Gurukkal* v *Abbinava Poornapriya A Srinivasa Rao Sahib*[6] .

> " It is the duty of the Court to protect trust property from misappropriation and diversion from the objects to which it was dedicated When trust property is without a legal guardian owing to any defects in the machinery for the appointment of a trustee or owing to the unwillingness of the legal trustee to act, it would be a monstrous thing if any honest person recognised as being in charge of the institution and actively controlling its affairs in the interests of the trust should not be entitled, in the absence of any one with a better title to take those actions which are necessary to safeguard the objects of the trust "

It may be mentioned that, once before, the question now referred to us was placed before a Full Bench, at the instance of Chandrasekhara Aiyar, J , but the learned Judges who formed the Full Bench considered that the question did not arise on the facts of the case, because that was not a case where *de facto* trustees, in the absence

1 (1934) 68 M L J 499 L R 62 I A 47 I L R 57 All 159 (P C)
2 (1933) 64 M L J 505 L R 60 I A 124 I L R 12 Pat 251 (P C)
3 A I R 1941 P C 33 (P C)
4 (1938) 2 M L J 663
5 (1944) 1 M L J 35
6 A I R 1940 Mad 617

of *de jure* trustees, took action with regard to the property of the trust in the interests of the trust It was a case where persons who had no manner of right to be in possession of trust property wrongfully kept the lawful trustees out of possession *Pattabhirama Reddi* v *Balarami Reddi*[1]

In my opinion, the learned Subordinate Judge was right in holding that if the plaintiffs were to prove that it is in possession and management of the Swarnamalai Kadiresan temple and its other properties and therefore is its *de facto* trustee it can maintain the suit

The appeal is dimissed with costs

Viswanatha Sastri, J—In *Vedakannu Nadar* v *Ranganatha Mudaliar*[2], Venkatasubba Rao and Abdur Rahman, JJ , held that a *de facto* trustee of a public, religious or charitable trust had no *locus standi* to maintain an action on behalf of the trust even if the action be found to have been instituted in the interests of the trust and for its benefit The decision was based on the ground that a *de facto* trustee was an intermeddler or wrongdoer and that he could not confer any rights on himself by committing a wrong, although he might assume liability on account of his conduct Abdur Rahman, J , observed that the expression "*de facto* trustee" was an unhappy one, loosely used in some Indian decisions to denote a "trustee *de son tort*", a term, which, according to his Lordship " is so well known and which brings out the idea of wrong so very clearly " To support his conclusion he also relied on the decision of the Privy Council in *Mata Din* v *Ahmed Ali*[3], relating to the powers of an unauthorised guardian under the Muhammadan Law to deal with the estate of a minor Both the learned Judges differed from previous decisions of this Court to the effect that suits for the vindication of the rights of a public religious endowment could be instituted by a *de facto* trustee where no *de jure* trustee was existing or functioning The correctness of the decision in *Vedakannu Nadar* v *Ranganatha Mudaliar*[2] which has since been followed in *Atmaram Rao's Charity* v *Packiri Mohammed Rowther*[4] is now assailed before the Full Bench

In holding that the conception of a "*de facto* trustee" had no legal basis or warrant, that it was a loose and unscientific popular equivalent of a " trustee *de son tort*," that the expression " trustee *de son tort* " borrowed from the English law was a well-known and well-understood legal expression denoting an intermeddler or a wrong doer and that the expression "trustee *de son tort* " would correctly describe the position of a " *de facto* trustee " under the Hindu Law, their Lordships, in my humble judgment, paid an exaggerated compliment to the legal cobwebs of an alien system and paid scanty attention to the well-established and well-understood principles of Hindu Law which they had to apply Let me say a word about the English conception of a " trustee *de son tort* " though, in my opinion, it may not be strictly germane to a consideration of the question now debated I shall advert later in the course of this judgment to the fundamental difference between the judicial conceptions on which the English law relating to trusts is based and those which underlie the Hindu legal system Dealing with the phraseology of the English law, I may be permitted to state in all humility that there is some amount of confusion discernible in the language employed by the English courts in their description of the status of persons occupying a fiduciary position The expressions " trustee *de son tort* " and ' constructive trustee " have been employed in English decisions sometimes as antithetical and sometimes as synonymous The expression " *de facto* trustee " is not found used in the leading English cases that I have been able to examine It will be agreed that trusts created by act of parties are express trusts Trusts which are assumed or presumed by law to exist without any reference to the expressed intention of the parties, in order to satisfy the demands of justice and good conscience, are generally styled constructive trusts A person who not being himself a trustee nor authorised by a trustee, intermeddles with the affairs

1 (1944) 2 M L J 326 (F B)
2 (1938) 2 M L J 663
3 (1912) 23 M L J 6 L R 39 I A 49 I L R 34 All 213 (P C)
4 (1944) 1 M L J 35

of the trust or the trust estate and does acts characteristic of the office of an express trustee has been called a "trustee *de son tort*"—a trustee of his own wrong A person who by mistake or otherwise *bona fide* assumes the character of trustee, though it does not really belong to him, is also a " trustee *de son tort* ' He is made liable as an express trustee under the English law—see *per* Lord Esher, M R , in *Soar* v *Ashwell*[1] At the same time, he is also described as a constructive trustee, the expressions " trustee *de son tort* " and " constructive trustee " being treated as interchangeable and appropriate to describe the same individual—see per A L. Smith, L J , in *Mara* v *Browne*[2], Halsbury's Laws of England, volume 33, page 192 Even the language used by the Lord Chancellor in the leading English case of *Barnes* v *Addy*[3], is not so precise or clear as one would expect from that august source, as even strangers who receive and become chargeable with some part of the trust estate are styled constructive trustees It is obvious that there cannot be both an express and a constructive trust in respect of the same matter The distinction between an express trustee and a constructive trustee would be very material in considering the period of limitation applicable to suits filed by or on behalf of the *cestui que trust* A trustee *de son tort* is not a constructive trustee, but is liable as an express trustee A constructive trust arises by legal inference or implication, by the operation of law and not by act of parties It arises when a trustee gains some personal advantage availing himself of his position and through the medium of his situation as a trustee Section 88 of the Indian Trusts Act provides for cases of this type A trustee *de son tort* may, like an express trustee, also become liable as a constructive trustee under the above rule if he abuses his position and gains a personal advantage to the detriment of the trust I do not think that a trustee *de son tort* in relation to the trust property can be regarded as a constructive trustee under section 94 of the Trusts Act In this country, the position of a person, who, in England, would be described as a trustee *de son tort* is that of an express trustee so far as his liabilities and disabilities are concerned Section 92 of the Civil Procedure Code proceeds on this basis The definition of "trustee" in section 9, clause (13) of the Madras Act II of 1927 includes a trustee *de son tort* The Judicial Committee have held that a trustee *de son tort* is in the position of an express trustee and like him, is debarred from setting up a plea of adverse possession as against the trust (See *Balwant Rao* v *Puran Mal*[4] and *Arunachalan Chetti* v *Venkatachalapathi*[5]) There is therefore no danger to the trust estate in recognising a trustee *de son tort* or holding that a person who is liable as a trustee is also entitled to take legal proceedings in the interests of the trust and for the recovery of property belonging to the trust

The position of an executor *de son tort* may also be referred to in this connection. If a person who is neither an executor nor an administrator intermeddles with the estate of a deceased person or does acts characteristic of the office of executor he thereby makes himself an executor *de son tort* Though an executor *de son tort* cannot by his own wrongful act, acquire any benefit for himself yet, he is protected in all acts which a rightful executor may do He can apply the assets which are in his hands to the payment of the debts of the deceased Any lawful act done by him in the professed course of the administration of the estate binds the rightful executor and the persons eventually entitled to the estate Payments made and alienations of the estate effected by an executor *de son tort* in due course of administration or by an executor whose probate is subsequently revoked, are treated as valid As against a creditor of the deceased who sues an executor *de son tort* for recovery of the debt, the latter may plead *plene administravit* How comes it, one may ask, that a person who himself has no title is able to convey a title to a purchaser and administer the estate by collecting moneys and giving a good discharge to the debtors of the estate ?

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1 (1893) 2 Q B 390, 394
2 (1896) 1 Ch 199, 209
3 (1879) 9 Ch A 244, 251 and 252
4 (1883) L R 10 I A 90 . I L R 6 All 1 (P C)
5 (1919) 37 M L J 460 L R 46 I A 204 : I L R 43 Mad 253 at 270 (P C)

Before applying the doctrines derived from the English law of trusts to public religious endowments in this country, it must be remembered that there are fundamental differences between the English and the Indian systems It is for this reason that the Indian Trusts Act, which is modelled on the English law of trusts, specifically declares in section 1 that its provisions do not apply to public or private religious or charitable endowments A " trust " in the sense in which the expression is used in English law postulates a conveyance of property to the trustee and the vesting of the legal title to the property in him, for the benefit of the *cestui que trust*. The position of the manager of a Hindu religous or charitable endowment in relation to the endowment is not strictly speaking that of a trustee In the early case of *Maharane Shibessouree Deebia* v *Acharjo*[1], Lord Chelmsford thus defined the position of shebait or manager *vis-a-vis* the idol or the temple —

" The Talook itself with which these Jummas were connected by tenure, was dedicated to the religious services of the idol The rents constituted therefore in legal contemplation its property. The shebait had not the legal property, but only the title of manager of a religious endowment In the exercise of that office she could not alienate the property, though she might create proper derivative tenures and estates conformable to usage "

In the case of *Vidyavaruthi Thirtha* v *Balusami Aiyar*[2], the Judicial Committee dealt with this matter exhaustively and came to the following conclusions

" When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency Called by whatever name, he is only the manager and custodian of the idol of the institution In no case was the property conveyed to or vested in him, nor is he a ' trustee ' in the English sense of the term, although in view of the obligations and duties vesting on him, he is answerable as a trustee in the general sense, for mal-administration "—(page 840)

" Neither under the Hindu law nor in the Mahomedan system is any property ' conveyed' to a shebait or a mutavalli in the case of a dedication Nor is any property vested in him, whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage"—(page 843)

" From the above review of the general law relating to Hindu and Muhammadan pious institutions, it would *prima facie* follow that an alienation by a manager or superior, by whatever name called, cannot be treated as the act of a ' trustee ' to whom property has been ' conveyed in trust ' and who by virtue thereof has the capacity vested in him which is possessed by a ' trustee ' in the English law "—(page 847)

In *Pramathanath Mullick* v *Pradyumna Kumar Mullick*[3], the Judicial Committee reiterated what they had previously said,

" A Hindu idol is, according to long-established authority, founded upon the religious customs of the Hindus, and the recognition thereof by courts of law, as 'juristic entity' It has a juridical status with the power of suing and being sued Its interests are attended to by the person who has the deity in his charge and who is in law its manager with all the powers which would, in such circumstances, on analogy, be given to the manager of the estate of an infant heir It is unnecessary to quote the authorities , for this doctrine, thus simply stated, is firmly established "

The position of the idol, therefore, is that of a legal owner and the position of the so-called trustee of a Hindu temple or other religious or charitable endowment is that of a mere manager (*Venkateswara* v *Venkatesa*[4])

The guardian of a Hindu minor, the manager of a Hindu religious endowment and the manager of a joint Hindu family, all occupy a position of trust and confidence towards the minor or the idol or the junior members of the family as the case may be. Their power to deal with the property of the minor or the idol or the joint family, is a limited power which can rightly be exercised only in case of necessity or for the benefit of the infant, idol or the family as the case may be *Hanooman Pershad's case*[5], *Srikrishna Das* v *Nathuram*[6], *Ramsunderlal* v *Lakshminarayana*[7], and *Palaniappa* v *Deivasigamani*[8] There is normally a *de jure* guardian of a minor's estate, a *de jure* manager or dharmakartha of an idol and a *de jure* head

1 (1869) 13 M I A 270
2 (1921) 41 M L J 346 L R 48 I A 302 I L R 44 Mad 831 (P C)
3 (1925) 49 M L J 30 L R 52 I A 245 I L R 52 Cal 809, 815 (P C)
4 (1941) 1 M L J 644 I L R 1941 Mad 599 (F B)
5 (1856) 6 M I A 393
6 (1926) 52 M L J 720 L R 54 I A 79 : I L R 49 All 149 (P C)
7 (1929) 57 M L J 7 (P C)
8 (1917) 33 M L J 1 · L R 44 I A. 147 : I L R 40 Mad 709 (P C)

of a joint Hindu family entitled to remain in possession and management of the properties and also to bring and defend suits concerning the estate The parents of a Hindu boy are his natural or *de jure* guardians The management or trusteeship of a religious endowment vests in those designated by the deed of dedication or foundation and in the absence of such a deed, in those who succeed according to the usage of the institution Such managers or dharmakarthas of religious endowments might be called *de jure* trustees The management of a joint Hindu family vests in the seniormost male member of the family and he may be styled its *de jure* manager When, however, the *de jure* guardian, *de jure* trustee or *de jure* manager of the family, ceases to function for one reason or another, or when there is no such *de jure* guardian or manager available, the affairs of the infant or the idol or the joint family, as the case may be, are usually attended to by a near relation of the minor, or a person interested in the idol either as a member of the founder s family or the trustee's family or a junior member of the joint Hindu family respectively The persons who step in and assume the management in such circumstances with a view to protect the interests of the estate without a strict legal title or valid appointment are styled *de facto* guardians, *de facto* trustees and *de facto* managers of a joint family

These expressions were not anathema to English jurists administering Hindu law but have long been in use as a compendious and convenient description of the status, position, powers and duties of these respective functionaries With reference to a minor, *de facto* guardianship of the minor's estate has long been recognised as clothing the *de facto* guardian with certain well-defined duties, obligations and powers including a power of disposal over the estate of the minor, limited however, by the same restrictions as would apply to a natural or *de jure* guardian A *de facto* guardian or manager of an infant's estate has, in cases of necessity, power to sell or mortgage the property of an infant It was so ruled by the Judicial Committee in *Hanooman Pershad's case*[1] and this decision has been constantly followed by this and the other High Courts on many occasions—see *Pundarikakshayya* v. *Sreeramulu*[2], *Sudarsana* v *Dalayya*[3], *China Alagamperumal* v *Vinayakathammal*[4], *Seetharamanna* v *Appiah*[5], *Mukkamala Hanumayamma* v *Kasineni Lakshmidevamma*[6], *Tulsidas* v *Vaghela Raisinghji*[7], and *Piara Lal* v *Lajjaram*[8] He is also bound to account for his management of the minor's estate, *Ramanatha* v *Annamalai*[9], *Sankaralingam* v. *Kuppuswami*[10] As the position of a guardian or manager of a Hindu minor's estate has been held by the Privy Council to be similar to that of the manager of a religious endowment, the following passage from the judgment of the Judicial Committee in *Hanooman Pershad's case*[1], may usefully be cited .

"Under the Hindu law, the right of a *bona fide* encumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title "

I am constrained to refer at length to this aspect of the matter for two reasons. In my opinion, there is a close analogy between the position of the *de facto* guardian of a minor's estate and that of the *de facto* trustee of a Hindu religious endowment Secondly, I consider it somewhat unfortunate that Abdur Rahman, J , in *Vedakannu Nadar* v *Ranganatha Mudaliar*[11], should have resorted to the analogy of a *de facto* guardian under the Muhammadan law It is true that the Judicial Committee in *Matadin* v *Ahmed Ali*[12] held that a *de facto* guardian of a Muhammadan minor was in the position of a mere trespasser without any rights whatever to act on behalf of the minor or to convey the minor's estate even for a necessary or binding debt. Their Lordships, however, expressly confined their remarks to a case arising under

1 (1856) 6 M I A 393
2 (1945) 2 M L J 375 I L R 1946 Mad 242 (F B)
3 (1943) 1 M L J 339 I L R 1944 Mad 218
4 (1928) 55 M L J 861
5 (1925) 50 M L J 689 I L R 49 Mad 768
6 (1938) 2 M L J 632
7 (1932) I L R 57 Bom 40 (F B)
8 (1935) I L R 17 Lah 78
9 (1934) 66 M L J 451 I L R 57 Mad. 1031
10 A I R 1935 Mad 305
11 (1938) 2 M L J 663
12 (1912) 23 M L J. 6 L R 39 I A 49 : I L R 34 All 213 (P C)

the Muhammadan law as might be seen from the following passages in the judgment of the Board

"The family were Muhammadans and were governed by the Muhammadan law relating to guardianship According to that law, in the absence of duly appointed testamentary guardians, the care of Ahmed Ali's (minor's) property would devolve, first on the father and his executor, next on the paternal grandfather and his executor and failing these, the right of nomination of a guardian would 'rest in the ruling power and its administration' The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court"

Dealing with the contention that the alienation in that particular case might be justified on the ground of necessity or benefit to the minor, even though it was effected by a *defacto* guardian, their Lordships observed,

"There has been much argument in this case in the courts below, and before their Lordships, as to whether, according to Muhammadan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor is altogether void or merely voidable It is not necessary to decide that question in this case"

That this limitation on the powers of the *de facto* guardian of a minor is not of general application, but confined only to the case of Muhammadans is clear from the later decision of the Judicial Committe in *Imam Bandi* v *Mutsaddi*[1] where the law is stated as follows

"For the foregoing considerations, their Lordships are of opinion, that under the Muhammadan law a person who has charge of the person or property of a minor without being his legal guardian and who may, therefore, be conveniently called a '*de facto* guardian' has no power to convey to another any right or interest in immoveable property which the transferee can enforce against the infant, nor can such transferee if let into possession of the property under such unauthorised transfer, resist an action in ejectment on behalf of the infant as a trespasser It follows that, being himself without title, he cannot seek to recover property in the possession of another equally without title"

The well known and oft-quoted case of *Hanooman Pershad*,[2] would have afforded a surer guidance to their Lordships who decided *Vedakannu Nadar* v *Ranganatha Mudaliar*[3] than the decision of the Privy Council which dealt solely with the Muhammadan law relating to the guardianship of a minor's property

In the case of a joint Hindu family, the father, if alive, or in his absence, the senior member of the family is the *de jure* manager of the family property and entitled to sue as such manager on behalf of the family *Suraj Bansi* v *Sheo Prasad*[4], *Krishnaprasad* v *Hari Narayan*[5], *Venkatanarayana* v *Somaraju*[6] The relation of the manager to the other members of the joint family is not that of an agent or partner but much more like that of trustee and *cestui que trust*, *Annamalai* v *Murugesa*[7] It sometimes happens that a junior member of the family assumes management of the family affairs and the management of the family properties with the consent or acquiescence of the other members often inferred from their conduct, *Mudit Narayan* v *Ranglal*[8], *Ramakrishna* v *Manikka*[9] A junior member, if he is in charge of the the family business, will have all the powers of a manager to the extent necessary for the proper conduct of the business of which he is in charge, *Sheo Pershad Singh* v *Saheblal*[10] The term "*de facto* manager" is a very convenient espression to denote the position of such a junior member

I now turn to the case of a Hindu religious endowment and that variety of it with which we are here concerned, namely, a Hindu temple To constitute a valid dedication, a conveyance by way of trust by the author of the trust to another person called the "trustee" is not required and an appropriation of property for a specific religious or charitable purpose is all that is necessary or requisite (*Vidyavaruthi* v *Balusami Iyer*[11], *Ramalinga* v *Sivachidambara*[12], *Hemantakumari Debi* v.

1 (1917) 35 M L J 422 L R 45 I A 73 I L R 45 Cal 878 and 903 (P C)
2 (1856) 6 M I A 393
3 (1938) 2 M L J 663
4 (1879) L R 6 I A 88 I L R 5 Cal 148, 165
5 (1911) 21 M L J 378 L R 38 I A 45 I L R 33 All 272 (P C)
6 (1937) 2 M L J 251 I L R 1937 Mad 880 (F B)
7 (1903) 13 M L J 287 L R 30 I A 220: I L R 26 Mad 544 (P C)
8 (1902) 29 Cal 797
9 (1937) 1 M L J 587
10 (1892) 20 Cal 453
11 (1921) L R 48 I A 302 41 M L J 346 I L R 44 Mad 831 (P C)
12 (1918) 36 M L J 575 I L R 42 Mad 440

Gowri Sankar[1], *Sankaranarayana* v *The Hindu Religious Endowments Board*[2]. The decisions of the Privy Council have now firmly established that the idol is a juridical person capable as such of owning and holding property The legal title or property is vested in the idol and the so-called trustee or dharmakartha is only the manager of the religious endowment The position of the dharmakartha or manager of a temple in relation to debutter property is by no means similar to that of a trustee towards the trust property under the English law The only resemblance is that he has certain duties to perform which are analogous to those of trustees In addition to the cases already cited, reference may be made to the following decisions of the Judicial Committee, *Jagadindranath* v *Hemanthakumari*[3] *Jadunath* v *Thakur Seetharam*[4], *Kanhaiyalal* v *Hamidali*[5], *Damodardas* v *Lakshandas*[6]. At the same time, the possession and management of the dedicated property and the right to sue for the protection of the property and the recovery of its rents and profits and the vindication of the rights of the idol must *ex necessitati rei* vest in some human agency, usually the dharmakartha, shebait, manager or trustee of the institution In *Prasannakumari Debya* v *Golabchand Baboo*[7], the Judicial Committee observed,

> " It is only in an ideal sense that the property can be said to belong to an idol, and the possession and management of it must, in the nature of things, be entrusted to some person as shebait or manager It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property, at least to as great a degree as the manager of an infant heir "

Again in *Jagadindranath Ray* v *Hemantakumari Debi*[8], the Privy Council stated the law thus

> " There is no doubt that an idol may be regarded as a juridical person capable as such of holding property, though it is only in an ideal sense that property is so held And probably this is the true legal view when the dedication is of the completest kind known to the law Assuming the religious dedication to have been of the strictest character, it still remains that the possession and mangement of the dedicated property belongs to the shebait And this carries with it the right to bring whatever suits are necessary for the protection of the property Every such right of suit is vested in the shebait, not in the idol "

To the same effect is a later decision of the Privy Council in *Damodar Das* v *Lakshan das*[9] The Courts in India acted on the principle enunciated by the Judicial Committee in the above cases and held that the *de facto* manager of a religious endowment was in the same position as the *de facto* guardian of a Hindu infant with the same powers and duties, see *Sheo Sankar Gir* v *Ram Shewak*[10], *Kasim Saheba* v *Sudhindra Thirthaswami*[11], *Seetharamanna* v *Appiah*[12] How comes it that if a *de facto* trustee is no more than a trespasser, an alienee from him of trust property gets a good title if there is justifying necessity or benefit to the institution as held in these cases ? How is it like a *de jure* trustee he gets a right of reimbursement and retainer for out of pocket expenses as held in *Abkan Sahib* v *Soran Bivi Sahiba*[13] It therefore follows that a *de facto* trustee is not in the same position as a trespasser or a mere wrongdoer

Coming to the question now before us, namely, the right of a *de facto* trustee or manager of a religious endowment to institute a suit for recovery of trust property held adversely to the trust by a stranger, there are two recent decisions of the Judicial Committee, that furnish a decisive answer in favour of the maintainability of such a suit I refer to the cases in *Mahant Ramacharandas* v *Nowrangilal*[14] and *Mahadeo Prasad Singh* v *Karia Bharti*[15], in both of which it was held that the *de facto* Mahant

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1 I L R 1941 All 401 L R 61 I A 53, (1941) 2 M L J 1 (P C)
2 L R 74 I A 230 I L R 1948 Mad 585 (P C)
3 (1904) L R 31 I A 203 I L R 32 Cal 129 (P C)
4 (1917) L R 44 I A 187 I L R 39 All 553 (P C)
5 (1933) 60 I A 263 65 M L J 811 I L R 8 Luck 351 (P C)
6 (1910) L R 37 I A. 147 20 M L J 624 I L R 37 Cal 885 (P C)
7 (1875) L R 2 I A 145 (P C)
8 (1904) I L R 32 Cal 129, 140 L R. 31 I A 203 (P C)
9 (1910) I L R 37 Cal 885 L R 37 I A. 147 20 M L J 624
10 (1896) I L R 24 Cal 77 82, 83
11 (1895) I L R 18 Mad 359
12 (1925) 50 M L J 689 I L R 49 Mad. 768
13 (1913) 28 M L J 347 I L R 38 Mad 260
14 (1933) L R 60 I A 124 64 M L J 505 I L R 12 Pat 251 (P C)
15 (1934) L R 62 I A 47 68 M L J 499 I L R 57 All 159 (P C)

or head of the Mutt, in actual possession of the mutt though without title, was entitled to maintain a suit to recover property, appertaining to the mutt, not for his own benefit, but for the benefit of the mutt, from a person claiming it adversely to the mutt These two cases have been fully discussed in the judgment of my Lord and I need not go over the same ground again

It was faintly suggested in the argument that these two decisions of the Judicial Committee related to the case of mutts where the Mahant or head of the mutt had a beneficial interest in the properties of the mutt and would not apply to the case of a manager or of a dharmakartha of a temple, as the latter is in a different position, having no personal interest or right in the income of the temple property, but only the right or duty to apply it for the purposes of the idol This considera-tion, far from supporting the argument tends to weaken it, because if you can predicate a *de facto* trusteeship even in cases where the trustee has an appreciable personal or beneficial interest of his own in the property, it is an *a fortiori* case where there is no personal interest whatever in the trustee and he is a mere manager Apart from this consideration, the Privy Council has held that the head of a mutt, the shebait of a family idol and the dharmakartha of a temple all occupy the same postition in the eye of the law even though there may be an element of beneficial interest in the case of the head of a mutt or shebait of a family idol, *Ponnambala* v. *Perianan Chetti*[1] Incidentally I may observe that Sir George Rankin, who deli-vered the judgment of the Judicial Committee in the case last cited, used the ex-pression " *de facto* managership ", to describe the position of Nataraja who functioned as the head of the Kunnakudi Mutt from 1902 to 1913 without any legal title to the office, his nomination as the head of the mutt having been held invalid by the Privy Council in *Nataraja* v *Kailasa*[2]. In a later case *Ishwar Ramachandra* v *The Bengal Duars Bank Ltd*,[3], their Lordships of the Privy Council referred to the suit before them as one for the recovery of property by a *de facto* shebait of an idol and affirmed the dismissal of the suit by the courts below on the ground that there was no evidence of the plaintiff having in fact acted in management of the idol's property as, for instance, by the collection of rents Their Lordships did not say that a *de facto* shebait was like a trustee *de son tort* and therefore wholly incompetent to sue but they proceeded in the assumption, that a *de facto* shebait could sue if he could establish that he was functioning as such I say so because their Lordships' attention was pointedly drawn to the two earlier cases in *Mahant Ramachandradas* v. *Naurangilal*[4] and *Mahadeoprasad Singh* v *Karia Bharti*[5] as empowering *de facto* trustees to sue

These decisions were cited before Horwill, J in *Atmaram Rao's Charity* v *Pakiri Mohammed Rowther*[6], but the learned Judge nevertheless felt himself bound by the decision in *Vedakannu Nadar* v. *Ranganatha Mudaliar*[7] If ever there was a case for allowing a *de facto* trustee to sue it was that case The preceding trustee of the property had alienated the trust property and time was running against the trust estate in favour of the alienees The person upon whom the trusteeship would devolve under the will of the founder did not come up on the scene at all A rela-tion of the founder claiming to be the next trustee under the terms of the will sued for recovery of possession of the property improperly alienated The alienation was found not to be binding on the trust and was even declared, to be such by the decree of the court below The Court, however, declined to pass a decree for possession, thereby emphasising the adverse character of the alienee's possession With the greatest respect to the learned Judge, I am constrained to dissent from this conclusion The decisions of this court upholding the right of a *de facto* trustee to sue in the interests of the trust are to be found in *Anjaya* v *Gundarayudu*[8], *Subra-mania* v *Srinivasarao*[9], *Mohideen Vivi* v. *Ratnavelu Mudali*[10], *Appaswami Pillai* v *Ramu*

1 (1936) 71 M L J 105 L R 63 I A 261 59 Mad 809 (P C)
2 (1920) L R 48 I A 1 39 M L J 98 I L R 44 Mad 283 (P C)
3 I L R (1941) Kar (P C) 51 A I R 1941 P C 33
4. (1933) L R 60 I A 124 64 M L J 505 I L R 12 Pat 251 (P C)
5 (1934) L R 62 I A 47 68 M L J 499 I L R 57 A 159 (P C)
6 (1944) 1 M L J 35
7 (1938) 2 M L J 663
8 (1943) 2 M L J 539
9 A I R 1940 Mad 617
10 (1926) 51 M L J 598

Thevar[1], *Mohamed Ibrahim* v *Sundaram Chetti*[2], *Kasi Chetti* v *Deivasigamani Nataraja Desigar*[3] The statement in the judgment in the case last cited that the *de facto* trustee was in possession of the suit property appears to be due to a misapprehension for, trustee or no trustee, a person in actual possession who is dispossessed by another who is not the owner of the property, can recover it merely on the strength of his prior possession apart from title, *Ismail Ariff* v *Muhammad Ghouse*[4], *Narayanarao* v *Dharnachar*[5]. I venture to think that if the two decisions of the Privy Council above cited had been considered by the learned Judges who decided *Vedakannu Nadar* v *Ranganatha Mudaliar*[6], they would not have ruled that a *de facto* trustee had no *locus standi* to maintain an action on behalf of the trust even if the action was one instituted for the benefit of the religious institution The other High Courts have held that a *de facto* shebait or trustee, accepted as such by persons interested in the institution, could bring a suit for recovery of property of the deity from a tresspasser in the interests of the trust I need refer only to a few of the latest decisions, *Tairt Bhushan* v *Sridhar Saligram*[7], *Annapoornadevi* v *Sivasundari*[8], *Dongarse Syamji* v. *Thirubhvundas*[9].

A Hindu religious endowment is a complex juridical concept and in considering the rights and remedies of persons interested in the welfare of endowment, it is unsafe to import bodily the doctrines of the English law relating to express trusts, or trustees *de son tort* With a view to protect the interests of religious endowments as well as the rights of persons dealing with shebaits or managers, the Indian Legislature has amended S 10 of the Limitation Act by providing that managers of property comprised in a Hindu Religious endowment are deemed to be express trustees thereof and has also enacted Article 134-A to 134-C of the same Act assimilating the position of the manager to that of a trustee Similarly Madras Act II of 1927 by section 9 clause (13) defines the term 'trustee" as including any person, by whatever designation known, in whom the *administration* of a religious endowment is vested including a person who would be liable as a trustee *i e*, a *de facto* trustee In other respects, the so-called trustees of a Hindu temple are merely managers or supervisors with obligations resembling those of trustees, the property itself being vested in ownership in the idol and its possession and management alone being vested in the trustee, dharmakartha or manager This is the normal feature of most religious institutions in this part of the country An express conveyance of property to named trustees to be held in trust for an idol, though perfectly legal, is not common It should be observed that the rights of a *de facto* trustee are not in all respects identical with those of a *de jure* trustee A *de jure* trustee of a public religious endowment can be removed only for misconduct and that only in a suit instituted with the sanction prescribed by section 92, Civil Procedure Code or section 73 of Madras Act II of 1927 Where, however, there is only a *de facto* trustee functioning as such, it is open to persons interested in the trust to bring a suit under the above provisions alleging a vacancy in the office and requiring that it should be filled up by the appointment of a trustee by the court This would entail the removal of the *de facto* trustee without any misconduct on his part If the *de jure* trustee appears on the scene and claims the office and the properties appeartaining to it, the *de facto* trustee must, unless he had in the meantime perfected his title to the office by adverse possession for the requisite period, surrender possession of the office and the properties to the *de jure* trustee The *de facto* trustee so long as he is functioning as such, has, from the necessities of the situation, the right to bring suits on behalf of and in the interests of the trust for evicting trespassers claiming adversely to the trust In this respect and for this purpose his rights and powers are the same as that of a *de jure* trustee. It is not competent to any person other than a *de Jure* or *de facto* trustee to sue for recovery of possession of the properties of a religious endowment, from a person claiming

1 (1931) 61 M L J 887, 893
2 A I R 1926 Mad 1066
3 (1913) M W N 181
4 (1893) L R 20 I A 99 I L R 20 Cal 834 (P C)
5 (1902) 13 M L J 146 I L R 26 Mad 514.
6 (1938) 2 M L J 663
7 I L R (1941) 2 Cal 477
8 I L R (1944) 2 Cal 144
9 I L R 1947 All 263

to hold adversely to the trust Whatever may be the necessity for and the propriety of a separate representation of an idol by a separate and independent next friend or guardian, when the rights of the idol and the rights of the shebait are in conflict or when the *de jure* shebaits or trustees of the idol are quarrelling among themselves, as regards its location and custody, treating the idol as a mere chattel as in the cases of *Pramathanath Mullick* v *Pradyumna Kumar Mullick*[1], *Kanhayalal* v. *Ahmed Ali*[2], it is a fallacy to treat the idol as a perpetual minor as suggested in *Ramareddi* v *Rangadasan*[3] and therefore capable of being represented by any next friend or guardian *ad litem* Such an assumption is extravagant and is repugnant to the sentiments and feelings entertained by the faithful It is also repelled by authority, see *Surendrakrishna* v *Iswar Bhuvaneswari*, affirmed on appeal by the Privy Council[4] The Indian Limitation Act has exempted a minor from the bar of limitation but this protection does not extend to an idol The only point of similarity is that they are both incapable of managing and protecting their property and interests which have to be done through another human agency, the powers of the guardian of a minor and the manager of an idol being similar. The analogy should not be pressed further and it is not necessary or proper to have a next friend or guardian *ad litem* appointed for an idol in every suit in which its interests are concerned

I am referring to this aspect of the case for it would introduce inextricable confusion in the administration of religious endowments if people professing to act in the interests of an idol or mutt, are allowed to bring suits in the name of the idol or the institution ignoring the manager or the head of the mutt who is living and functioning as such As we are recognising the power of a *de facto* trustee to sue on behalf of an idol or a mutt, it is necessary that courts should prevent this power from being abused or exercised fraudulently or collusively to the detriment of the trust by persons professing to act on behalf of and in the interests of the idol or mutt, behind the back of the *de jure* manager or head of the mutt The law is clear that where there is a lawful shebait, Dharmakartha or head of a mutt, he alone can bring the suits necessary for recovering possession of the property of the institution and otherwise protecting its interests and he alone is the proper person to represent it in a suit filed against the mutt, temple or idol as the case may be, *Prosonna Kumari Debya* v *Golab Chand Baboo*[5], *Jagadindranath* v. *Hemanthakumari*[6] Where there is a lawful shebait or manager, until he is removed or controlled by the Court, he can alone act for the idol Per Rankin, C J, see *Surendrakrishna* v *Ishwar Bhuvaneshwari*[4] Indeed, the Privy Council has observed that in such cases, the right of suit is really in the manager or shebait though the processual law of the country allows for a suit in the name of the idol or the deity. See the *Shahid Ganj case*[7] Though as already stated, managers of Hindu temples are not trustees in the English sense, still, on the analogy of co-trustees, if there are more shebaits or managers than one, they are deemed to constitute one single body, as it were, in the eye of law and all of them must normally be parties to a suit on behalf of or against the deity or the idol If any of the managers are unwilling to be joined as plaintiffs or have themselves done acts prejudicial to the trust or otherwise precluded themselves from being plaintiffs, they should be made defendants, *Rajandranath Dutt* v *Sheik Muhammad Lal*[8]. As regards co-trustees, strictly so-called, they stand on a different footing from joint managers or shebaits, for, the property is vested in all of them, there is unity of title and possession and their interests are joint and indivisible. But having regard to the position and status of shebaits and managers of Hindu religious endowments and their

1 (1925) 49 M L J 30 L R 52 I A 245 I L R 52 Cal 809 (P C)
2 (1933) 65 M L J 811 L R 60 I A 263 I L R 8 Luck 351 (P C)
3 (1925) 50 M L J 589 I L R 49 Mad 543
4 (1932) I L R 60 Cal 54, 73, 77 affirmed on appeal by the Privy Council in (1937) 2 M L J. 527 L R 64 I A 203 I L R (1937) 2 Cal. 447 (P C)
5. (1875) L R 2 I A 145 (P C)
6 (1904) L R 31 I A 203 I L R 32 Cal. 129 (P C)
7 (1940) 2 M L J 903 L R 67 I A 251: I L R 1940 Lah 493 (P C)
8 (1881) L R 8 I A 135 I L R 8 Cal 42 (P C)

relation to the endowed property the legal title in which vests, not in the managers but only in the deity or the idol, the rule requiring all co-shebaits or managers to join in an action on behalf of the deity or idol is not so inexorable or incapable of exception or relaxation as in the case of co-trustees strictly so-called. In *Rajendranath Dutt* v *Sheik Muhammad Lal*[1], where three out of four joint shebaits omitted to implead the fourth in their suit to recover alienated property, the Judicial Committee dismissed the suit, because their Lordships were of the opinion that those plaintiffs were acting from motives personal to themselves and sought to recover the property for their own use. In *Baraboni Coal Concern, Ltd* v *Gokulananda Mahanta Thakur*[2], it was held by the Judicial Committee that one of four joint shebaits could not sue to recover his one-fourth share of the royalties payable to the deity or the idol Their Lordships stated that the claim being laid on behalf of the deity by the plaintiff suing only as shebait, he could not competently sue for his share in the idol's interest There was no warrant for splitting up the property of the deity in the manner the plaintiff tried to do and it was not competent to one of four joint shebaits and lessors to sue for an adequate share of the whole "The suit must be for the whole of the interest demised, else it fails" There are observations of a general character in the other reported cases to the effect that all the co-shebaits or managers must join in a suit filed on behalf of the deity, whether as plaintiffs or defendants While I agree that this should be the normal rule, I would, at the same time, express my respectful agreement with the following statement of the law by Biswas, J, in *Ishwar Sridhar Jieu* v *Jahorlal*[3]

"As is, however, recognised in many of these cases, and is in fact implied in the statement of the rule, it cannot be maintained as an absolute rule of law that all the co-shebaits must join in representing the deity The rule is subject to exceptions, and circumstances may exist in which the deity may be validly represented by some only of the shebaits, and even by a person who is not a shebait Where a suit is a suit by the deity represented by some of its shebaits, the question whether or not the other shebaits should be joined as parties is often, in the last analysis, a mere question of procedure and expediency the test is whether or not, having regard to all the circumstances of the case, the interest of the deity may be said to be sufficiently represented"—See also *Nirmal Kumar* v *Jyoti Prasad*[4]

Apart from the right of the idol or the deity to sue through its duly constituted shebait or trustee, or through its *de facto* manager, for recovery of property belonging to it, the worshippers have a right of suit in respect of the property of a deity or idol They have been held entitled to sue for a declaration, that a decree obtained against the shebait or head of a mutt was not binding on the institution, *Arunachalam Chettiar* v *Velappa*[5], or to sue for a declaration that an alienation by the manager or madathipathi is an improvident transaction not binding on the institution even in the lifetime of the alienor, *Chidambaranatha* v *Nallasiva*[6], *Naina Pillai Maracair* v *Ramanathan Chetti*[7] The view taken in *Mahant Ramacharan Das* v *Naurangilal*[8] and *Ponnambala* v *Periannan Chettiar*[9] that such an alienation by the manager of a temple or head of a mutt might be good during the lifetime of the alienor is no longer of practical interest in view of the amendment of section 10 and Article 134 of the Limitation Act which makes the shebait or manager of a religious endowment a trustee, so far as alienations of endowed property effected by him are concerned The right of worshippers and persons interested in the institution to sue to have the alienation made by the manager or head of the mutt set aside even during his lifetime is now recognised by Article 134-A of the Limitation Act The worshippers of the idol or the disciples of a mutt are interested in the idol or the mutt and interested in seeing that the property dedicated to it for its service is not made unavailable by any act of the manager or head of the mutt and can bring a suit for re-annexing the property to the idol or the mutt so as

1 (1881) L R 8 I A 135 I L R 8 Cal 42 (P C)
2 (1933) 66 M L J 399 L R 61 I A 35 I L R 61 Cal 313 (P C).
3 (1945) 49 C W N. 37
4 I L R (1941) 2 Cal 128
5 (1915) 28 M L J 410
6 (1917) 33 M L J 357 I L R 41 Mad 124
7 (1923) 46 M L J 546 L R 51 I A 83 I L R 47 Mad 337 (P C)
8 (1933) 64 M L J 505 L R 60 I A 124 I L R 12 Pat 251 (P C)
9 (1936) 71 M L J 105 L R. 63 I A. 261 I L R 59 Mad 809 (P C)

to ensure its proper maintenance and the performance of its services Such a suit could and should be brought by the worshippers in their own names and not in the name of the idol, for, the worshippers do not exercise the idol's right of suit for the protection of its own interests but their own right as persons interested in the service of the idol The idol is also supposed to exist for the benefit and in the interests of the worshippers themselves Worshippers for whom temples have been founded are in the position of *cestui que trustent* or beneficiaries in a spiritual sense See *Vidhyapurna Thirthaswami* v *Vidhyanidhi Thirthaswami*[1], *Venkatachalapathi* v *Subbarayudu*[2] Since the worshippers do not exercise the idol's power of suing to protect its own interests, they are not entitled to recover possession of the property improperly alienated by the manager, but they can only ask for possession being given to the manager then existing or thereafter to be appointed by the Court after removal of the manager in appropriate proceedings *Neti Ramajogayya* v. *Venkatacharlu*[3], *Subramania Aiyar* v *Nagarathna Naicker*[4], *Srinivasacharlu* v *Subuddhi*[5], *Noor Mohammad* v *Karima Bibi*[6], *Venkatarama Aiyangar* v *Kasturiranga Aiyangar*[7]. Suits of the above description could be filed by the worshippers under the general law or common law as it might be called and do not fall within section 92, Civil Procedure Code or its corresponding equivalent, section 73 of Madras Act II of 1927, for these provisions do not authorise suits against third parties and strangers for possession of trust properties claiming a hostile title, *Raghavalu Chettiar* v *Seethamma*[8], *Rangaswami* v *Chinnaswami*[9] and *Evalappa Mudaliar* v *Balakrishna Ammal*[10] I am referring to this aspect of the matter to show that notwithstanding the limited right the worshippers have, to impugn unauthorised alienations by the managers of religious endowments, the properties could not be reduced into possession by them while a *de facto* trustee would be able to recover possession of such property

In recognising the right of *de facto* trustee to sue for recovery of possession of trust property, Courts must be astute to safeguard the interests of the institution, for it is only in such interest that the right of suit is at all conceded to him The *de facto* trustee can act only in the absence of the *de jure* trustee and in the interests of the trust, and cannot keep the lawful trustee or manager out of possession The expression " *de facto* trustee " cannot include persons who purport to act as trustees in fraud of the rights of the existing lawful trustees The *de facto* trustee would be a trespasser so far as the lawful trustee is concerned, *Pattabhirama Reddi* v *Balarami Reddi*[11] A person who asserts his own title to the property of a religious endowment, who does not sue as trustee or manager of the endowment and who claims to recover the property for himself and not for the trust, can never be allowed to sue as a *de facto* trustee He is entirely in the position of a trespasser so far as the trust is concerned and cannot be considered to be one who has taken upon himself the duties and obligations of a trustee If a man forcibly, violently and dishonestly takes possession of trust properties under a false claim to be a trustee or if there is a scramble for possession between rival contestants, the claim of *de facto* trusteeship is untenable A fugitive or isolated act of a person with regard to the property of a religious endowment would not make him a *de facto* trustee. One swallow does not make a summer There must be a continuous course of conduct, the length of the same depending on the facts and circumstances of the case The possession of the office or the institution which is the object of the trust and the exercise of the rights pertaining to that office, would be important indicia of a *de facto* trusteeship, cf. *Chinna Alagamperumal* v *Vinayakathammal*[12], *Hanumayamma* v *Lakshmidevyamma*[13], *Harilal Ramchod* v *Gordhan Keshav*[14] In the case last cited which related to a *de facto* guardianship, Crump, J , observed that that

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1 (1904) 14 M L J 105 I L R 27 Mad 435, 451
2 (1890) I L R 13 Mad 293, 306
3 (1902) I L R 26 Mad 450, 453
4 (1909) 20 M L J 151
5 (1912) 23 M L J 348, 351
6 (1914) 27 M L J 270
7 (1916) 31 M L J 777 I L R 40 Mad. 212, 223
8 (1914) 27 M L J 266
9 (1915) 28 M L J 326
10 (1927) 53 M L J 183
11 (1944) 2 M L J 326 (F B)
12. (1928) 55 M L J 861
13 (1938) 2 M L J 632
14. (1927) I L R. 51 Bom 1040.

term implied some continuity of conduct, some management of the property beyond an isolated act of alienation which alone was in question in that case

A person who *bona fide* takes charge of the office of trustee and acts in the character of a trustee under a title which is afterwards found to be invalid would, during the period he functions, be a *de facto* trustee The office of trustee is hereditary in many cases and is filled by an election or appointment in other cases. The question of succession to the office of trustee is often the subject of prolonged litigation in several Courts with varying results Sometimes, owing to defects in the machinery provided for the appointment of new trustees, whether it is by nomination or by election, the office of trustee remains unfilled Sometimes, the validity of the nomination or election of a trustee or head of a mutt is contested in Courts from the lowest to the highest and our reports teem with cases where succession to the headship of a mutt has been contested for decades to the bitter end Sometimes the trustee elected or nominated or succeeding by hereditary right is unwilling to act or is incapable of acting and the affairs of the institution, if uncontrolled by any responsible person, would fall into chaos and disorders A *de facto* trustee or manager who assumes possession of the office and manages the property in the interests of the deity to the satisfaction of the worshippers does not deserve the appellation of a trustee *de son tort* or a wrong doer If a *de facto* trustee is guilty of any breach of trust, he can be removed like a *de jure* trustee The law fixes him with the responsibility for the proper administration of the trust and also gives him the power to act on behalf of and in the interests of the trust, until a lawful trustee emerges Cases have arisen where there has been an interregnum between the death of one trustee and the succession of another and the trust has lost its title to the property improperly alienated by the deceased trustee See *Venkateswara Sarma* v. *Venkatesa*[1] In holding in the case last cited that the title of the trust was barred, His Lordship Venkataramana Rao, J , in his order of reference referred to the enactment of Article 134-B fixing the death of the previous matathipathi or manager as the starting point of limitation and observed as follows

"What was contemplated by the Legislature was that though there may be no *de jure* manager, there would be some one functioning on behalf of the mutt till a manager is constituted and he would be capable of instituting the suit on behalf of the institution It has not been shown in this case and the burden is on the plaintiff to show that there was no person in possession of the mutt or its properties who could have instituted a suit to recover possession of the properties "

The case in *Mahant Ramcharan Das* v *Naurangilal*[2], was also referred to and relied on by the learned Judge The present case itself furnishes an instance of the desirability of recognising the right of a *de facto* trustee to bring a suit for recovery of the properties of a Hindu temple The *de jure* trustee alienated the properties of the temple and his whereabouts have not been known for some years The succeeding trustee appointed under a compromise decree passed by the Court brings a suit for recovery of possession of the alienated property, and is met with the defence that his title to the trusteeship is not well founded and he should be non-suited for that reason Reason, convenience and positive authority alike impel me to hold that the decisions in *Vedakannu Nadar* v *Ranganatha Mudaliar*[3] and *Atmaram Rao's Charity* v *Packiri Muhammad*[4], are erroneous in so far as they decided that a *de facto* trustee is in the position of a trespasser and wrongdoer and cannot sue for recovery of property belonging to a Hindu religious institution on behalf of that institution from a person holding adversely to and in denial of the title of the trust

After preparing this opinion I have had the advantage of reading the judgment of My Lord with whose reasoning and conclusions I entirely agree

Raghava Rao, J —I also concur in the conclusion of My Lord the Chief Justice that this appeal must be dismissed

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1 (1941) 1 M L J 644 I L R 1941 Mad 599 (F B)
2 (1933) 64 M L J 505 L R 60 I A 124 I L R 12 Pat 251 (P C)
3 (1938) 2 M L J 663
4 (1944) 1 M L J 35

It is obvious that unless the two Privy Council decisions reported in *Mahant Ram Charandas* v *Naurangilal*[1] and *Mahadeo Prasad Singh* v. *Karia Bharti*[2], can be distinguished on some rational, intelligible ground from the decision in *Vedakannu Nadar* v. *Ranganatha Mudaliar*[3], the latter must stand overruled by us. I sought such a differentiation from Mr Sundaram Aiyar, the learned advocate for the appellant, during the progress of the hearing of the appeal He suggested that the two Privy Council decisions, being in respect of a suit by the *de facto* manager of a mutt, would not necessarily govern the case of a suit by the *de facto* manager of a temple There seems no doubt to be some little authority for such a line of discrimination in certain observations to be found in *Prasanna Deb* v *Bengal Duars Bank*[4] But the distinction drawn will be found on reference to the observations of the Privy Council on appeal in the same case reported in *Iswar Ramchandra* v *Bengal Duars Bank*[5], to be a distinction between the *de facto* managership of a mutt and the *de facto* shebaitship of a *private* idol The distinction is not between the *de facto* managership of a mutt and the *de facto* Dharmakarthaship of a *public* temple or idol It is true, as pointed out by Mr Sundaram Aiyar, that between a Mahant and a Dharmakartha there exists a fundamental difference, that the former has a beneficial interest in the property of the institution which the latter has not The firm has "an ownership in trust" to adopt the language of Lord Shaw in *Ram Prakash Das* v *Anand Das*[6], an ownership which carries with it some measure of personal, beneficial enjoyment also ; whereas the latter is, to use the language of the same learned Lord in *Srinivasachariar* v *Evalappa Mudaliar*[7], the legal equipollent to a trustee whose rights are generally never in a higher legal category that those of mere trustees.

Why this difference should make a difference to the maintainability of a suit of the kind now in question according as the suit is at the instance of a *de facto* Mahant or a *de facto* Dharmakartha of a public temple, I am not able to understand or appreciate on principle Both, not strictly speaking trustees, occupy positions analogous to that of a truatee In the case of a public temple as well as of a mutt, the public institution is the juristic entity holding property on whose behalf the suit is laid And if in the case of a mutt, a *de facto* manager had the *locus standi* to file a suit for recovery of possession of mutt properties outstanding in others, I should be loath to deny a similar right to the *de facto* manager of a public temple. The implication, if any, of the observations of the Privy Council in *Iswar Ram Chandra* v *Bengal Duars Bank*[5], is, in my opinion, rather that, in the case of the *de facto* manager of a public temple suing, there is no difficulty in the way of the mutt, decisions in *Mahant Ramcharandas* v. *Naurangilal*[8] and *Mahadeo Prasad Singh* v. *Karia Bharti*[9], applying Further there is just another case reported in *Aravamudha Aiyangar* v. *Ramanuja Aiyangar*[10] to which I may refer here. That was also like *Vedakannu Nadar* v *Ranganatha Mudaliar*[3]. not the case of a mutt. In that case the son of a *de jure* trustee after the latter had for good left for a foreign place, sued to recover properties wrongfully alienated by him That case was decided on the 17th of August, 1938, the case reported in *Vedakannu Nadar* v. *Ranganatha Mudaliar*[3] having been decided on the 6th May of the same year. No reference is made in the later decision to the earlier ; but in the later decision reference is made to the two Privy Council decisions in *Mahant Ramcharandas* v. *Naurangilal*[8] and *Mahadeo Prasad Singh* v *Karia Bharti*[9] and an argument founded upon them of a right to sue on the basis of *de facto* trusteeship was repelled by the learned Judges, Varadachariar and Abdur Rahman, JJ. (the latter of whom, it may be noticed, by the way, had himself been a party to the earlier decision

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1 (1933) 64 M L J 505 L R 60 I A 124 I L R 12 Pat 251 (P.C)
2 (1934) 68 M L J 499 . L R 62 I A 47 I.L R. 57 All 159 (P C)
3 (1938) 2 M L J 663.
4 A I R 1936 Cal 744 at 751
5 I L R 1941 Kar. 51 · A I R 1941 P C 33 at 34
6 (1916) 31 M L J 1 · L R 43 I A 73 . I L R 43 Cal 707 at 714 (P C)
7 (1922) L R. 49 I A 237 . I L R. 45 Mad 565 (582) : 43 M L J 536
8 (1933) 60 I A 124 64 M L J 505 I L. R 12 Pat 251
9 (1934) 62 I A 47 · 68 M L J. 499 : I.L. R 57 All 159 (P C)
10. (1938) 2 M L J 982

sitting with Venkatasubba Rao, J), not on the ground that the Privy Council decisions could only govern cases of suits by *de facto* managers of mutts but on the ground that the allegations in the plaint in the case then before the Court did not attract the application of the Privy Council decisions. The implication, if any, of the observations of Varadachariar, J, who delivered the judgment of the Bench in that case is also adverse, I should think, to the line of differentiation suggested by Mr Sundaram Aiyar

In this view of the matter, the decision in *Vedakannu Nadar* v *Ranganatha Mudaliar*[1], which suffers from the rather serious infirmity that it does not even so much as refer to the two Privy Council decisions, must be held to have been erroneously decided. With reference to the decisions of this Court subsequent to *Vedakannu Nadar* v *Ranganatha Mudaliar*[1] I may observe that as against the decision of Horwill, J, sitting singly, reported in *Atmaram Rao's Charity* v *Packiri Mohammed Rowther*[2] in which the two Privy Council decisions are distinguished and the decision in *Vedakannu Nadar* v *Ranganatha Mudaliar*[1] is followed, there is the decision of another Bench of this Court reported in *Gudur Anjayya and another* v *Devabhakturu Gunda Nayudu and others*[3] containing observations relevant to the point now before us, in which, while *Vedakannu Nadar* v *Ranganatha Mudaliar*[1] is not noticed, the latter of the two Privy Council decisions is referred to as showing that the proposition that a *de facto* trustee can maintain the suit in the name of the temple and for its benefit, if he is in actual possession and management of the temple and its properties, is no longer open to question The mode of differentiation of the two Privy Council decisions attempted by Horwill, J, has not appealed to me, and I respectfully agree with My Lord in what I may be permitted to characterise as his lucid exposition of the two Privy Council decisions based upon a detailed scrutiny of the facts and circumstances of each of them, as well as in his Lordship's exhaustive treatment of the entire case-law bearing on the point which falls to be decided by us

Having said so much with reference to the position created by precedents of the highest tribunal binding on us, I shall proceed to examine the soundness of the decision in *Vedakannu Nadar* v. *Ranganatha Mudaliar*[1], from the standpoint of principle. Judged from this standpoint also, the decision strikes me as not being altogether right. Apart from analogical reasoning derived from Privy Council decisions refusing to recognise the existence of a *de facto* guardian under the Muhammadan law, which are not directly in point, the principle on which the decision in *Vedakannu Nadar* v *Ranganatha Mudaliar*[1], directly rests is that a *de facto* trustee is a trustee *de son tort*, and that a trustee *de son tort* has no right of action of the kind now in question. On the careful consideration that I have bestowed on the matter, I am prepared to accept the first part of the assumption as correct, but not the second. I accept the first part, because it seems to me that it is not open to us to invent a *tertium quid* between a *de jure* trustee and a trustee *de son tort* which there is not in law, if you understand the expression "trustee *de son tort*" in its true sense (which I shall elaborate in the immediate sequel) to give such a *tertium quid* the label *de facto* trustee, which does not in its connotation differ from a trustee *de son tort* and then to clothe him with powers which he cannot, on the assumption that he is an intermeddler with the trust estate, enjoy as a matter of course That there is little or no difference between a *de facto* trustee and a trustee *de son tort* becomes clear by a reference to a passage at page 232 of Maitland on Equity (2nd Edition), where the learned author points out that trustees *de son tort* may better be described as *de facto* trustees At the same time I cannot accept the second part of the principle of the decision in *Vedakannu Nadar* v *Ranganatha Mudaliar*[1], because even an intermeddler with an estate not his own may have certain rights against the whole world except the true owner. The trustee *de son tort* has undoubtedly certain rights to which my learned brother, Viswanatha Sastri, J, has referred in his judgment Such rights are not merely of reimbursement of expenditure incurred for the preservation of the estate on the principle of salvage lien laid

1 (1938) 2 M L J 663
2 (1944) 1 M L J 35.
3 (1943) 2 M L J 539.

down in *Peruvian Guano Co* v *Dreyfus Bros* [1] *Dakhina Mohan Roy* v *Saroda Mohan Roy*[2], and *Kasim Sahiba* v. *Sudhindra Thirthaswami*[3], but also of dealings with property for the benefit of the estate, which, as a constructive trustee, that he is, (as I shall show presently), he is entitled to exercise The only question is whether he has a right of suit of the kind now in question before us.

My learned brother, Viswanatha Sastri, J, observes that there is some amount of confusion discernible in the language employed by English Courts in their description of the status of persons occupying a fiduciary position, and that in English Law Reports a trustee *de son tort* is sometimes regarded as an express trustee and sometimes as a constructive trustee Be that as it may With reference, however, to the meaning of the expression "trustee *de son tort*" in English law (which, by the way, is not to be found mentioned as such in any Indian enactment relating to trusts) there is, in my opinion, no confusion This expression which corresponds to the term "trustee *ex delicto*" or "*ex male ficio*" familiar to American lawyers and jurists (*vide* Cyclopedia of Law and Procedure, Vol. 39, page 34) has a two-fold meaning in English law. It denotes either (1) a person who has acquired by means of his ownership of or dealings with one trust property other property not expressly subject to a trust, or, more strictly, (2) a person who holds property which is subject to an express trust without having duly become trustee thereof or acquired a fiduciary position in respect thereof (*vide* Halsbury's Laws of England, 2nd edn, Vol 33, page 138, paragraph 235, and foot-note (*c*) thereof). In either case, as is apparent there is the idea of wrong in which this trusteeship originates —wrong by abuse of a pre-existing fiduciary position in respect of other property in the one case, wrong by way of entry into possession of trust property *qua* trust property without any title whatsoever in the other case There are in English law (as also in American) implied trusts—trusts resulting and trusts constructive of various kinds corresponding to "obligations in the nature of trusts" specified in Chapter IX of the Indian Trusts Act, and the constructive trustees denoted by the two-fold meaning of trustee *de son tort* in English law are dealt with in section 88, and as I presume, in section 94, illustration (*b*) of the Indian Trusts Act. That a trustee *de son tort* in its second meaning may, while *prima facie* falling under illustration (*b*) of section 94 of the Indian Trusts Act, not as easily seem to fall within the body of the section, I admit That is because there are the words "there being no trust" in the body of the section, whereas the second sense of the expression "trustee *de son tort*" assumes the existence of a trust by entering into possession of which the person so entering makes of himself a trustee *de son tort*; but if one understands the expression "there being no trust" as meaning "there being no trust *quod* the person entering into possession" there will be no difficulty and to my mind there seems to be no strain on language involved in so understanding the expression Even otherwise, a person in India fulfilling the position of a trustee *de son tort* as known to the English law, may in my opinion be regarded as at least a constructive trustee with the rights and obligations attaching to such a trustee, on an equitable application of the English law which regards him as at least a constructive trustee The application to India of rules of English law as rules of Justice, Equity and good conscience, if not repugnant to the express provisions of an Indian Statute and not unsuitable to Indian conditions is not unknown and there is no reason why such a process should not be invoked in this connection

I have not been able to find, I must say, any decided case or any passage in any text book on the English law of trusts to the specific effect that a trustee *de son tort*, in either sense imputed to the expression in English law, has or has no right of suit of the kind now in question Generally it is stated in the books that a trustee must take all reasonable and proper measures including the institution of legal proceedings, if necessary, to obtain possession of trust property, if outstanding. That a trustee *de son tort* must not take such proceedings is nowhere stated In India we have not only the provisions of sections 12 and 13 of the

1 (1892) A C 166
2 (1893) L R 20 I A 160 I L R 21 Cal 142 (P C)
3 (1895) I L R 18 Mad 359

Trusts Act from which such right on the part of the trustee can be readily inferred, but also section 95 of the Act which provides that the person holding property in accordance with the preceding sections of Chapter IX must, so far as may be, perform the same duties and is subject to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it. The right of suit of the kind now in question may well be regarded in the case of a constructive trustee as an incident of the duty to call in trust property laid down for a trustee generally by the Act and must be available also for a trustee *de son tort* as a constructive trustee, which he certainly is in my judgment, whether or not he is an express trustee. My learned brother, Viswanatha Sastri, J., has attempted to show by reference to certain statutes in India that a trustee *de son tort* is capable of being regarded as an express trustee. Whether he is not to be regarded as trustee for purposes of those Acts only, which specifically include him in their definition of trustee but for which it might be contended that he would not be an express trustee, I do not know for certain, but I must express my hesitation on principle to subscribe readily to any view that makes of a trustee *de son tort* an express trustee to all intents and purposes of the law.

It follows from the foregoing that a trustee *de facto* like a trustee *de son tort* with whom the learned Judges who decided *Vedakannu Nadar* v. *Ranganatha Mudaliar*[1] equate him, cannot be regarded, so far as the expressed principle of the reasoning of that decision is concerned, as lacking in the *locus standi* to maintain a suit of the kind with which we are concerned.

I must confess, however, that I should have experienced greater difficulty in the determination of the point in controversy, had there not been available to me the guidance afforded by the two Privy Council decisions reported in *Mahant Ram-charan Das* v. *Naurangilal*[2] and *Mahadeo Prasad Singh* v. *Karia Bharti*[3], and had I not found myself on principle able to conclude that a trustee *de son tort* has the right of action now in dispute. I quite agree that there are fundamental points of difference between the conception in English law of trust strictly so called which is embodied in the Indian Trusts Act and the conception of trust associated in India with Hindu and Muhammadan religious and charitable endowments which are expressly excluded from the operation of the Indian Trusts Act. I entertain my own doubt however whether this consideration *per se* would have persuaded me to hold that a *de facto* manager of a temple or mutt is entitled to institute proceedings for recovery of property belonging to the institution.

Even assuming that, whether in the case of the Dharmakartha of a temple or in the case of the head of a mutt, the position occupied by the human agency functioning is that of a manager on behalf of the institution which is itself a juristic entity capable of holding property in ownership, the question still remains why in either case where the human agency is functioning *de facto* and not *de jure*, there should be a right of suit which is ordinarily available only to a person functioning *de jure*. In the case of a strict trust as well as in the case of a trust connected with a mutt or temple you have an officer functioning, and there is an office of which he is the incumbent. The officer is a fiduciary in both the cases, though the description "trustee" may not be strictly applicable to the latter. Assuming that the title to the mutt or temple property is different and distinct from the title of a person to represent the mutt or temple property in a litigation, is not a proper representation of the mutt or temple by the *de jure* manager a matter on which the defendant is entitled to insist in his own interest in order to escape the avoidable harassment of unnecessary suits at the instance of possibly irresponsible individuals as well as in the interests of the institution? Is it so clear that a *de facto* manager can sufficiently represent the institution to render all decrees and decisions to which he is a party as its representative binding on the institution? In the case of mutts

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1. (1938) 2 M.L.J. 663.
2. (1933) 64 M.L.J. 505 : L.R. 60 I.A. 124 : I.L.R. 12 Pat. 251 (P.C.).
3. (1934) 68 M.L.J. 499 : L.R. 62 I.A. 47 : I.L.R. 57 All. 159 (P.C.).

or temples, as my Lord has pointed out, the worshippers, the Advocate-General, a prospective shebait, and any person interested in the temple or mutt are allowed to institute a suit for the enforcement of the rights of the temple or mutt, but does it therefore mean that you can add to the recognised classes the *de facto* manager so called? The worshippers have the right of suit, I think, because they are beneficiaries, at any rate "in a spiritual sense" to use the language of Bhashyam Aiyangar, J, in *Vidhyapurna Thirthaswami* v *Vidhyanidhi Thirthaswami*[1] The rights of action of the Advocate-General and of the relators are statutory That of a prospective shebait recognised in cases like *Gopal Jew* v *Baldeo Narainsingh*[2] and *Tarit Bhusan* v *Sridhar Thakur*[3] is because he is in the line of succession and is a reversionary, although I have to observe in this connection that there are two reported decisions of this Court in which such recognition has been refused—*Ramaswami Goundan* v *Singaperumal Kadavul*[4] and *Aravamudhu Iyengar* v *Ramanuja Iyengar*[5], it being pointed out in the former of them and accepted in the latter that the appropriate course is for the worshippers to file a suit of the kind prescribed by section 92 or Order 1, rule 8, Civil Procedure Code But whence comes the right of the *de facto* manager to sue?

Then, again, where and how are we to draw the line between a manager *de facto* and a manager *ad hoc* exercising isolated acts on particular occasions? I respectfully agree with my learned brother Viswanatha Sastri, J, in his picturesque observation that one swallow does not make a summer; but the practical question still remains, how many do? Even in the case of a *de facto* guardian in Hindu law that difficulty has been felt, and it is bound to be felt similarly in the case of a *de facto* manager In the case of the former the tendency has now a days been, in fact, to confine his powers to the limits already recognised by decisions on the principle *stare decisis* and not to extend them beyond such limits (Vide *Pundarikakshayya* v *Sreeramulu*[6] and *Ramaswami Pillai* v. *Kasinatha Iyer*[7]) One eminent Judge, Beaumont, C J, of the Bombay High Court now on the Privy Council, has even refused to recognise a *de facto* guardian as guardian at all in his dissident judgment in *Tulsidas* v *Vaghel Raisinghji*[8] holding that his situation which is that of an unauthorised person cannot be bettered, to use the language of Lord Robson in the Privy Council decision reported in *Matadin* v *Ahmed Ali*[9] by describing him as a *de facto* guardian.

Can anybody then sue on behalf of the institution as anybody can on behalf of a minor? Is the analogy between a minor and an institution to be pushed so far as to attract to the latter the provisions of Order 32, Civil Procedure Code, applicable to the former? If not, (as ruled for instance in *Doongarsee Syamji* v *Tribhuwan Das*[10], how best to make sure that the person suing on behalf of the institution does not enter into improper agreements or compromises pre-decretal or post-decretal, or walk away with the monies representing the fruits of a particular decree obtained on behalf of the institution? If that is not possible, is it any consolation that at the hands of a *de jure* manager too the institution may sustain sometimes a similar detriment?

Thoughts such as these, I may say, exercised my mind in no inconsiderable measure during the argument as well as after reservation of judgment. But the existence of binding precedents of the highest authority which are undistinguishable in principle and the conclusion reached by me that a *de facto* trustee or a trustee *de sôn tort* has, as a constructive trustee, a right to sue of the kind now in question render the pursuit of the line of thought involved in such queries and enquiries at once otiose and impermissible Apparently the Privy Council proceeded in

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1 (1904) 14 M L J 105 I L R 27 Mad 435 at 451
2 (1947) 51 C W N 383
3 (1941) 45 C W N 932 A I R 1942 Cal. 99
4 (1923) 50 M L J. 42.
5 (1938) 2 M L J 982
6 (1945) 2 M L J 375 I L R 1946 Mad 242 (F B)
7 (1927) M W N. 356
8 (1932) I L R. 57 Bom 40 (F B)
9 (1912) 23 M L J 6 L R 39 I.A 49: I L R 34 All 213 (P C)
10 A I R. 1947 All 375

ruling as it did in *Mahant Ramcharan Das* v. *Naurangilal*[1] and *Mahadeo Prasad Singh* v *Karia Bharti*[2], on the view that possession of the institution and management of its affairs is itself good title effective to clothe anybody who has such possession and management with the right to institute suits for recovery, not merely of property of which he or the institution represented by him gets dispossessed after his assumption of management, on the basis of possessory title well-known to law (*vide* for instance *Perry* v *Clissold*[3] and *Narayanarao* v *Dharmachar*[4], but also of trust property which had before such assumption of management been wrongfully alienated or had otherwise passed out of the possession of the head of the mutt or the idol of the temple Presumably the interests of the institution have been regarded by the Privy Council as so far paramount as to justify the conclusion that a *de facto* manager should in the absence of a *de jure* manager be allowed the right to maintain such suits, and it would require more than ordinary courage on the part of any one to suggest that such a point of view which finds warrant in principle as well as in decisions of the highest authority binding on all Courts in India is still open to consideration here and now

K C *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Patna)

PRESENT :—VISCOUNT SIMON, LORD OAKSEY, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

Bhuboni Sahu *Appellant**

v

The King *Respondent*

Evidence Act (I of 1872), sections 30, 114, Illustration (b) and 133 and Criminal Procedure Code (V of 1898), section 164—Approver's evidence—Independent evidence in corroboration—Necessity—Statement of approver under section 164, Criminal Procedure Code—If can amount to corroboration evidence—Evidence of co-accused—Value

The law in India relating to the evidence of accomplices is that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused and that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice and is thus substantially the same as in England

A statement made under section 164 of the Criminal Procedure Code can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement The statement made by an approver under section 164 does not amount to the corroboration in material particulars which courts require in relation to the evidence of an accomplice An accomplice can never corroborate himself, tainted evidence does not lose its taint by repetition Apart from the suspicion which always attaches to the evidence of an accomplice it would plainly be unsafe to rely implicitly on the evidence of an accomplice who had deposed on oath to two different stories

Confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction

Though a conviction founded upon the evidence of an accomplice supported only by the confession of a co-accused may be justified in law under section 133 of the Evidence Act and though the coincidence of a number of confessions of co-accused all implicating the particular accused given independently, and without an opportunity of previous concert, might be entitled to great weight, nevertheless courts should be slow to depart from the rule of prudence based on long experience which requires some independent evidence implicating the particular accused

D. N. Pritt K C and *P V Subba Rao* for Appellant

Sir Valentine Holmes, K C. and *R K Handoo* for Respondent

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1 (1933) 64 M L J 505 L R 60 I A 124 I L R 57 All 159 (P C) I L R 12 Pat 251 (P C)
2 (1934) 68 M L J 499 L R 62 I A 47
3 (1907) A C 73
4 (1902) 13 M L J 146 I L R 26 Mad 514.

* P C Appeal No 39 of 1948 17th February, 1949

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT —This is an appeal by special leave from the judgment and order of the High Court of Judicature at Patna dated the 19th September, 1947, dismissing an appeal against the judgment and order of the Court of the Sessions Judge of Ganjam-Puri dated the 23rd July, 1947, whereby the appellant was convicted of the offence of murder under section 302/34 of the Indian Penal Code and sentenced to death At the conclusion of the arguments their Lordships announced that they would humbly advise His Majesty that the appeal be allowed and would state their reasons later This they now proceed to do

It is not in dispute that on the 11th October, 1946, one Kalia Behara was brutally murdered at a place between Berhampur, where he lived and carried on business as a jutka driver, and Golantra, to which he was driving with passengers in his jutka It is unnecessary to refer to the details of the murder ; though it may be noted that the motive attributed to the appellant was that he is a relation of accused Nos 1 and 2 who are said to have been on terms of enmity with the deceased, but both of whom were acquitted of the murder Eight persons were charged with the offence and tried by the Sessions Judge of Ganjam-Puri The learned Judge convicted six of the accused including the appellant, who was accused No 7, and one Trinath, who was accused No 5 The six convicted persons appealed to the High Court at Patna Two of the appeals were allowed, but the other appeals, including those of the appellant and Trinath, were dismissed The only question which arises on this appeal is whether there was evidence upon which the appellant could be properly convicted

The evidence against the appellant consisted of (*a*) the evidence of Kholli Behera who had taken part in the murder and had become an approver ; (*b*) the confession of Trinath recorded under section 164 of the Code of Criminal Procedure which implicated both himself and the appellant in the murder, but which was retracted in the Sessions Court , and (*c*) the recovery of a loin cloth identified as the one which the deceased was wearing when he was assaulted, and a khantibadi, or instrument for cutting grass, in circumstances alleged to implicate the appellant.

The law in India relating to the evidence of accomplices stands thus .—Even before the passing of the Indian Evidence Act, 1872, it had been held by a Full Bench of the High Court of Calcutta in *R* v *Elahee Buksh*[1], that the law relating to accomplice evidence was the same in India as in England Then came the Indian Evidence Act which by section 133 enacts that

> " An accomplice shall be a competent witness against an accused person , and a conviction s not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice "

Illustration (B) to section 114 of the Evidence Act however provides that

> " The Court may presume that an accomplice is unworthy of credit unless he is corroborated in material particulars "

Reading these two enactments together the courts in India have held that whilst it is not illegal to act upon the uncorroborated evidence of an accomplice it is a rule of prudence so universally followed as to amount almost to a rule of law that it is unsafe to act upon the evidence of an accomplice unless it is corroborated in material respects so as to implicate the accused , and further that the evidence of one accomplice cannot be used to corroborate the evidence of another accomplice. The law in India, therefore, is substantially the same on the subject as the law in England, though the rule of prudence may be said to be based upon the interpretation placed by the courts on the phrase " corroborated in material particulars " in illustration (B) to S 114

The approver in the present case was a man aged about twenty He was arrested on the 12th October, 1946, the day after the offence, and on the 14th Octo-

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1 (1866) 5 W R Cr 80.

ber was sent by the police to a magistrate, who was called as a witness at the trial, and who on 15th October recorded a statement of the approver under section 164 of the Code of Criminal Procedure In this statement the approver described the murder, and alleged in effect that he and Trinath had been engaged by the appellant to assist in the murder, which they did , that in the struggle the cloth of the murdered man became untied and the appellant threw it over a bush On the 17th February, 1947, the approver, having been tendered a pardon, gave evidence before the Committing Magistrate His evidence followed the general lines of his statement made under section 164 but added some further details In particular he said that the appellant gave him a khantibadi which he, the approver, subsequently gave to Trinath who handed it over at the appellant's house The approver also alleged that the appellant gave to each of them, himself and Trinath, a sum of Rs 25, presumably as remuneration for the part they had taken in the murder. On the 8th July, 1947, the approver gave evidence in the Sessions Court His evidence was that he knew nothing about the murder, and he denied all the facts to which he had deposed before the Committing Magistrate He affirmed that his evidence before the Committing Magistrate was the result of beating and tutoring by the police, and he denied that he had made any statement at all before a magistrate under section 164 of the Code of Criminal Procedure. Thereupon the Sessions Judge brought the evidence of the approver given before the Committing Magistrate upon record under section 288 of the Code of Criminal Procedure, the effect being to make the evidence given before the Committing Magistrate evidence in the case for all purposes. Both the learned Sessions Judge, and the learned Judges of the High Court in appeal, preferred the evidence given by the approver before the Committing Magistrate to his evidence given in the Sessions Court. Some discussion took place in the High Court as to whether under section 157 of the Evidence Act the Court could use the statement made by the approver under section 164 of the Code of Criminal Procedure Section 157 is in these terms:—

> "In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved "

A statement made under section 164 of the Code of Criminal Procedure can never be used as substantive evidence of the facts stated, but it can be used to support or challenge evidence given in Court by the person who made the statement The statement made by the approver under section 164 plainly does not amount to the corroboration in material particulars which the Courts require in relation to the evidence of an accomplice An accomplice cannot corroborate himself; tainted evidence does not lose its taint by repetition But in considering whether the evidence of the approver given before the Committing Magistrate was to be preferred to that which he gave in the Sessions Court, the Court was entitled to have regard to the fact that very soon after the occurrence he had made a statement in the same sense as the evidence which he gave before the Committing Magistrate

Although the learned judges of the High Court accepted the evidence of the approver given before the Committing Magistrate, they appreciated that it would be unsafe to act upon such evidence unless it were corroborated in the manner required by the rule of prudence Apart from the suspicion which always attaches to the evidence of an accomplice it would plainly be unsafe, as the judges of the High Court recognised, to rely implicitly on the evidence of a man who had deposed on oath to two different stories The learned Judges stated the principle upon which they proposed to act in these terms —

> "It is of the utmost importance, however, that such evidence (*i e*, the evidence of an approver admissible under section 288 of the Code of Criminal Procedure) before it can be acted upon as against other accused persons, should be corroborated by independent evidence in material particulars The corroboration must be not only with regard to the occurrence but also as against each of the accused sought to be implicated in the crime."

Acting upon this principle the learned Judges proceeded to consider, in the case of each accused, whether the evidence of the approver was sufficiently

corroborated against him They were not prepared to accept the confession of Trinath, who was also an accomplice, as sufficient corroboration of the evidence of the approver, and in the case of Mata Simma, who was accused No. 6, against whom there was only the evidence of the approver and Trinath, they allowed the appeal; but as against the appellant, they found sufficient independent corroboration in the discovery of the deceased's cloth and the production of the khantibadi. With regard to the cloth, as already noticed, the evidence of the approver was that the appellant threw the cloth over a hedge, and it was proved at the trial that the cloth was found in the place pointed out by the approver. This fact no doubt was of value as supporting the general credibility of the approver's story, but there is nothing beyond the statement of the approver to connect the appellant with the cloth It was not found at the appellant's house, or in any place under his control, and the statement made by the approver that it was the appellant who threw the cloth to the place where it was found is of no more, and no less, value than his statement that the appellant took an active part in the murder. Sir Valentine Holmes for the Crown admitted that he could not rely on the finding of the cloth as a piece of corroborative evidence implicating the appellant With regard to the khantibadi the evidence of the approver was that the appellant gave it to him, that he passed it on to Trinath, and Trinath handed it over at the house of the appellant, and the police recovered a khantibadi from the house of the appellant where it was produced, somewhat unwillingly, by the appellant's mother No blood stains were found on the khantibadi so produced, and there is nothing on the record from which it can be inferred that it was that khantibadi which was employed in the murder Had a khantibadi been the sort of instrument which would be unlikely to be found in the house of an agriculturist it would no doubt be a striking coincidence that a khantibadi was handed over by Trinath at the appellant's house and one was subsequently found there But the evidence is that a khantibadi is an instrument commonly possessed by agriculturists, and there was nothing strange in finding one at the house of the appellant. The High Court attached some importance to the unwillingness of the mother of the appellant to produce the khantibadi, but such unwillingness is in accord with the unco-operative attitude which agriculturists, and particularly female members of the family usually display towards police investigations In their Lordships' view neither the finding of the piece of cloth nor the production of the khantibadi tends to implicate the accused in the crime, nor affords such corroboration of the evidence of the approver as the rule of prudence requires

Sir Valentine Holmes did not rely strongly upon these pieces of alleged corroboration He concentrated his argument mainly on the contention that the High Court was wrong in not accepting the confession of Trinath as sufficient corroboration of the evidence of the approver. This involves consideration of the position of the confession of a co-accused under Indian law Section 30 of the Evidence Act enacts

> "When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession"

This section was introduced for the first time in the Evidence Act of 1872, and marks a departure from the Common Law of England. It will be noticed that the section applies to confessions, and not to statements which do not admit the guilt of the confessing party. In the present case the Courts in India appreciated this, and ruled out statements made by certain of the accused which were self-exculpatory in character The statement of Trinath was, however, a confession. Section 30 seems to be based on the view that an admission by an accused person of his own guilt affords some sort of sanction in support of the truth of his confession against others as well as himself But a confession of a co-accused is obviously evidence of a very weak type. It does not indeed come within the definition of "evidence" contained in section 3 of the Evidence Act. It is not required to be given on oath, nor in the presence of the accused, and it cannot be tested by cross-

examination. It is a much weaker type of evidence than the evidence of an approver which is not subject to any of those infirmities Section 30, however, provides that the Court may take the confession into consideration and thereby, no doubt, makes it evidence on which the Court may act, but the section does not say that the confession is to amount to proof Clearly there must be other evidence The confession is only one element in the consideration of all the facts proved in the case; it can be put into the scale and weighed with the other evidence Their Lordships think that the view which has prevailed in most of the High Courts in India, namely, that the confession of a co-accused can be used only in support of other evidence and cannot be made the foundation of a conviction, is correct. Sir Valentine Holmes puts his case in this way He relies on one of the examples given by the Evidence Act of the sort of facts to which the Court should have regard in applying illustration (B) to section 114 of the Evidence Act The example is in these terms

> "A crime is committed by several persons *A*, *B* and *C*, three of the criminals, are captured on the spot and kept apart from each other Each gives an account of the crime implicating *E*, and the accounts corroborate each other in such a manner as to render previous concert highly improbable "

Sir Valentine contends that Trinath's confession was made independently of that of the approver, that neither he nor the approver had any reason for falsely implicating the appellant, and that the confession does afford sufficient corroboration to justify acceptance of the evidence of the approver, even if it does not amount to corroboration in material particulars within illustration (B) of section 114. The evidence on record however does not support this argument The confession of Trinath is a very short one and gives only the bare outline of the story It discloses nothing which the police had not been able to ascertain from the approver, and affords no intrinsic evidence of its truth It was, as already noted, retracted in the Sessions Court Retraction of a confession by an accused is a common phenomenon in India The weight to be attached to it must depend upon whether the Court thinks that it was induced by the consideration that the confession was untrue, or by realization that it had failed to secure the benefits the hope of which inspired it Their Lordships will assume that the confession of Trinath was not weakened by its retraction. Even so, the approver and Trinath were, according to both their statements, working together on the day of the murder when they were summoned by the appellant to take part in the crime; they were arrested on the following day so they, had had a day, in which they must have appreciated that they were under suspicion, in which to arrange their story After their arrest they were for some two days in police custody before they were sent up together, and with other accused, to the Magistrate to have their confessions recorded, and there is no evidence that they were kept apart during this period In that state of the evidence it is impossible to say that the approver and Trinath were kept apart from each other, and that their previous concert was highly improbable. Sir Valentine Holmes has relied strongly on the case in In re *B K. Rajagopal*[1], in which the Court founded a conviction upon the evidence of an accomplice supported only by the confession of a co-accused Their Lordships whilst not doubting that such a conviction is justified in law under section 133 of the Evidence Act, and whilst appreciating that the coincidence of a number of confessions of co-accused all implicating the particular accused, given independently, and without an opportunity of previous concert, might be entitled to great weight, would nevertheless observe that Courts should be slow to depart from the rule of prudence, based on long experience, which requires some independent evidence implicating the particular accused The danger of acting upon accomplice evidence is not merely that the accomplice is on his own admission a man of bad character who took part in the offence and afterwards to save himself betrayed his former associates, and who has placed himself in a position in which he can hardly fail to have a strong bias in favour of the prosecution; the real danger is that he is telling

1. (1943) 2 M L J. 634 : I L R (1944) Mad. 308.

a story which in its general outline is true, and it is easy for him to work into the story matter which is untrue. He may implicate ten people in an offence, and the story may be true in all its details as to eight of them, but untrue as to the other two, whose names have been introduced because they are enemies of the approver This tendency to include the innocent with the guilty is peculiarly prevalent in India, as Judges have noted on innumerable occasions, and it is very difficult for the Court to guard against the danger An Indian villager is seldom in a position to produce cogent evidence of alibi If he is charged with having taken part in a crime on a particular night when he was in fact asleep in his hut, or guarding his crops, he can only rely, as a rule, on the evidence of his wife, members of his family, or friends to support his story, and their evidence is interested and not likely to carry weight The only real safeguard against the risk of condemning the innocent with the guilty lies in insisting upon independent evidence which in some measure implicates each accused This aspect of the matter was well expressed by Sir George Rankin in *Ambica's case* [1]

In the present case their Lordships are in complete agreement with the Judges of the High Court in declining to act upon the evidence of the approver supported only by the confession of Trinath These two persons appear to have been nothing but hired assassins. They had ample opportunity of preparing their statements in concert, and, in addition, the approver has sworn to two contradictory stories, and Trinath has denied that his confession was true It is true that no motive is shown for their falsely implicating the appellant, but motive is often a matter of conjecture It may be that these two men thought it advisable to say falsely that they were acting on the instigation of another rather than on their own initiative or they may have had reasons of their own for wishing to conceal the name of the real instigator

For the above reasons their Lordships are of opinion that the conviction of the appellant cannot stand

Solicitors for Appellant *Hy S L. Polak & Co*

Solicitor for Respondent : *Solicitor for the High Commissioner for India.*

V S ——— *Appeal allowed. Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI

Venneti Sundara Rama Rao . *Appellant* *

v

Chamarti Satyanarayanamurti being minor by natural father and guardian Chamarti Bulli Venkatarao and another *Respondents.*

Hindu Law—Adoption by widow—Consent of husband's undivided coparcener withheld wrongfully—Consent of divided sapinda—If sufficient to validate adoption—Refusal of consent, when not proper

A Hindu widow in the Madras Presidency can make a valid adoption with the consent of a divided sapinda of her husband when an undivided coparcener of her husband, whose consent was sought in the first instance, withholds his consent wrongfully Hence, where the widow of one of two undivided brothers who formed a Joint Hindu family asks for the consent of her husband's undivided brother to make an adoption to her husband and on its being refused on improper grounds, makes an adoption with the consent of her husband's divided paternal grandfather, it would be a valid adoption.

Case-law discussed exhaustively

Opinion expressed in Mayne's Hindu Law, 10th Edition, page 219, not approved

The refusal of consent of a sapinda to the adoption of a boy on the ground that the boy proposed to be adopted was the son of an enemy of his is not proper and can be ignored by the widow

No general rule can be laid down that in all cases and under all circumstances the refusal of a sapinda to give his assent to the adoption on the ground that the widow refused to take the boy of his own in adoption as a proper refusal The question has to be considered on the facts of each case.

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1. (1931) 35 C W N 1270 at 1274

* L P. A No 95 of 1946. 5th April, 1949.

Per *Viswanatha Sastri, J*—The sapindas' power of assenting or refusing assent to an adoption by a Hindu widow is a fiduciary power which must be exercised for the end designed, namely, the substitution of an heir by adoption to the deceased person and not for the purpose of advancing the personal interest of this or that sapinda

An assent hedged in with a condition that the son of the assenting sapinda alone should be adopted and none else may be in effect a refusal and an improper refusal

Appeal under clause 15 of the Letters Patent against the judgment and decree of Rajamannar J, dated 9th August, 1946, in S A No 586 of 1945 preferred to the High Court against the decree of the Court of the Subordinate Judge, Rajahmundry, in A.S No. 4 of 1944 preferred against the decree of the Court of the District Munsif, Ramachandrapuram, in O S No 153 of 1948

N. Bapi Raju for Appellant.

P Somasundaram for Respondents

The Court delivered the following

JUDGMENTS : *Satyanarayana Rao, J*—The only question that arises for consideration in this appeal is whether the adoption of the second defendant by the first defendant is valid The adoption was upheld by the Subordinate Judge and his decision was confirmed by Rajamannar, J (as he then was). The question received, if I may say so with respect, an exhaustive and careful consideration by the learned Judge in the judgment now under appeal and as I am agreeing with his decision, it is unnecessary to consider the question elaborately in this judgment. As the question raised, however, is of considerable importance and is not covered by any decision, I should like to state, in my own words, the reasons for my conclusion

The first defendant's husband, the late Hari Govindarao, died on the 14th of November, 1937 The plaintiff is his undivided brother Both of them are the sons of one Veerabadra Raju, who was the son by the first wife of one Govinda Raju Govinda Raju married a second wife Bangaramma. It has been found that Govinda Raju separated from his son Veerabadra Raju, and, therefore, the plaintiff and Hari Govinda Rao alone constituted members of an undivided family. Soon after the death of her husband the first defendant applied to the plaintiff for consent to the adoption and there was an exchange of registered notices in that connection between them They are Exhibits P-2, dated 10th December, 1937, D-4 (*a*), dated 19th December, 1937, P-2 (*a*), dated 10th January, 1938, D-5 (*a*), dated 18th January, 1938, P-2 (*b*), dated 7th February, 1938 and D-6 (*a*), dated 14th February, 1938 As the plaintiff refused to give his assent to the adoption, the first defendant approached Govinda Raju, the paternal grandfather of her husband, and with his consent evidenced by Exhibit D-8, dated 7th May, 1938, she adopted the second defendant on 11th May, 1938 The factum of adoption though disputed by the plaintiff in the courts below has now been accepted as true by the plaintiff.

He instituted the suit out of which this appeal arises on 5th August, 1938, for a declaration that the alleged adoption of the second defendant by the first defendant is not true and valid in law. He succeeded in the trial court, but that decision was reversed by the Subordinate Judge on appeal and was confirmed in second appeal by this Court This Letters Patent Appeal is against the decision in the second appeal

The validity of the adoption was questioned in this appeal on two grounds: first, that the widow without the consent of the undivided coparcener, the plaintiff, could not make a valid adoption even if he had improperly refused to give his assent to the adoption, and that, in any event, even if the refusal was improper, she was not entitled to travel outside the undivided family and seek the assent of a divided sapinda to justify the adoption Secondly, that the refuasl by the plaintiff was proper and was justified On the first of these questions there is no decision which has considered the question and answered it one way or the other, and the question was expressly left open in *Chellathammal* v. *Kalitheertha Pillai*[1]

1. (1942) 2 M.L.J 206 I.L.R. 1943 Mad. 107.

The rules relating to the adoption by a widow with the assent of the sapindas are developed by judicial decisions and are not based upon any texts of Hindu law except the principle founded on texts that a woman is always under a perpetual titulege to some one or other of her relations The rule itself was formulated for the first time by Sir James Colvile in three decisions familiarly known as the *Ramnad case*[1], *Sir Virada Pratapa Raghunada Deo* v *Sri Broze Kishore Pattadeo* (*first Berhampore case*[2]), and the *Guntur case*[3]. The statement of the law by His Lordship in these three cases has been extracted in almost all the decisions dealing with the point and also in the judgment now under appeal and have become classic No useful purpose will, therefore, be served by extracting those passages and in burdening this judgment with them

In Southern India the position that in the absence of an authority from the husband, a widow can make a valid adoption with the assent of her husband's sapindas has now been settled In the *Ramnad case*[1], the question as to who are the sapindas, whose assent will be a substitute for want of a positive authority from the deceased husband was considered from a twofold aspect, the first, where the husband was a member of an undivided family at the time of his death and the second, where the husband was a divided member It was there stated that in the case of a divided family there should be such assent of the kinsmen as would suffice to show that the act of adoption was done by the widow in the proper and *bona fide* performance of a religious duty and not from any capricious or corrupt motive. By that it was not meant that the assent of every kinsman, however remote, was essential If the father-in-law of the widow were alive, he being the natural guardian and venerable protector of the widow, his assent alone would suffice. If there is none, however, the assent of the kinsmen is needed by reason of the presumed incapacity of the woman for independence, rather than the obtaining of the consent of all those whose interest in the estate would be defeated by the adoption. In the subsequent *Guntur case*[3], this rule was further amplified and made clear that proof of assent in the part of the sapindas was required to establish the inference that the adoption was made by the widow without any capricious or corrupt motive, with a view to defeat the interests of this or that sapinda The sapindas who constitute a family council, according to that decisions, have to decide upon a fair consideration of all the circumstances the expediency of substituting an heir, by adoption, to the deceased husband. When these pronouncements were made, however, they were not intended to lay down an exhaustive statement of the law applicable to each and every situation The first difficulty that occasioned a modification of the rigour of the rule was the situation where some of the sapindas whose consent was asked for refused on interested and improper motives to give their assent to the adoption If the rule as stated in the above decisions were to be strictly applied if any one of the group of sapindas nearest in degree who constituted a family council refused to give the assent to the adoption on improper grounds, the adoption by the widow, became impossible This court in *Parasara Bhattar* v *Rangaraja Bhattar*[4] observed that all that the *Ramnad case*[1], decided was that the adoption was valid when the assent of the majority of the sapindas was accorded but that it never decided that an adoption was absolutely invalid by reason of the consent of less than the entire body of sapindas having been obtained It was enough, it was stated therein, that if all the sapindas nearer in degree were consulted and their assent sought, that if the sapinda refused on improper grounds to give his assent, his dissent may be ignored This principle was further developed and was elaborated by Subramania Iyer, J, in the decision in *Venkatakrishnamma* v *Annapurnamma*[5], and by Bashyam Aiyangar, J, in *Subramaniam* v *Venkamma*[6], which was confirmed by the Privy Council in *Venkamma* v *Subramaniam*[7], which is the next land mark in the

1 (1868) 12 M I A 397 at 441 to 444
2 (1876) L R 3 I A 154. I L R 1 Mad 69 at 81 (P C)
3 (1876) L R 4 I A 1 I.L R 1 Mad 174 at 190 and 191 (P.C)
4 (1880) I L R 2 Mad 202
5 (1899) 10 M L J 73 I L R 23 Mad 486.
6 (1903) 13 M L J 239 I L R 26 Mad 627.
7 (1906) 17 M L J 114 L R. 34 I.A. 22: I L.R. 30 Mad 50 (P.C)

development of the law. In *Venkamma* v *Subramaniam*[1], the Judicial Committee laid down the imperative duty on the part of the widow of consulting the nearest sapinda and obtaining his mind on the family question and obtaining his judgment on the expediency of the proposed adoption The same principle was again examined by the Privy Council more elaborately in *Veerabasavaraju* v *Balasurya Prasada Rao*[2] There were further difficulties which had to be got over and the rule requiring that the sapinda should be consulted in the matter of the adoption with all its implications received fuller consideration by the Judicial Committee in *Krishnayya* v *Lakshmipathi* (*Adusumilli's case*)[3] This branch of the law has been amplified and authoritatively settled by this last decision of the Judicial Committee which considerably modified the rigour of the rule as stated by Sir James Colvile in the three judgments referred to above Viscount Cave who delivered the judgment in *Adusumilli's case*[3], explained the meaning of the expression "family council" which was for the first time used in the *Guntur case*[4], and stated its implications At page 654 the law on this branch was thus summarised

> "The reference in the last mentioned case to 'family council' gave rise to some doubt whether where there were agnatic relations closely related to the deceased, the assent of those standing in a remoter degree was either necessary or sufficient, but this doubt was resolved in the recent case in *Veerabasavaraju* v *Balasurya Prasada Rao*[2], where it was held that the absence of consent on the part of the nearest sapindas cannot be made good by the authorisation of distant relatives whose assent is more likely to be influenced by improper motives This does not mean that the consent of the near sapinda who is incapable of forming a judgment on the matter, such as a minor or lunatic, is either sufficient or necessary, nor does it exclude the view that where the near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded."

Nor does it contemplate cases where the nearest sapinda happens to be in distant country, and it is impossible without great difficulty to obtain his assent, or where he is a convict or suffering a term of imprisonment The consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment in the matter It must, however, be added that, save in exceptional cases such as those mentioned above, the consent of the nearest sapindas must be asked, and if it is not asked, it is no excuse to say that they would certainly have refused. *Venkamma* v *Subramaniam*[1] When this statement of the law is considered with reference to the rule applicable to the case where the husband of the widow died a divided member as in the *Ramnad case*[5], it is evident that the rigour of the rule as stated in that case has been considerably modified It is not, therefore, now necessary to obtain the consent of all the nearest sapindas ; it is enough if they are all consulted. If, however, it is not possible to consult all of them and to ask for their consent by reason of the fact either that a sapinda had not the requisite mental capacity or was not available owing to absence in distant country or for other reasons, he may be ignored. There must, however, be a consent of a substantial majority of the agnates *nearest in relationship* who are capable of forming an intelligent and honest judgment on the questions of the proposed adoption The duty of the widow to ask for the consent of the nearest sapindas as far as possible is imperative.

There was considerable divergence of opinion in the Indian courts particularly by reason of the judgment of Lord Kingsdown in *Bhoobun Moyee Debia's case*[6], regarding the test to be applied to determine when and under what circumstances the power of the widow to make an adoption continues or is extinguished. At one time it was thought that the decision in *Bhoobun Moyee Debia's case*[6] and the other decisions which have considered it have drawn the limit of the power at the point when the property vested on the death of the last holder in a person other than the adoptive widow or in another coparcener of the joint family or an outsider claiming by reverter or by inheritance While examining the correctness of this view, Sir George Lowndes in an exhaustive judgment had to examine the essential features

1 (1906) 17 M L J. 114 : L R 34 I A 22 : I L R 43 Mad 650 (P C) I L R 30 Mad 50 (P C)
2 (1918) 36 M L J 40 L R 45 I.A 265 : I.L R 41 Mad 998 (P C).
3. (1920) 39 M L J. 70 : L R. 47 I A. 99 : (P C)
4 (1876) L R. 4 I A 1 I L R. 1 Mad 174 :
5 (1868) 12 M I A 397.
6 (1865) 10 M I A 279.

of the doctrine of adoption among Hindus in *Amarendra Mansingh* v *Sanatan Singh*[1]. It was there stated that the adoption under Hindu law had peculiar religious significance as it was essential, according to the notions of every Hindu, that he should have a son to deliver him after death from *puth* or hell. For this purpose, the son according to the Hindu law, by reason of his birth became subject to three debts The foundation of the doctrine of adoption therefore is based on the duty which every Hindu owes to his ancestors to provide for the continuance of the line and the solemnisation of the necessary religious ceremonies It was, therefore, held in that case, that the institution of adoption was not secular but religious and that the consideration of property rights and the effect of adoption on such rights was of subordinate or of secondary importance For this reason it was laid down in the *Amarendra's case*[1], that the limit of the widow's power to adopt is reached when the natural son of the widow proposing to make an adoption dies after attaining full legal capacity to continue the line either by birth of a natural born son or by an adoption to him of a son by his own widow

After these decisions, the Privy Council had again to examine the true foundation of the adoption in Hindu law in considering the question whether the consent of a daughter's son was necessary and whether he was entitled to be consulted in the matter of adoption by his grandmother as the daughter's son takes a peculiar position in the line of succession among the agnates by virtue of the commentary of Mitakshara on the text of Yajnavalkya enumerating the order of succession to a sonless person It was contended in *Ramasubbayya* v *Chenchuramayya*[2] that as the rights over property of the daughter's son would be seriously affected by the adoption he was entitled to insist that his opinion also should be obtained in the matter of the expediency, of introducing, by adoption, a son to the deceased Some of the expressions used by the Privy Council in the *Ramnad case*[3] and in the subsequent cases such as "kinsman," "kindred" and "sapinda" gave rise to some doubt whether these expressions included "agnates" and "cognates" as well or were confined only to sagotra sapindas or male agnates Sir Madhavan Nair, who delivered the judgment in that case again considered the question whether the adoption is a temporal or a spiritual institution In view of the conclusions of Sir George Lowndes who delivered the judgment in the *Amarendra case*[1], it was held that the substitution of a son of the deceased is the essence of adoption and that the consequent devolution of the property was of a subordinate importance, and was a mere accessory to it The decision in *Amarendra's case*[1] and the decision in *Ramasubbayya's case*[2] practically accept the view of Halloway, J. in the *First Berhampore case*[4], that

> "the validity of an adoption is to be determined by spiritual rather than temporal considerations; that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property is a mere accessory to it"

It was therefore held that as the daughter's son was a cognate and not an agnate and considerations of proprietary interest were of subordinate importance, the daughter's son had no place in the family council The decisions in *Seshamma* v *Narasimharao*[5] was approved

These two decisions establish finally and conclusively that in matters of adoption devolution of property is of secondary importance and that the validity of the adoption is to be judged and determined by spiritual rather than by temporal considerations

This discussion of the principles relating to adoption in divided families is intended to establish that serious inroads were made by the later decisions into the stricter doctrine of the earlier decisions in the *Ramnad case*[3] and other cases

1. (1933) 65 M L J 203 L R 60 I A 242 I L R 12 Pat 642 (P C)
2. (1947) 2 M L J 39 L R 74 I A 162 I L R. 1948 Mad 362 (P C)
3. (1868) 12 M I.A 397.
4. (1876) L R 3 I A 154 I L R 1 Mad 69 (P C)
5. (1940) 1 M L J 400 I L.R. 1940 Mad. 454 (F B)

How does the matter then stand in cases where the deceased husband was an undivided member of the family? If the rule in the *Ramnad case*[1] and the first *Berhampore case*[2], were to be strictly enforced in the manner contended on behalf of the appellant, if the coparcener or coparceners living, refuse even for no valid reason to give their assent to the adoption or even if they are incapacitated by reason of minority, lunacy or otherwise, it would be impossible for the widow to provide for the perpetuation of the line of her husband and for ministering to his spiritual needs. It cannot be and it is unthinkable that a distinction in matters spiritual exists whether the deceased was at the time of his death a divided or an undivided member of the family. The spiritual needs of both stand on the same footing and according to orthodox Hindu notions the souls of both have to be saved in the same manner and to the same extent if possible from hell. The duty of providing a means for the performance of the ceremonies continuously for the salvation of the soul of the deceased is cast on the widow who alone according to the decisions, is capable of continuing the line. If the undivided coparceners, purely from secular motives withhold their consent and interdict on adoption by the widow, there is no means of saving the soul of the deceased and conferring upon him spiritual benefit. This cannot certainly be the intention of the rule as stated in the earlier decisions when examined in the light of the later decisions. The passages in the two decisions, the *Ramnad case*[1] and the first *Berhampore case*[2] extracted in the judgment now under appeal in my opinion, do not prohibit the widow from travelling outside the family under all circumstances and in all eventualities. Ordinarily, the nearest sapindas will be the undivided coparceners. They being vitally interested in the joint family are certainly persons entitled to be consulted in the first instance in the matter of the proposed adoption and in introducing a new coparcener into the family. This statement of the law cannot mean, in my view, more than that. In the *Ramnad case*[1], in stating the rule where there is no father who is the head of the joint family, the Privy Council were careful enough to use words to indicate that they were not finally and conclusively determining that the consent of all the brothers who in default of adoption, take the husband's share, was needed under all circumstances. The use of the expression "would probably be required" is significant as indicating that it is not their final decision that under all circumstances without exception the consent of all the brothers should be obtained. In the *Berhampore case*[2], it was said that the widow was not entitled at her will to travel out of the undivided family which clearly indicates, in my opinion, that she is not entitled, according to her choice, to ignore the coparceners altogether even in the first instance and go outside the family to make an adoption with the consent of the divided members. It was only intended in my opinion to emphasise the duty of the widow to seek the assistance, in the first instance, in the family where she must necessarily find such counsellers and protectors as the law makes requisite for her. The decision in *Chellathammal* v. *Kalitheertha Pillai*[3] creates an exception in the case where the only coparcener happened to be a lunatic. In such a case it was held reversing the decision of Somayya, J., in *Kalitheertha Pillai* v. *Chellathammal*[4], that the widow was entitled to make a valid adoption with the consent of the divided members. I do not see, in principle, any distinction between a case where a coparcener was incapable of giving his assent and therefore there was no necessity to consult him and a case where the coparcener improperly refused and withheld his assent for the valid act of adoption. The principles laid down by Viscount Cave in *Krishnayya* v. *Lakshmipathi* (*Adusumilli's case*)[5], in my opinion apply equally to the case of an undivided family.

Patanjali Sastri and Bell, JJ., in an unreported decision in Appeal Nos. 96 and 256 of 1944 which was referred to in another connection by Rajamannar, J.,

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1. (1868) 12 M.I.A. 397.
2. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).
3. (1942) 2 M.L.J. 206: I.L.R. 1943 Mad. 107.
4. (1942) 1 M.L.J. 29.
5. (1920) 39 M.L.J. 70: L.R. 47 I.A. 99: I.L.R. 43 Mad. 650 (P.C.).

considered the matter and Patanjali Sastri, J., who delivered the judgment of the Bench indicated that the rule in the *Ramnad case*[1], is not an inflexible one. In that case the widow made the adoption with the consent of a coparcener of her deceased husband, a divided member Two other coparceners who were asked for permission refused to give the assent on proper grounds The question raised was whether the widow was entitled to go outside the family to justify the adoption and obtain the assent of an outsider It was held that as in that case the refusal was proper, the adoption was invalid and in answer to the contention that the widow was not entitled to go outside the family, it was held that as she obtained the consent of at least one of the coparceners in the family it satisfied the rule ; and that it was unnecessary to decide the larger question But the point of interest is that if the refusal of the other two coparceners was improper, the judgment of the learned Judge implies that as she consulted and obtained the assent of one coparcener, even though there is no consent of the other two, the adoption would have been valid In other words the consent of all the coparceners is not essential in such a case.

The passage from Mayne's Hindu Law, 10th edition, page 219 no doubt supports the argument advanced on behalf of the appellant, but for the reasons already stated I am unable to agree with the opinion of the learned author. His view is based entirely upon the decisions in the *Ramnad case*[1], and the *Berhampore case*[2], and in the light of what has been stated above, it is difficult to accept that view. The learned counsel for the appellant also referred to the *Travancore case*[3], in which it was held that the assent of certain separate dayadhis of the deceased husband was not sufficient to validate the adoption by a widow without the assent of the husband's undivided brother who was also the head of the family This decision was approved by the Privy Council in the *first Berhampore case*[2] On an examination of the facts of the case, it is not clear whether the widow did or did not ask the undivided member for his assent before the adoption and if he was asked reasons, if any, on which his refusal was based to decide whether his refusal was proper or not That case therefore, in my opinion, cannot be an authority in support of the contention of the appellant For these reasons I am of opinion that the assent of Govinda Raju in the circumstances is valid and is also sufficient

The only other question that remains to be considered is whether the refusal of the plaintiff to consent to the adoption was justified The reasons on which the refusal was based and on which it was sought to be justified before us are that the boy adopted belongs to a family in which there was leprosy and that he in fact had patches on his body and that he came from enemy's camp, *i e*, the group of Bangaramma, the second wife of Govinda Raju The third ground was that he was prepared to give his son in adoption and that the widow unjustly refused to adopt him and therefore he was justified in withholding his assent It has been found by the Subordinate Judge and by the learned Judge who heard the second appeal that the plaintiff failed to substantiate his plea that the boy came from a family of lepers The learned Subordinate Judge characterised the imputation by the plaintiff that the boy had patches of leprosy as reckless and wilful untruth. This ground therefore was rejected also in second appeal as not having been established and we agree with the conclusions of the learned Judge It was argued that one Sitharamudu, the paternal aunt of the natural father of the boy has leprosy as established by the doctor's evidence, D W 12, and that the residence of the boy in the house in which that woman also continues to live was dangerous There is no evidence to show that this Sitharamudu was living in the family at or about the time of the adoption This ground, however, is a frivolous one and has not been substantiated The ground that the boy adopted belonged to the enemy camp is not a proper ground for refusal as held by the Judicial Committee in *Sri Krishnayya Rao* v. *Suryarao Bahadur Garu*[4]. The relationship of the natural father and also the father

1. (1868) 12 M I A 397.
2. (1876) L R 3 I A 154 I L R 1 Mad 69 (P C)
3. 8 Mad. Jurist 58
4. (1935) 69 M L J. 388.

of the first defendant to Bangaramma and that group was emphasised as showing enmity There is evidence to show that the widow liked the boy and that Govindaraju executed a deed of settlement in favour of the plaintiff and his deceased brother. I agree with the conclusion of the learned Judge that

> "it is difficult to understand how the fact that, they were inimically disposed to his deceased brothers could have an important bearing."

This ground, therefore, both on the facts and on the law is untenable

Lastly, there remains the question of the alleged offer by the plaintiff in the registered notice to give his son in adoption. The plaintiff had only one son at the time of the adoption and his wife was *enciente* at the time A perusal of the letters show as pointed out by the learned Judge that

> "the reference to his own boy is more to persuade the widow not to adopt rather than by way of a *bona fide* offer of his only son."

Certain observations of Bhashyam Aiyangar, J., in *Subramaniam* v *Venkamma*[1] were relied on to show that the refusal coupled with an offer to give his own son in adoption by a nearer sapinda was proper refusal The widow in the present case pointed out in her reply that it would be improper to adopt an only son. No doubt under law there is no prohibition for the adoption of an only son of the natural father; but this is opposed to Hindu notions. The widow, therefore, was entitled to reject the offer. Further, in my opinion, the observations of Bhashyam Ayyangar, J., in the above decision are *obiter* According to the decisions of the Privy Council already referred to, the sapinda whose consent was asked for has to consider the expediency of the proposal adopted and pronounce an independent and unbiassed judgment on that question It would be open to the widow if she chooses, to consider the offer made by the sapinda but the sapinda cannot justify his refusal on the ground that his son was not accepted in adoption It would not be an independent judgment of his to say that because his son was not adopted the adoption was improper. In *Subramaniam* v. *Venkamma*[1], the observations were *obiter* as in that case the sapinda was not asked to give his assent for the adoption and he stated that he could not say what he would have done if he was asked to give his assent for the adoption The decision of Patanjali Sastri and Bell, JJ, in A S. Nos 96 and 256 of 1944 was relied on in justification of the refusal by the plaintiff on this ground In that case the facts were somewhat peculiar. The two undivided brothers of the deceased husband of the widow when they received notice from the widow asking for their consent, requested the widow to meet them with a view to enable them to discuss the question of the proposed adoption In pursuance of this request the widow met her brothers-in-law at Narasapur where the matter was discussed in the house of a vakil At that meeting the brothers-in-law suggested that each of them had sons and that they were prepared to give any one of their sons in adopton This offer was not acceptable to the widow. The coparceners also subsequently intimated their desire to give their own son in adoption in order to save the situation of bringing into the coparcenary an utter stranger. Even then the widow did not consider the matter but made up her mind even before consulting the coparceners to adopt the particular boy. It was there held that in those circumstances, the refusal of the coparceners was proper and that the adoption was invalid No general rule can, therefore, be laid down that in all cases and under all circumstances the refusal of a sapinda to give his assent to the adoption on the ground that the widow refused to accept the boy of his own in adoption as a proper refusal. The question has to be considered on the facts of each case There may be several objections to adopt the boy offered The boy may be grown up, the boy may not be quite intelligent or up to the mark or be even subject to constant illness. After all, the boy proposed to be adopted should be one whom the widow expects or finds a reasonable expectation that he would be affectionate and attached to her. All

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1. (1903) 13 M.L J 239 · I L.R. 26 Mad 627

these are matters which have to be considered before selecting the boy. It cannot, therefore, be said that the refusal of the widow in all cases to accept the son of the sapinda in adoption was not justified and on that ground the refusal of the sapinda was proper In the circumstances of this case, it cannot be said that there was a *bona fide* offer by the plaintiff or even an offer at all as I read the language of the notice to give his only son in adoption.

For these reasons, the judgment appealed against must be confirmed and the Letters Patent Appeal must be dismissed with costs.

Viswanatha Sastri, J—This is an appeal by the plaintiff, a Hindu reversioner, against a judgment of Rajamannar, J (as he then was) upholding the validity of the adoption of the minor second defendant by the first defendant, the widow of the plaintiff's deceased elder brother I should have been content to express my concurrence with the conclusion of the learned Judge, were it not for the strenuous arguments of the learned counsel for the appellant and the importance of the question involved It is remarkable that even after nearly a century of exposition of the principles of Hindu law relating to adoption by the High Courts and the Judicial Committee, questions of such frequent recurrence as those involved in this appeal, still remain the subject of debate This case demonstrates the need for an immediate codification of this branch of the Hindu law and the avoidance of protracted and expensive litigation which has often followed adoptions

Venneti Govindaraju had a son Veera Bhadraraju by his first wife and two grandsons by Veera Bhadraraju, namely, Harigovind and Sundararama Veera Bhadraraju and his mother predeceased Govindaraju Govindaraju in his advanced age, took for his second wife a lady of the name of Bangaramma, an event which led to disruption and strife in this family of humble means. Govindaraju became divided from his two grandsons, Harigovind and Sundararama, the two latter however, continuing to be joint in estate. Harigovind died on 14th November, 1937, leaving a widow, the first defendant and a minor daughter who is not a party to these proceedings On 11th May, 1938, the widow adopted the second defendant with the consent of Govindaraju, her husband's grandfather and in spite of the dissent and disapproval of Sundararama, who now challenges the validity of the adoption on the following grounds The plaintiff Sundararama and the deceased Harigovind having been undivided, the consent of the former to the adoption was indispensable to its validity The refusal of consent in this case by the plaintiff was proper Assuming without admitting that the refusal of the plaintiff's consent was improper the widow had no right to travel outside the joint family of which her husband was a member at the time of his death and rely on the consent of a divided sapinda, namely, her father-in-law's father It will be convenient to deal with the latter part of the argument before I consider the propriety of the refusal of the plaintiff's consent to the adoption.

There is no text of Hindu law which has a direct bearing on the question and the law applicable, has to be gathered mainly from the decisions of the Judicial Committee The learned editor of the 10th edition of Mayne's Hindu law, on an examination of the relevant cases, states his conclusion in these terms:

> "It is fairly clear that even where the coparceners improperly refuse their consent, she will not be entitled to adopt with the consent of her husband's divided kinsmen, as it would be introducing into the joint family a coparcener against their will" (P. 219)

The appellant maintains that this is a correct statement of the law The authorities relied upon by the learned author in support of his conclusion will be examined in the course of this judgment. Looking at the matter apart from authority, a Hindu coparcener can introduce against the wishes of other coparceners a new coparcener either begotten or adopted by him if he is sonless His widow too, if he dies sonless, can introduce such a coparcener by adoption irrespective of the wishes of the surviving coparceners if she has her husband's permission to adopt. If she has not her husband's permission, then she is required to take the consent of his gnatis to what is considered on all hands a pious and meritorious act, not because as I shall endeavour to show of the effect of an adoption on the rights of

other coparceners but by reason of her assumed dependence on the male members of her husband's family. The position is the same whether the husband died a divided member or as a member of an undivided family. If the consent of the husband's kinsmen has been obtained the widow's power to adopt is co-extensive with that of the husband: *Balusu Gurulingaswami v. Balusu Ramalakshmamma*[1].

The law of adoption has very little textual authority and has been built up mostly by case law. This judge-made law was in its formative stages when the *Ramnad case*[2], the *Berhampore case*[3], and the *Guntur case*[4] were decided. The Judicial Committee, if I may say so without meaning any disrespect, were feeling their way in an unexplored tract and sailing in uncharted seas, at the time when these cases were decided. The pundits who had been advising the Sadar Court began to be considered from the days of Holloway, J., as obstacles in the way of administration of justice and their opinions met with scant respect. It was left to the Judicial Committee in the *Ramnad case*[2] to point out the value of these opinions as containing, in many cases, an authentic and acceptable interpretation of Hindu law. The abolition of the pundit system threw upon the courts, manned in those days mostly by English Judges, the heavy responsibility of ascertaining and applying the rules of a legal system with which they were necessarily unfamiliar. Where the doctrines of one system of law have to be applied by lawyers of another, there is always the possibility of unconscious reasonong in the back ground of notions and ideas wholly foreign. The Hindu Law of Inheritance was once upon a time described as

> "a law of inheritance of the offerings of the dead"

by western lawyers. It was left to a later generation to realise that consanguinity or blood relationship was the governing rule of inheritance under the Mitakshara law. With reference to adoptions, judicial opinion was oscillating for a considerable time between the secular and religious motives and effects of an adoption as a test of its validity. Is religious efficacy the touchstone of the validity of an adoption or is the effect of an adoption on the proprietary rights of other persons the decisive consideration? As late as 1933, the Judicial Committee observed in *Amarendra's case*[5],

> "Their Lordships think that in dealing with the arguments which have been addressed to them, it is important to bear in mind the essential features of the doctrine of adoption among orthodox Hindus, as they are conscious that these may have been to a certain extent blurred by the mass of cases-law which has been accumulated in the last three-quarters of a century".

In making these observations their Lordships must have had in view some of their own earlier pronouncements. On many matters arising in connection with adoption by a Hindu widow, the law was for a considerable time in a fluid state, *e.g.*, the limits to the exercise of the power of adoption by a widow, the mode and manner of consulting sapindas, the effect of refusal of consent by one or more of the sapindas, the reasons for which a sapinda could properly refuse consent, the effect of an adoption on antecedent alienations by the widow and so on. In my judgment it is not right to treat isolated passages in the *Ramnad case*[2] and the *Berhampore case*[3], or the re-statement of the effect of those passages in later cases, like *Veerabasavaraju v. Balasurya Prasada Rao*[6], as finally or decisively settling the law. The law on this subject cannot be said to have reached a high degree of precision and has to be gathered from a series of decisions, each of them concerned with the circumstances of a particular case in which the principle involved has been progressively though not always consistently formulated.

Does the Hindu law invalidate an adoption by a Hindu widow which is authorised and assented to by her husband's divided father or grandfather but is opposed

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1. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113: I.L.R. 22 Mad. 398 (P.C.)
2. (1868) 12 M.I.A. 397.
3. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.)
4. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.)
5. (1933) 65 M.L.J. 203: L.R. 60 I.A. 242: I.L.R. 12 Pat. 642 (P.C.)
6. (1918) 36 M.L.J. 40: L.R. 45 I.A. 265: I.L.R. 41 Mad. 998 at 1008 (P.C.)

by her husband's only undivided brother? For the purpose of this argument it is assumed that the dissent of the undivided coparcener was improper The well known text of Vasishta

"Let not a woman give or accept a son except with the assent of her lord"

is the starting point of discussion The need for outside assent arises from the presumed incapacity of women for independence as illustrated by Yajnavalkya in Chapter 1 verse 85,

"Let her father protect a maiden, her husband a married woman, sons in old age, if none of these, other gnatis (kinsmen). She is not fit for independence"

Another text of Yajnavalkya, Chapter 2, verse 130, relating to adoption runs thus

"He whom his father or mother give in adoption in Dattaka (a son given)"

The genius of Hindu law, as remarked by Ellis, allows substitution in almost every conceivable case The subsequent commentators developed the law by a process of interpretation The Smritichandrika adopts a rule of interpretation familiar in Hindu law, that where there is no absolute prohibition, you can infer assent especially if the act is meritorious Devanna Bhatta the author, considers that by the use of the disjunctive in the text "he whom his father or mother gives" Yajnvalka suggests the independence of women in the matter of adoption At the same time there is the other text of Yajnavalkys that woman is not fit for independence The author reconciles the two seemingly contradictory positions by laying down that a Hindu widow could give her son in adoption if she be authorised by an independent male Presumably he would apply the same rule to the taking in adoption of a son by a Hindu widow. Indeed, Nandapanditha stated that the same rule should apply both to giving and taking, only he applied the rule differently In the case of an adoption by a Hindu widow a text of Dattaka Mimamsa by Vidyaranyaswami cited in the *Ramnad case*,[1] stated

"In the same way the adoption of a son by a widow with the permission of the father etc., cannot be censured in the Kali age"

This author construes the text of Yajnavalkya in the same manner as Devanna Bhatta and after laying down in distinct terms the religious necessity for an adoption, says that it must be with the assent of the father, *i e*, father of the deceased husband, etc The introduction of the word "etc" in the above passage was seized upon by the later exponents of Hindu law and the thesis was developed that the reference to the word "father" *i e*, the father-in-law of the widow, in the above passage, was only illustrative and not exhaustive. As observed by Holloway, J, Hindu commentators saw as great virtues in an *etcetera* as Coke, the Commentator on Littleton Professing to submit to the rule that a woman is not fit to act independently by herself, the Hindu legists first circumvented it by stating that the defect was cured by the permission of her father-in-law for an adoption by her The next step was to hold that the reference to the permission of the father-in-law was merely illustrative and not exhaustive and the consent of the other kinsmen was sufficient By this process of reasoning the Hindu lawyers of a century ago arrived at the conclusion that in the Dravida country a Hindu widow who had not her husband's permission could adopt a son with the consent of her husband's gnatis or kinsmen Thus law was brought into conformity with the current sentiments and usages of the people This statement of the law by the pundits received high judicial sanction from its acceptance by the Judicial Committee in the well known *Ramnad case*[1]

I have sketched in brief outline the early development of this branch of the law with a view to show that according to the traditional view of Hindu law, the question of sonship by adoption to a deceased person in no way depended on the title or absence of title of other persons to the estate either *in praesenti* or in reversion and that the devolution of property is a temporal incident or consequence of the

1 (1868) 12 M I A 397

religious act of the widow in making an adoption for the spiritual benefit of her deceased husband. The root of the matter is that permission of the husband, or in its absence, the assent of his father or other gnatis was required for an adoption by the widow by reason only of her dependence, adoption being in itself a meritorious Act To day it cannot be said that Hindu women are dependent as in the days of Yajnavalkya The religious motive also is not appreciable in modern adoptions which are made not so much for the purpose of securing the repose of the soul of the deceased as for the purpose of divesting the course of succesion or dispossessing an heir in whom inheritance has already vested But the maxim *cessante ratione legis cessat ipsalex* has no application, for the Court cannot enquire into the present utility of this ancient doctrine which has become part of the law We cannot annul it because it has survived its usefulness and stands merely as a vestigial relic.

The argument for the appellant in effect makes what is merely accessory or consequential, namely, the divestment of proprietary rights by an adoption, as the main criterion of its validity. The latest view of the Judicial Committee on this topic is found in two recent cases It must now be taken to be established by *Amarendra's case*[1], that the validity of an adoption is to be determined primarily by a consideration of the religious necessity for and efficacy of a sonship under the Hindu law, that the adoption of a son to her husband by a Hindu widow is a meritorious act and that succession to property is only a secondary consideration. The Judicial Committee quoted with approval the following passage from the *Berhampore case*[2] .

"A distinction which is founded on the nature of property seems to belong to the law of property, and to militate against the principle which Mr Justice Holloway has himself strenuously insisted upon elsewhere, *viz*, that the validity of an adoption is to be determined by spiritual, rather than temporal considerations, that the substitution of a son of the deceased for spiritual reasons is the essence of the thing, and the consequent devolution of property a mere accessory to it "

Their Lordships then proceeded to observe

"Having regard to this well established doctrine as to the religious efficacy of sonship, their Lordships feel that great caution should be observed in shutting the door upon any authorised adoption by the widow of a sonless man , *see* in this connection *Suryanarayana* v *Venkataramana*[3] The Hindu law itself sets no limit to the exercise of the power during the lifetime of the donee, and the validity of successive adoptions in continuance of the line is now well recognised Nor do the authoritative texts appear to limit the exercise of the power by any considerations of property But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognised both by the Courts in India and by this Board "

Their Lordships held that the limit to the exercise of the power of adoption by a Hindu widow was reached only where her husband had himself left a son, natural or adopted, and that son had himself left children or his own widow to provide for the continuance of the line by an adoption The mere fact that the son had attained majority and marriageable age before he died was held ineffective to put an end to the power of the widow to adopt

These observations in *Amarendra's case*[1], which profoundly modified the effect of previous decisions were accepted and acted upon by the Judicial Committee in *Ramasubbayya* v *Chenchuramayya*[4] where it was held that in determining whose assent should be taken by a Hindu widow in the Dravida country for an adoption, interest in the property which would be *defeated* by the adoption was not the sole or supreme test In this case an adoption made by a Hindu widow with the assent of the agnatic sapindas of her husband but without the consent of his daughter's son, who would be the next reversioner after the death of the widow, was held to be valid All the earlier cases on the subject were reviewed by their Lordships and the basis of their decision was that the test of the validity of the adoption was the propriety of the substitution of a son of the deceased and not the consequent devolution of property In short, the Board reiterated the view that the

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1 (1933) 65 M L J 203 L R 60 I A 242 : I L R. 12 Pat 642 (P C)

2 (1876) L.R 3 I A. 154 I L R 1 Mad 69 (P C)

3 (1906) 16 M L J 276 L R 33 I A 145 : I L R 29 Mad 382 (P C)

4 (1947) 2 M L J. 74 L R 39 I.A. 162 : I L R 1948 Mad 362 (P.C)

assent of a masculine mind was required by reason of the presumed incapacity of women for independent action and as evidence of the propriety of the adoption and not because it in any way operated as a waiver or surrender of the proprietary rights of the party by whom assent was given Reference may be made in this connection to the decisions of the Judicial Committee which held that divestment of property vested in another as a surviving coparcener of heir-at-law is not the test or deciding factory of the validity of an adoption See *Pratapsingh Shivsingh* v *Agarsinghji Rajasangji*[1], *Madanamohan Deo* v *Purushotham Deo*[2] and *Bhimabai* v. *Gurunathgowda Khandappa Gowda*[3], *Vijaysinghji* v *Shivsingji*[4] and *Anant Bhillappa* v. *Shanker Ramachandra*[5] The limiting principle of a widow's power to adoption is not now rested on any theory of divestiture of an estate vested in others

It is contended for the appellant that the several decisions of the Judicial Committee above referred to dealt with the case of an adoption by the widow of a divided coparcener and the position with reference to the widow of an undivided coparcener is wholly different

Reference is made to the following observations of the Judicial Committee in the *Ramnad case*[6] referring to the position of the widow of a coparcener who died as a member of a joint family

"In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would *probably* be required, since it would be unjust to allow the widow to defeat their interest by introducing a new coparcener against their will" (Italics are mine)

Dealing with the position of the widow whose husband died a divided member their Lordships stated

"In such a case, therefore, their Lordships think, that the consent of the father-in-law, to whom the law points as the natural guardian and 'venerable protector" of the widow, would be sufficient It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show, that the act is done by the widow in the proper and *bona fide* performance of a religious duty, and neither capriciously nor from a corrupt motive"

The actual decision of their Lordships in the *Ramnad case*[6] was that according to the law prevalent in the Dravida country a Hindu widow not having her husband's permission might, if duly authorised by his gnatis (kinsmen), adopt a son to him. The reason for requiring the consent of the kinsmen was also stated as follows .

"The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption"

Whether it is an undivided or a divided family the reason for adoption is the same, the spiritual benefit of the deceased husband of the widow In either case the need for taking outside assent is the same, namely, the presumed incapacity of women. Division does not affect her personal dependence or give her independent status to alter by her own volition by making an adoption, the succession to the estate which she holds as the widow of her husband Even according to the Judicial Committee, whether the family is divided or undivided the consent of the father-in-law alone "the natural guardian and venerable protector" of the widow is sufficient to validate her act and there is no need to take the consent of the other members Their Lordships observed that in an undivided family where there was no father-in-law in existence, the consent of the coparceners who would take the husband's share of the joint family property would probably be required. This observation of the Judicial Committee was *obiter* inasmuch as the Privy Council

1. (1918) L R 46 I A 97 · I L R. 43 Bom 778 (P C)
2 (1918) 35 M L J 138 L R 45 I A 156 I L R 41 Mad 855 (P C)
3 (1932) 64 M L J 34 L R 60 I A 25 I L R. 57 Bom 157 (P C).
4 (1935) 68 M L J 701 L R. 62 I A 161 : I L R 59 Bom 360 (P C)
5 I.L R. 1944 Bom 116
6 (1868) 12 M I A 397.

dealt with the case of the widow of a separated member This Court was inclined to the view that in an undivided Hindu family where there was no father-in-law, the consent of the manager and the seniormost member of the undivided family might alone be sufficient See *Venkatakrishna* v *Annapurnamma*[1], *Subramaniam* v *Venkamma*[2] Even in *Ganesa Ratnamier* v *Gopala Ratnamier*[3], the assent of the managing member of the family was assumed to be sufficient The literal application of the rule suggested by the *obiter dictum* of the Judicial Committee in the *Ramnad case*[4] with reference to undivided families would lead to many difficulties in practice. Suppose there are five surviving coparceners and three of them assent to an adoption by the widow and two dissent Is the adoption to be held invalid on the ground that you cannot force a coparcener against the wishes of the dissenting minority Suppose a divided father-in-law consents to an adoption by a widow which is opposed by the undivided cousins of her deceased husband. Is the adoption in such a case invalid? Suppose again the husband was joint at the time of his death and the coparceners separate after his death It is impossible to obtain the consent of the undivided coparceners The consent of the divided sapindas has been held to be sufficient in such a case. *Panyam* v. *Ramalakshmamma*[5] The Judicial Committee observed that the consent of the father-in-law would be necessary and sufficient whether the family was divided or undivided That the consent of the sapinda, whether he is a coparcener or a divided member, is required by reason of the presumed incapacity of women for independent action and not by reason of the effect of an adoption on the proprietary interest of the coparceners or reversioners was not firmly established till a later date in the evolution of the judge-made law The cases already cited with reference to the effect of an adoption on the divestment of the estate vested in a person other than the adopting widow, would bear out my statement So far as the widow's power of adoption is concerned, the distinction between vesting by inheritance and vesting by survivorship has been in my judgment obliterated by the Judicial Committee in *Pratapsingh Shivsingh* v *Agarsingji Rajasangji*[6], *Yadao* v. *Namdeo*[7], and *Amarendra's case*[8]

The next case relied upon by the appellant is the decision in the *Berhampore case*[9] which accepted the statement of the law in the *Travancore case*[10]

"If it were necessary which in this case, it is not, to decide the point, their Lordships would be unwilling to dissent from the principle recognised by the *Travancore case*[10], *viz*, that the requisite authority, is, in the case of an undivided family, to be sought within that family The Hindu wife upon her marriage passes into and becomes a member of that family It is upon that family that, as a widow, she has her claim for maintenance It is in that family that in the strict contemplation of law, she ought to reside It is in the members of that family that she must presumably find such councillors, and protectors as the law makes requisite for her There seem to be strong reasons against the conclusion that, for such a purpose as that now under consideration she can at *her will* travel out of that undivided family, and obtain the authorisation required from a separated and *remote kinsmen* of her husband" (Italics mine)

In the Gunture case, (*Vellanki Venkatakrishnarao* v *Venkata Ramalakshmi*[11], decided a little later than the *Berhampore case*[9] the Judicial Committee explained the reason of the rule requiring the assent of sapindas in these terms

"Their Lordships think it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow, and that all which this committee in the former case (*Ramnad case*[4]) intended to lay down was, that there should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband"

1 (1899) 10 M L J. 73 I L R 23 Mad 486, 488
2. (1903) 13 M L J 239 I L R 26 Mad 627, 634
3 (1880) L R 7 I A 173 I L R 2 Mad 270 (P C.),
4 (1868) 12 M I A 397
5 (1931) 62 M.L J 187. I L R 55 Mad 581.
6 (1918) L R 46 I A 97 I L R 43 Bom 778 (P C.).
7 (1921) 42 M L J 219 L R. 48 I.A 513 I L R. 49 Cal 1 (P C)
8 (1933) 65 M L J 203 L R 60 I.A 242 I L R 12 Pat 642 (P C).
9 (1876) L R 3 I A 154 I L R. 1 Mad. 69 (P C)
10 8 Mad. Jurist 58
11 (1876) L R 4 I.A 1 I L R. 1 Mad. 174 (P.C)

It will be observed that the judgment of the Judicial Committee in the *Ramnad case*[1], the *Berhampore case*[2] and the *Guntur case*[3] were all delivered by Sir James W Colvile whose observations above quoted were with respect to matters which did not arise directly for decision in those cases In the *Berhampore case*[2] their Lordships assumed that the surviving coparceners of the husband would normally be his nearest sapindas and therefore they observed that the widow could not *at her own will* travel outside the family to get the requisite consent for an adoption. Their Lordships could not have intended that when the nearest sapinda was a divided father-in-law and a remote sapinda say a cousin, was an undivided member, the consent of the latter alone counted and the former could be ignored altogether. In the *Guntur case*[3], their Lordships refer to "the family council," an expression which is far too general and comprehensive. It could not be that their Lordships intended that the whole array of sapindas and samanodakas of a deceased person should be summoned for a meeting to consider the propriety of an adoption by the widow. The subsequent decisions qualified the generality of this observation by restricting the "family council" to the sapindas nearest in degree See *Subramaniam* v. *Venkamma*[4] A further development of the case-law was that the consent of the majority of the nearest sapindas was sufficient, the consent of the entire body of the nearest sapindas being unnecessary See *Krishnayya* v *Lakshmipathi*[5]. A still further refinement of this doctrine was that it was the duty of the widow to ask the consent of every one of the nearest sapindas and she could not ignore some of them on the ground that she had procured the consent of the majority or on the ground that the consent would be refused even if asked for See *Venkamma* v. *Subramaniam*[6] and *Krishnayya* v *Lakshmipathi*[5] If one of two nearest sapindas of equal degree improperly refuses assent the assent of the other alone is sufficient and there is no question of the decision of a majority. See *Krishnayyarao* v *Suryarao Belladagaru*[7]. I am referring to these latter developments of the law to show that the general expressions and observations found in the early decisions of the Judicial Committee have been considerably qualified and modified by the same tribunal to suit different facts and circumstances Indeed in the *Berhampore case*[2], the Judicial Committee does not lay down any inexorable rule that the widow could in no event adopt even if the surviving member or members of the joint family improperly refuse assent to an adoption and even though the nearest divided sapindas give their assent All that was said was that the widow could not at *her will* travel outside the undivided family and obtain the authorisation from a separate and *remote kinsman*.

The Hindu widow in making an adoption is exercising a power which she alone can exercise In legal theory this power is vested in her in order to secure the spiritual welfare of her husband's soul The assent of the sapinda is required only by reason of her supposed incapacity for independent action and not by reason of the effct of an adoption on the proprietary rights of coparceners or reversioners. The early decisions mixed up the two considerations, but later decisions of the Judicial Committee have disentangled them and settled the law in this sense that property considerations are no more paramount in the case of an undivided family than in the case of a divided family and in either case, the nearest sapindas must be asked to assent to the adoption The argument of the appellant's counsel would if accepted lead to anomalous results Suppose there are two undivided brothers *A* and *B* who died sonless one after the other, each leaving his widow The estate would rest in the widow of the last surviving coparcener under the Hindu law as it stood before the recent legislation There is no male coparcener left in the undivided family In such a case is it to be said that neither widow is capable of adopting with the consent of the divided sapindas If she makes an adoption with such consent, is it to be declared invalid on the ground that she travelled outside the joint family?

1. (1868) 12 M I A 397
2 (1876) 3 I A 154 I L R 1 Mad 69 (P C)
3 (1876) L R. 4 I A. 1 I.L.R. 1 Mad. 174 (P C).
4 (1903) 13 M L J. 239, I L.R 26 Mad. 627
5. (1920) 39 M L J 70. L R 47 I A. 99 I L R 43 Mad 650 (P C)
6 (1906) 17 M L J 114: L R 34 I A 22: I L R. 30 Mad 50 (P C).
7 (1935) 69 M.L J 388 (P C)

It would amount to a denial of the right of adoption in those cases for which it was primarily intended, if the appellant's argument is accepted

I need not refer to the other cases cited at the Bar at any great length. The decision in *Veerabasavaraju* v. *Balasurya Prasada Rao*[1], merely reproduces the substance of the passages in the *Ramnad case*[2] It may be conceded that Mr Amir Ali, who delivered the judgment of the Board in *Veerabasavaraju* v *Balasurya Prasada Rao*[1], understood the *Ramnad case*[2], and the *Berhampore case*[3] as laying down that one of the reasons for requiring the consent of the sapindas to an adoption by a widow was their interest, actual or potential, in the estate of the deceased. This view is however, no longer the law as explained in *Amarendra's case*[4] and in *Ramasubbayya* v *Chenchuramayya*[5] Similarly, in *Bhimabai* v *Gurnathagowda Khandappa Gowda*[6] a case governed by the Maharashtra School, the Judicial Committee shortly restated the effect of the decisions in the *Ramnad case*[2] and in the *Berhamapore case*[3]. In *Krishnayya* v *Lakshmipathi*[7] the Board referred to the *Veerabasavaraju* v. *Balasuryaprasada Rao*[1], as regards the necessity for obtaining the consent of the nearest sapindas and observed

"This does not mean that the consent of a near sapinda who is incapable of forming a judgment on the matter, such as a minor or a lunatic, is either sufficient or necessary, nor does it exclude the view that, where a near relative is clearly proved to be actuated by corrupt or malicious motives, his dissent may be disregarded Nor does it contemplate cases where the nearest sapinda happens to be in a distant country, and it is impossible without great difficulty to obtain his consent, or where he is a convict or suffering a term of imprisonment"

These observations, it may be observed, are perfectly general, and would apply both to a case where the husband died, a member of an undivided family, and a case where he died a divided member.

So far as the decisions of this Court are concerned, it is unnecessary to refer to any case earlier than the full Bench decision in *Seshamma* v *Narasimharao*[8], which decided that a widow could validly adopt a son with the consent of the agnatic sapindas of her husband and without reference to the daughter's son, though the latter happens to be the next reversionary heir This view was approved by the Judicial Committee in *Ramasubbayya* v. *Chenchuramayya*[5] The ratio *decidendi* of these cases is that the assent of the sapindas is required not by reason of their proprietary interest actual or reversionary, but by reason of the doctrine that a woman is unfit for independent action. A case coming very near the present one was decided by this Court in *Chellathammal* v *Kalitheerathapillai*[9]. In that case, the only surviving undivided coparcener was of unsound mind and the widow made an adoption with the consent of the divided sapindas of her husband. This Court upheld the validity of the adoption The learned Judges no doubt observed that it was not necessary for them to consider a case where there was an undivided sapinda capable of assenting and the widow adopted a son in spite of his dissent but with the consent of divided sapindas That is the present case

I do not see the difference between a case where the surviving coparcener is a lunatic and therefore incapable of giving his consent and a case where he is improperly withholding his consent In either case there is justification for the widow to travel outside the family and seek the consent of the divided sapindas Indeed the Judicial Committee in the *Ramnad case*[2], stated that whether the family is divided or undivided, the consent of the father-in-law is necessary and sufficient to validate an adoption by the widow In my judgment, the father-in-law's father stands in a similar position as the "guardian and venerable protector" of the widow. The case may be put on the broader ground also Once it is recognised that an adoption

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1 (1918) 36 M L J 40 . L R 45 I A 265 : I.L R 41 Mad 998 at 1009 (P C)
2. (1868) 12 M I A 397.
3 (1876) L R 3 I A 154 I L R 1 Mad. 69 (P C.).
4 (1933) 65 M L J. 203 L R. 60 I.A. 242 I L R 12 Pat 642 (P C).
5 (1947) 2 M.L J 39 . L R. 74 I.A 162 · I L.R. 1948 Mad. 362 (P.C)
6 (1932) 64 M L J 34 L R 60 I A 25 : I L R 57 Bom 157 (P C)
7 (1920) 39 M L J 70 L R 47 I A. 99 I L R 43 Mad 650 (P C)
8. (1940) 1 M L J 400 I L R 1940 Mad. 454 (F B)
9 (1942) 2 M L J 206 I L R 1943 Mad. 107

by a widow of a son to her deceased husband is a meritorious act, that its propriety has to be judged from a religious or spiritual point of view, the matter of succession to property being a secondary consideration, that the consent of the widow's father-in-law or in his absence, the consent of sapindas, is required by reason of the presumed incapacity of a woman, for independent action, it seems to me that the principle which applies in the case of a divided family should, with equal reason, be applied to the case of an undivided family. The decision, in *Chellathammal* v *Kalitheerthapillai*[1] proceeds on this basis I am therefore constrained to disagree with the opinion of the learned editor of the 10th edition of Mayne's Hindu Law, quoted at the beginning of my judgment

It now remains to deal with the first contention of the appellant, that the refusal of consent by the plaintiff to the adoption was proper. I have already stated that there had been considerable ill-feeling between Govindaraju and his two grandsons due to the former taking a second wife and submitting himself to the influence of his second wife and her relations Govindaraju had settled a good portion of his landed property on his second wife, who in her turn transferred it to her relations in her parental family. It is contended that on the death of Harigovind, Govindaraju and his wife wanted the karnam's office held by Govindaraju as well as the family properties belonging to the share of Harigovind, should go to a close relation of Bangaramma to the exclusion of the plaintiff and that they, therefore, instigated Harigovinda's widow, who was young and inexperienced, to adopt the second defendant, a relation of Bangaramma's brother The correspondence, Ex P-2, series, Exs D-4-R, D-5-a and D-6-a, between the widow and the plaintiff with reference to the adoption shows that the latter refused his consent to the adoption of the second defendant on the following grounds

" (1) The boy proposed to be adopted is afflicted with leprosy

(2) The boy is from his enemy's camp (*i e*,) the camp of Bangaramma

(3) The plaintiff himself had a son and his wife who was then *enciente* might present him with another son who could be adopted by the widow

(4) There is no hurry for the adoption and the widow could and should wait and adopt a boy from the Vennati family or a grandson that might be born to her own infant daughter "

The learned advocate for the plaintiff sought to support these grounds of refusal by referring to the evidence at length It is true that two relations of the boy were afflicted with leprosy but there is evidence that the boy himself had no leprous taint at all The first ground therefore fails. The second ground is a reason personal to the plaintiff, namely, that the proposed boy comes from the camp of his enemy In *Krishnayya Rao* v *Suryarao Bahadur Garu*[2], the Judicial Committee held that the refusal of consent by a sapinda to the adoption of a boy on the ground that the boy proposed was the son of a long standing enemy is not proper and that the refusal should be disregarded by the widow The position is much the same in the present case The other grounds may be considered together Having regard to the object of an adoption by a Hindu widow, it can never be a valid objection to it, that it is made soon after the death of her husband. The sooner, the better. It is no doubt true that the adoption of a mere gnati is recommended by the commentators and the adoption of an only son is prohibited by the smrities But these are merely moral precepts which do not affect the validity of an adoption. The plaintiff did not, in so many terms, offer his only son in adoption possibly because the giving of an only son in adoption is not recommended either by Hindu law or by popular sentiment Indeed the widow took up this position The appellant's counsel relied on the observations of Bhashyam Aiyangar, J. in *Subrahmaniam* v. *Venkamma*[3], to the effect that there is nothing improper in a sapinda proposing to give his assent to the widow adopting his own son if such son happened to be a near sapinda and refusing to give his assent to her adopting a stranger or a distant sapinda if there be no reasonable objection to the adoption of his own

1 (1942) 2 M L J 206 I L R (1943) Mad. 207.

2. (1935) 69 M L J. 388 (P C.).

3 (1903) 13 M L J 239 : I L R. 26 Mad. 627.

son He also referred to the decision of Patanjali Sastri and Bell, JJ in A.S Nos. 96 and 256 of 1944 wherein similar observations are to be found In the unreported case there were two sapindas each of whom had more than one son and there was an offer of one of the sons of either sapinda It was held that the sapindas were within their rights in refusing to give their assent to the adoption of a stranger or a sapinda more distant than their sons The refusal of assent on the part of the nearest sapindas on the ground stated by them was held to be proper and the adoption by the widow ignoring their dissent was declared invalid Their Lordships do not indicate any solution for the problem which would arise if each of the two sapindas insisted upon the adoption of his own son as a condition of his consent. Here the plaintiff, at the relevant period, had an only son though he was hopeful of having further male progeny. He did not offer his only son in adoption in so many words but assuming there was a hint of such an offer in the correspondence the widow did not like the idea of depriving him of his only son, the same being unshastraic That in such circumstances the widow could ignore the refusal of assent by the plaintiff was laid down by Sir John Wallis, C J and Hannay, J. in *Venkatapathi* v. *Punnamma*[1]; After referring to the dictum of Bhashyam Aiyangar, J, in *Subramaniam* v *Venkamma*[2], the learned Judges observed :

> "Assuming this to be so, the circumstances of the present case are very different, because here the next reversioner has no son and if a son were born to him, the widow would be entitled to object that the adoption of an only son was improper and therefore it would be never necessary to wait for a second son to be born to him before he could, with propriety, insist upon this condition We think, that even assuming that refusal under the circumstances mentioned by Bhashyam Aiyangar, J, is justifiable it cannot be said that in the circumstances of the present case the refusal was justified."

The ground of refusal in that case appears to be the fact that according to the Hindu notions, an adoption of a near sapinda is preferable to the adoption of one more remote But I think it will be going too far to say that a widow is bound to adopt the only son of the assenting sapinda or wait until he has two sons, a possibility which may never occur In A.S No 9 of 1946, recently decided by Rajamannar, C J and Balakrishna Aiyar, J. it was observed that the observations of Bhashyam Aiyangar, J in *Subramaniam* v, *Venkamma*[2], above referred to were *obiter*.

With the greatest deference to that great Judge, it seems to me to be questionable whether refusal of consent by a sapinda to an adoption by the widow except on condition that his son should be adopted, is a valid or proper refusal In the *Medur cases*[3], as well as in *Rajendraprasad Bose* v *Gopal Prasad Sen*[4], the Judicial Committee have freely applied the law relating to powers to test the validity of an adoption made by a widow pursuant to her husband's authority The sapindas' power of assenting or refusing assent to an adoption by a Hindu widow is, in my opinion, a fiduciary power which must be exercised for the end designed, namely, the substitution of an heir by adoption to the deceased person and not for the purpose of advancing or prejudicing the personal interest of this or that sapinda. The sapindas are to be regarded as a "family council", the natural guardians of the widow and the protectors of her interests In giving or withholding their consent, it is their duty, in this capacity to form an honest and independent judgment on the advisability or otherwise of the proposed adoption, in and with reference to the widow's branch of the family *Krishnayya Rao* v *Suryarao Bahadurgaru*[5]. The refusal of assent on the ground of loss or injury to the reversionary or coparcenary interest of the dissentient sapinda has always been held to be an improper refusal (*Venkataramaraju* v. *Papamma*[6] and *Kamayya Bhakta* v *China Sooranna*[7]. Such a conflict between duty and interest has always been resolved by the Courts in only one way An assent hedged in with a condition that the son of the assenting sapinda alone should be adopted and none else may be in effect a refusal and an improper refusal. It amounts to depriving the widow of her choice of the boy

1. 1915 M W N 236
2. (1903) 13 M L J 239 I L R 26 Mad 627
3. (1913) 25 M L J 386 : L R 41 I.A 51 : I.L.R 37 Mad 199 (P.C.).
4. (1930) 59 M L J 615 L R. 57 I A. 296 : I L.R. 10 Pat 187 (P C)
5. (1935) 69 M L J 388 (P C).
6. (1914) 27 M L J 638 : I L.R. 39 Mad. 77.
7. (1932) 66 M L J. 37.

to be adopted and forcing the sapinda's son on her in his own selfish interests. If there are several sapindas of the same degree having sons of their own, each of them might insist on the adoption of one of his own sons and they are rarely likely to agree on any particular boy. These considerations would have to be kept in mind in deciding whether the *obiter dictum* of Bhashyam Aiyangar, J. in *Subramaniam v. Venkamma*[1], is to be accepted as a correct enunciation of the law applicable to all cases and circumstances. In the present case, the learned Judge whose judgment is now under appeal, has expressed his conclusion on this part of the case in these words,

"I am of opinion that the plaintiff in this case was, in these circumstances, not actuated by proper motives, in withholding his consent. The widow, was therefore justified in disregarding the refusal of the plaintiff. Admittedly the nearest sapinda, then would be Govinda Raju, the paternal grandfather of her deceased husband and his consent was sufficient to enable her to make a valid adoption."

With this conclusion, I am in entire agreement.

It therefore follows that this Letters Patent Appeal fails and must be dismissed with costs.

V S

Appeal dismissed.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. P. V. RAJAMANNAR, *Chief Justice*, MR. JUSTICE VISWANATHA SASTRI AND MR. JUSTICE RAGHAVA RAO.

Ediga Hanumanthappa and another . . *Appellants**

v

Eeranti Seethayya and Company consisting of Eeranti Seethayya and another . . *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 2 and 15—Decree in favour of firm—Payment outside Court to one of the partners—If binds other partners.

Per Full Bench (Raghava Rao, J., dissenting) —When a decree is passed in favour of a firm, payment made outside Court to one partner decree-holder can bind the other partners decree-holders, provided that the other partners decree-holders would be at liberty to establish special circumstances why such a payment should not bind them.

Mohammed Silar Sahib v. Nabikhan Sahib, (1916) 31 M.L.J. 93 and *Muthuswami v. Narasimha*, (1933) 66 M.L.J. 656 : I.L.R. 57 Mad. 696, overruled.

Observations of Bhashyam Ayyengar, J. in *Periaswami v. Krishna Ayyar* (1902) 12 M.L.J. 166 : I.L.R. 25 Mad. 431 (F.B.) not approved.

Appeal against the order of the District Court, Anantapur, dated 15th January 1946, in O.S. No. 147 of 1945, preferred against the order, dated 8th August, 1945, in E.A. No. 218 of 1945 in E.P. No. 467 of 1944, in O.S. No. 133 of 1942, District Munsiff Court, Anantapur.

D. Narasaraju and *K. B. Krishnamurthi* for Appellants.

T. S. Narasinga Rao and *K. Balachandrudu* for Respondents.

The Court (CLARK, J.) made the following

Order of Reference to a Full Bench —This appeal is filed by the judgment-debtors in O.S. No. 133 of 1942 on the file of the District Munsif's Court, Anantapur. They filed an application to enter up satisfaction,—E.A. No. 218 of 1945. At that time, there was an execution application (E.P. No. 467 of 1944) pending. The amount due under the decree was Rs. 3,342-8-0 and the application for execution was in respect of that amount.

The decree-holder is a firm, Eranti Seethayya and company, consisting of two partners Eranti Seethayya and Thallam Suryanarayanappa. The application for execution was filed by Eranti Seethayya. The judgment-debtors' application to enter up satisfaction was in respect of an alleged payment of Rs. 2,750 to the other patner, Suryanarayanappa. The judgment-debtors claimed that he accepted that amount in full satisfaction of the decree. The payment was evidenced by a receipt which has been exhibited as Ex. P. 1 and the partner, Suryanarayanappa gave evidence in support of the judgment-debtors' application. He has a four-anna interest in the firm and, in cross-examination by the counsel appearing for his partner, he admitted that he had not been authorised to compromise the claim and further that he and his partner were on inimical terms.

The District Munsif of Anantapur held that the settlement of the decree behind the back of the managing partner "is thoroughly fraudulent and *mala fide*." But, on appeal, the District Judge of Anantapur did not deal with this aspect of the case. I have thought it unnecessary to remand the

1. (1903) 13 M.L.J. 239 : I.L.R. 26 Mad. 627.

* A. A. A. O. No. 199 of 1946. 4th March, 1949.

case for a finding on this point as it is agreed by counsel before me that the only evidence before the District Munsif was the receipt, Ex. P-1, and the evidence of Suryanarayanappa, to which I have already referred I cannot accept the finding of the District Munsif that the payment was fraudulent and *mala fide*. This was not suggested to Suryanarayanappa when he was cross-examined. All that was suggested to him was that he had no authority to settle the decretal amount for Rs 2,750 and generally that he was not dealing with the suit or the execution proceedings Accordingly I hold that Rs 2,750 was in fact, paid by the judgment-debtors to the partner, Suryanarayanappa and the only question is whether that payment is sufficient to discharge the judgment-debtors from their liability under the decree in favour of the firm Both the courts below have held that it is not, and have arrived at that decision of this court in *Muthuswami* v *Narasimha*[1] If that was the only decision of this Court on the point, there would be no difficulty, but it is not There are two other decisions to the contrary. They are *Duraiswami Sastrigal* v. *Venkatarama Ayyar*[2] and *Krishna Hande* v. *Padmanabha Hande*[3].

Muthuswami v *Narasimha*[1] followed an earlier decision of this Court in *Mohammad Silar Sahib* v. *Nabi Khan Sahib*[4], which was expressly founded on the observations of Bashyam, J, in *Periaswami* v. *Krishna Ayyan*[5] *Mohammad Silar Sahib* v *Nabhi Khan Sahib*[4] was also followed in *Thimma Reddi* v *Subba Reddiar*[6], and *Pitcha Kuttiya Pillai* v *Doraiswami Mooppanar*[7]. This is an imposing list of authority and ordinarily I should have felt complelled to accept the authority of the decision in *Muthuswami* v *Narasimha*[1] Also, that decision was arrived at in 1934, whereas the latter of the two decisions to the contrary was a decision of 1913 However, I feel unable to regard the point as concluded by the decision in *Muthuswami* v *Narasimha*[1] There was no discussion in that case of the decisions arrived at in *Duraiswami Sastrigal* v *Venkatarama Ayyar*[2] or *Krishna Hande* v *Padmanabha Hande*[3], although the Bench which disposed of the earlier of those two cases, (Sundara Ayyar and Phillips, JJ), had expressly dissented from the observations of Bashyam J in *Periasami* v *Krishna Ayyan*[5] Further, I feel that it is to be regretted that the point upon which the decision in *Diraisami Sastrigal* v *Venkatarama Aiyar*[2] was principlally founded was not considered in disposing of *Muthusami* v *Narasimha*[1]. The point concerned section 7 of the Limitation Act and the inferences properly to be drawn from the wording of that section

In view of this conflict, I consider that the following question should be referred for decision by a Full bench:

"When a decree is passed in favour of a firm, can payment outside court to one partner/decree-holder bind the other partner/decree-holders?"

Accordingly, I direct that this case be placed before the Hon'ble Chief Justice for orders.

The costs of this appeal will abide the decision of the Full Bench

(In pursuance of the above Order of Reference to the Full Bench dated 7th January, 1948, by Clark, J, this appeal coming on for hearing the Court delivered the following

JUDGMENTS: *The Chief Justice*—The question referred to the decision of the Full Bench is,

"when a decree is passed in favour of a firm, can payment outside Court to one partner/decree-holder bind the other partner/decree-holders?"

Though the question is in general terms, it is necessary to state the facts of the case to understand the implications of the question On 18th August, 1942, the District Munsif of Anantapur passed a preliminary decree for sale in a suit on a mortgage in favour of the firm of Eeranti Seethayya and company against the two defendants who are the appellants before us. The firm was represented by its managing partner, Eeranti Seethayya. The final decree was duly made on 17th July, 1943 On the 12th October, 1944, the execution petition (E.P No 467 of 1944) was filed by the decree-holder firm by its managing partner, Eeranti Seethayya, to recover a sum of Rs 3,342-8-0, by sale of the mortgaged properties. While this application was pending, on 22nd March 1945, the judgment-debtors filed an application under Order 21, rule 2, Civil Procedure Code, for recording full satisfaction of the decree, on the ground that they had paid Rs 2,750 to one Tallam Suryanarayanappa, a partner of the decree-holder firm on 15th January, 1945 in full satisfaction of the amount due under the decree and had obtained a receipt (Ex. P. 1) from him The managing partner opposed the application on two grounds: (1) that payment to one of the partners was not a valid payment, and (2) that the judgment-debtors and the other partner had colluded together and brought about the receipt fraudulently. The District Munsiff of Anantapur held that

1. (1933) 66 M L J 656 I L R. 57 Mad 696
2. (1911) 21 M L J. 1088.
3. (1913) 25 M L J 442
4. (1916) 31 M L.J 93.
5. (1902) 12 M L J. 166. I L.R. 25 Mad. 431 (F B)
6. (1918) M W N. 507.
7. (1924) 47 M L J. 498.

the settlement alleged by the judgment-debtors was fraudulent and *mala fide* and that the receipt granted by one of the joint decree-holders, that is, one of the partners, was not binding on the other partner who was executing the decree He followed the decision of a Division Bench of this court in *Muthuswami* v *Narasimha*[1]. On appeal, the learned District Judge of Anantapur confirmed the order of the District Munsiff He rested his decision on the point of law that one of the joint decree-holders,though they be partners, cannot give a valid discharge by receiving payment out of court without the concurrence of the other decree-holders He also followed the ruling in *Muthuswami* v. *Narasimha*[1] He did not give a finding as to the *bona fides* of the alleged payment itself The judgment-debtors filed a second appeal to this Court When it came on for hearing before Clark, J ,he thought it was unnecessary to remand the case for a finding on the question of fact He went into the evidence himself, and held that a sum of Rs 2,750 was in fact paid by the judgment-debtors to one of the partners, namely, T Suryanarayanappa The only question, therefore, which remained for his decision was whether that payment was sufficient to discharge the judgment-debtors from their liability under the decree in favour of the firm He found a conflict of authority on this question, and in view of the conflict, considered that the question may be referred for decision by a Full Bench

Both the Courts below, the learned Judge here, and counsel on either side before us, argued this question on the assumption that the decree in favour of the firm must be deemed to be a joint decree in favour of the two partners of the firm, namely, Eeranti Seethayya and Tallam Suryanarayanappa. Actually, the name of the latter did not find a place in the decree or in the execution application, but it is common ground, that he was at all material times a partner of the firm

Before proceeding to discuss the conflicting decisions on this question, I shall refer to the statutory provisions which have a bearing on the question Under Order 21, rule 1, sub-rule (1)

> All money payable under a decree shall be paid as follows, namely
>
> (*a*) into the Court whose duty is to execute the decree ; or
>
> (*b*) out of Court to the decree-holder ; or
>
> (*c*) otherwise as the Court which made the decree directs "

Rule 2, sub-rule (1) runs thus

> " Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly "

Though it may not appear to have a direct application, the following provision, namely, rule 15 of the same order has been considered as having great relevancy. That rule is in these terms

> " (1) Where a decree has been passed jointly in favour of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the deceased
>
> (2) Where the court sees sufficient cause for allowing the decree to be executed on an application made under this rule, it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application '

There is one section of the Limitation Act which, to my mind, does throw considerable light on the point in issue, and that is section 7 of the present Act of 1908. Section 7 enacts

> " Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability, and a discharge can be given without concurrence of such person, time will run against them all ; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased "

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1. (1933) 66 M L.J. 656 · I L R. 57 Mad. 696.

Two illustrations are appended to this section, which are interesting It may be mentioned here that the corresponding section of the Indian Limitation Act of 1877 (Act XV of 1877), namely, section 8, ran as follows

" When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all, but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others "

Money due under a decree can be paid out of court to the decree-holder, who presumably can give a valid discharge Only Rule 2 insists that such payment shall be certified, and recorded Obviously, a payment to an authorised agent of the decree-holder, that is, a person authorised by the decree-holder to receive the decree amount and give a discharge, would also be a payment to the decree-holder. When there are two or more decree-holders and the decree is passed jointly in favour of them all, then obviously, payment must be to all of them, because the word " decree-holder " must mean " decree-holders ", when there is a plurality of decree-holders It follows that when there are two or more decree-holders, a payment to one of them cannot be a valid payment under rule 1 of Order XXI which can be certified or recorded under rule 2. This is, of course, subject to the qualification that if one of two or more decree-holders happens to be also the authorised agent of the other decree-holder or decree-holders, then he can give a valid discharge on behalf of himself and the others So far, there appears to be no occasion for controversy But what is contended for by the respondents and controverted by the appellants is that the agency empowering one of the decree-holders to accept a payment and give a discharge on behalf of the other decree-holders must be an agency created after the decree, unless the decree itself recognises such agency The question, therefore, narrows itself down to this, namely, whether the agency should be special and post-decretal, or whether the agency could be general and existing even before the passing of the decree, though certainly it should be subsisting at the time of the payment and discharge

Taking the case of partners, which is the case on hand, section 18 of the Partnership Act declares what has always been understood as a principle of universal application that a partner is the agent of the firm for the purposes of the business of the firm. The implied authority of every partner to bind the firm by any act of his done to carry on in the usual way the business of the firm, is subject to other provisions of the Act, limiting such power It has never been doubted that ordinarily one of the partners of a firm can receive a debt due to the firm and the payment to him would be a valid discharge of the debt, binding on the entire firm. The question is whether there is any principle, either expressly laid in, or necessarily to be implied from, any enactment, which overrides and puts an end to this implied agency of a partner Any express provision to that effect I have been unable to discover But it is contended that this limitation on the power of a partner as an agent of the firm necessarily flows from the provisions of Order 21, rule 1 (1) (*b*) and rule 15 On the other hand it is urged by the appellants that logically there is no impediment to applying the general law of partnership, under which one partner is the agent of the other partners even to rights declared by a decree of court A partner is not expressly prohibited from receiving money due under a decree to the firm out of court, nor is it stated that such a payment would not bind the other partners If the decree-holder is the firm composed of the several partners, that payment to one of them, would be in law a payment to the firm. If one of the partners could have given a discharge by accepting payment in favour of the claim which is the subject matter of the suit before the decree, it does not stand to reason—so the argument ran that he cannot do so once a decree is passed. As the several aspects of the question find support in one or other of the decisions cited to us, I shall now deal with them chronologically.

The earliest of the cases in *Sultan Mohideen* v *Savalayammal*[1] is not of much help There one of two decree-holders applied for execution of the decree to the

1 (1892) 2 M L J 50 I.L.R. 15 Mad 343.

full amount. It appeared that the other decree-holder had received a certain sum from the judgment-debtor, but the payment had not been certified It was held that the payment was valid only to the extent of the share to which the payee was entitled, and the court directed that the share due to the payee should be ascertained, and credit given for it, and the decree should be executed in favour of the applicant for the balance The learned Judges gave this direction for the purpose of determining what order should be passed under section 231 (corresponding to Order 21, rule 15 of the present Code)

In *Perasami* v *Krishna Ayyan*[1] the facts were as follows . On 30th June 1892, a joint decree was passed in favour of three brothers, who, at the date of the decree, were all minors On 3rd January, 1896, an application for execution was made. On that date, two of the brothers had attained majority, but one was still a minor. On 25th February 1899, the next application for execution was presented, by which time the youngest of the brothers also had attained majority, but three years had not elapsed from the date on which he had attained majority It was held by the Full Bench that the application was barred by limitation, and the joint decree was no longer executable even in respect of the interest of the youngest of the decree-holders Reliance was placed for the decree-holders on section 8 of the Limitation Act then in force, but the learned Judges decided that joint decree-holders were not "joint creditors" within the meaning of that section There is nothing in the judgment of Sir Arnold White, C J , which is material for the purpose of this case It was in his judgment, that Davies, Benson and Moore, JJ concurred. Bhashyam Aiyangar, J , delivered a separate judgment, in which he held that if the last preceding application for execution was made in accordance with law, the application before the court, whether regarded as one made by all three joint decree-holders or by the youngest brother alone for the benefit of all, or for his share was barred by limitation During the course of his judgment, he made certain observations in discussing the point whether joint decree-holders were joint creditors within the meaning of section 8 In his opinion if joint decree-holders could be considered to be joint creditors within the meaning of that section, it would follow that the execution application of 1899 was not barred because

> "no discharge of the decree could validly be given either by the senior of the major brothers or by both without the concurrence of the youngest"

As the observations he made in this connection have been the foundation of some of the later decisions, it is useful to extract them

> "A payment made out of court only to one of several joint decree-holders cannot bind the others unless he was also constituted, by them, an agent for the purpose, in which case alone the payment can be recorded as certified under section 258, Civil Procedure Code . . . But payment to one or some of several joint decree-holders cannot operate as a discharge of the decree-debt, nor be recorded as certified under section 258, Civil Procedure Code, unless, of course, such person or persons were duly authorised by the others to accept such payment in entire or partial satisfaction of the decree"

Referring to the position of the managing member of an undivided Hindu family as a joint decree-holder, the learnaed Judge said,

> "The mere fact that one of the joint decree-holders is the managing member of an undivided Hindu family consisting of the joint decree-holders will not empower him to give a valid discharge of the decree debt, without the concurrence of the remaining members, any more than it will empower him to execute the whole decree, as of right, without the concurrence of the remaining decree-holders"

From an analysis of the observations of the learned Judge on this point, only two reasons emerge to support his conclusion first, that the expression "decree-holder" will include also the plural "decree-holders" and if the decree be in favour of two or more persons as joint decree-holders, the amount should be paid to all of them If the learned Judge meant that one decree-holder as such could not give a discharge on behalf of all the decree-holders, the rule is axiomatic and can admit of no argument. But he surely did not mean that in no case could one of several joint decree-holders give a valid discharge, when there were two or more decree-holders He himself points out that a payment to one only would bind the

1 (1902) 12 M.L.J 166 I L R 25 Mad 431

others, if he was constituted by them an agent for the purpoe. The question, therefore, still remains whether this constitution of one of the joint decree-holders as an agent should be for the special purpose of giving a discharge of the decree-debt, or if such constitution could be the result flowing from the general or personal law applicable to the parties Second, that under section 231, Civil Procedure Code (corresponding to Order 21, rule 15) one of the joint decree-holders cannot execute the whole decree as of right, without the concurrence of the remaining decree-holders, and he has to obtain permission from the court to execute the whole decree, and the court may, if it sees sufficient cause, allow him to so execute the whole decree, and in that case the court could pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application. In drawing any inference from this section, it is important to bear in mind three things: namely, that it is a procedural provision, it is enabling in its character, and it is general in its application Aa a matter of procedure, it lays down that when there is a decree passed in favour of two or more persons, in special circumstances, one of them alone can be permitted to execute the decree, the ordinary rule being that all of them should join in executing it It does not profess to effect the substantive rights of parties under the general law, and it neither expressly nor impliedly says anything about what may happen outside court and without its intervention Next, it is clearly an enabling section. It does not prohibit any act For the sake of convenience, when there is a plurality of decree-holders, it permits one of them to execute the decree with the leave of the court It does not prohibit the judgment-debtor from paying money due under the decree out of court It does not declare to whom it should be paid out of court. Nor does it declare the effect of a payment by the judgment-debtor to one of several decree-holders Finally, it applies to all kinds of joint decrees, such as for instance decrees passed in favour of several decree-holders who may be tenants-in-common owning undivided shares in property, between whom *inter se* there is no kind of relationship of agency and where one of them has no special representative capacity It may be, that in such cases the court, when it allows one of them to execute the whole decree, passes such order as it deems necessary to protect the interests of the other decree-holders. I am ready to confess that I have considerable doubt as to the application of this rule (Order 21, rule 15) to the case of a decree passed in favour of a firm Taking the case now before us as an instance, what we find is that there is a decree passed in favour of Eeranti Seethayya and Company represented by its managing partner, Eeranti Seethayya The name of the other partner does not appear on the face of the decree The execution petition was filed by Eeranti Seethayya alone as the managing partner of the firm, and it has been signed only by him In the petition, there is no mention of the name of the other partner. There was no order obtained under Order 21, rule 15 Under Order 30, rule 1 (2), where persons sue or are sued as partners in the name of their firm, it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons. I do not see anything which prevents the same rule obtaining in the case of execution applications I do not find anything in the Code or in the Civil Rules of Practice to compel an execution application on behalf of a firm as decree-holder to be signed and verified by all the partners Where a decree has been passed against a firm, execution may be granted, under Order 21, rule 50, not only against the property of the partnership, but against any person who has admitted on the pleadings or who has been adjudged to be a partner and a decree-holder is also entitled to cause the decree to be executed against any person not mentioned in the decree as a partner, alleging that he is a partner, and where the liability is disputed, the issue can even be tried in a manner in which any issue in a suit can be tried and determined But, even assuming that Order 21, rule 15 of the Code applies to the case of a decree obtained by a firm, it does not, in my opinion, directly or indirectly affect, enlarge or abridge the rights and obligations of the partners *inter se* or in their relation to third parties according to the general law applicable to them.

There is another aspect of the matter adverted to by Bhashyam Aiyangar, J., which must not be overlooked. According to him, section 8 of the Limitation Act then in force could not apply to the case of joint decree-holders, because one of several persons entitled jointly to make an application for execution could not, without the concurrence of others, give a valid discharge binding upon all in respect of the matter of the application, though it may be that according to the general law or the personal law governing them, one of several joint creditors or claimants might give a discharge binding upon the others. Now, subsequent to this decision which was in 1902, there has been a change in the section corresponding to section 8 of the Limitation Act of 1877. Section 7 of the present Act which replaces section 8 of the Act of 1877 expressly makes it applicable to the case of an application for the execution of a decree in favour of several persons, and to the contingency of a discharge being given by one on behalf of the other decree-holders, without the concurrence of such persons. The two illustrations which were appended to the old section 8 have been reproduced without any alteration. This statutory provision, to my mind, appears to directly overrule the opinion expressed by Bhashyam Aiyangar, J., that in no case could one decree-holder, without the concurrence of the others, give a valid discharge binding upon all.

The next case in *Duraiswami Sastriar* v. *Venkatarama Iyer*[1] arose under section 7 of the Limitation Act, 1908. Sundara Aiyar and Phillips, JJ., held that the managing member of a Hindu joint family was competent to give a valid discharge of a decree-debt due to the family, within the meaning of that section. In that case, a decree was passed in favour of two persons who were members of a joint Hindu family, of whom the first plaintiff was the managing member. The learned Judges pointed to the alternation in the statute of limitation and stated that it contemplated the existence of cases where one of several decree-holders could give a discharge without the concurrence of the others. The learned Judges expressly dissented from the observations of Bhashyam Aiyangar, J., in *Periasami* v. *Krishna Aiyan*[2], in these terms:—

> "If the learned Judge really meant to lay down that the provisions of section 257 should be construed without reference to the substantive law of the parties in deciding whether one of them is entitled to receive moneys for which a decree is passed in favour of a joint Hindu family, then, with all deference, we are unable to concur with him."

The learned Judges also pointed out that the language of section 257 of the old Code is only permissive and does not expressly prohibit the payment to an agent or to one having the power of an agent under the law of the partnership. Their following remarks on the scope of Order 21, rule 15 are also relevant:

> "It is no doubt open to the Court, where the manager is obliged to seek its help for realising a decree by process of execution, to direct security to be given for protecting the interests of other members when it sees reason for doing so, but this cannot deprive him of the right to receive the money himself if he can do so without the assistance of the court."

No doubt, the learned Judges gave as an additional reason in support of their conclusion that it had been held by a Division Bench that a managing member would have a right to compromise a suit without the consent of the Court where minor members of the family are parties to the litigation and are represented by the managing member as their guardian. The reference is to the decision in *Ganesh Rao* v. *Tuljaram Rao*[3]. This decision of the High Court was, however, reversed by the Privy Council in *Ganesh Rao* v. *Tuljaram Rao*[4]. But I agree with the learned Judges who decided *Krishna Hande* v. *Padmanabha Hande*[5] that the reversal of the decision of this Court on that point does not affect the correctness of the conclusion in *Duraiswami Sastri* v. *Venkatarama Iyer*[1]. *Tuljaram's case*[4] was decided on the express provisions of Order 32, rule 7, which prohibits a next friend or guardian of a minor from entering into any agreement or compromise on behalf of a minor, without leave of the Court. The manager of a joint Hindu family, once he accepts the

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1 (1911) 21 M L J 1088.

2 (1902) 12 M L J 166 : I L R 25 Mad 431 (F B).

3 (1908) 19 M L J 4.

4 (1913) 25 M L J 150 : L R 40 I A 132 : I L R 36 Mad 295 (P C).

5 (1913) 25 M L J 442.

position of a next friend or guardian of a minor coparcener, to that extent, must be deemed to have himself surrendered his rights under general law as manager of the family There is no such express provision when the manager is not also the next friend or guardian of any of the minor coparceners Then, the prohibition will not stand in the way, and he will be entitled to exercise his powers under the general and personal law That this is so in spite of the ruling of the Privy Council in *Ganesh Rao* v *Tuljaram Rao*[1] is clear from a decision of a Bench of this Court in *Ramalinga Chettiar* v *Radhakrishna Chettiar*[2] It was there held that the provisions of Order 32, rules 6 and 7 did not restrict in any way the powers of a father or a manager in a joint Hindu family to receive the amount of a decree and to give a discharge so as to bind a minor member of his family also, who is a party to the suit, without obtaining the leave of the Court, in case where such father or managing member is not the next friend of the minor, because there is no provision, statutory or otherwise, imposing such a restriction

The next decision in order of date is that in *Mahomed Silar Sahib* v *Nabi Khan Sahib*[3] which sounded a note opposed to that of *Duraiswami Sastri* v. *Venkatarama Iyer*[4] and *Krishna Hande* v *Padmanabha Hande*[5] In this case, the learned Judges, Oldfield and Sadasiva Aiyar, JJ , held that where three partners held a joint decree a payment out of Court of the decree amount to two of them, cannot bind the third wholly or in part, unless they had been constituted by him agent for the receipt of the decree amount Oldfield, J , contented himself with accepting the statement of the law by Bhashyam Aiyangar, J , in *Periasami* v *Krishna Ayyan*[6] Sadasiva Aiyar, J., dealt with the question at greater length He said,

"The right of two out of three partners to receive on behalf of the partnership a partnership debt *which has not merged into a decree*, so as to bind the third partner, has no bearing on the decision of the question whether when the three partners have become joint *decree-holders* (and are not merely joint private creditors), two of them *as such decree-holders* can receive the joint decree-debt so as to release the judgment-debtor from liability in execution for even a portion of the decree-debt Sir Bhashyam Aiyangar's judgment in *Periasami* v *Krishna Ayyan*[6], in my opinion, establishes that one of the several joint decree-holders cannot receive his alleged share of the decree-debt so as to enable the judgment-debtor to put forward a claim to enter satisfaction of that portion of the decree unless the payee had been appointed by all other decree-holders as their agent The status as such agent must either appear expressly in the decree or should be expressly created after the passing of the decree, and cannot merely be inferred from the position of the payee as managing member of the joint Hindu family of the decree-holders or as one of several partners decree-holders see also *Lachman Das* v *Chaturbhuj Das*[7]."

With great respect to the learned Judge, I find no additional and convincing reasons in his judgment, apart from the reasons contained in Sir Bhashyam Aiyangar's judgment. I fail to see the logic of the rule that the status as agent must either appear expressly in the decree or should be expressly created after the passing of the decree I also fail to see why the right of two out of three partners to receive a partnership debt which has not merged into a decree so as to bind the third partner has no bearing on the question whether in respect of the same debt two of them as decree-holders can receive the joint decree-debt so as to release the judgment-debtor from liability

Sadasiva Aiyar, J , referred to the decision in *Lachman Das* v *Chaturbhuj Das*[7]. In that case, Banerjee and Richards, JJ , held that one out of several joint decree-holders was not competent to give a valid discharge for the amount of the joint decree, and his position in this respect was not affected by the fact that he and his fellow decree-holders were co-executors The conclusion at which the learned Judges arrived appears to me to be entirely based upon their inference from the provisions of section 231 of the old Code, because they say,

"Under section 231 one of several decree-holders may apply for execution for the benefit of all the decree-holders The inference from the provisions of this section is irresistible that one of several decree-holders cannot give a full discharge of the amount of the decree"

1 (1913) 25 M L J 150 L R 40 I A 132 I L R 36 Mad 295 (P C)
2 (1935) 70 M L J 700
3 (1916) 31 M L J 93
4 (1911) 21 M L J 1088
5 (1913) 25 M L J 442
6 (1902) 12 M L J 166. I L R 25 Mad. 431 (F B)
7 (1905) I L.R 28 All 252.

I am unable to discover any such irresistible inference. Moreover, that case depended upon the provisions of section 92 of the Probate and Administration Act, under which one of several executors had power to release a debt due to the deceased. It is doubtful whether this can have a direct bearing on the question before us which is a case of payment.

In *Thimma Reddi* v. *Subba Reddiar*[1], Sadasiva Aiyar and Napier, JJ., applied the decision in *Mahomed Silar Sahib* v. *Nabi Khan Sahib*[2] to a case of a certification under Order 21, rule 2 by two out of four decree-holders. In that case, the payment was to all the four partners, but two of the partners alone certified the payment to Court. On this ground, the learned Judges held that the decree must be deemed to be alive in favour of all the decree-holders so far as the executing Court was concerned, though the decree had been discharged except in the eye of an executing Court. Actually, however, the application for execution by a transferee from the two partners who had certified, was held to be not maintainable and dismissed, and if I may say so, eventually justice was done. This decision does not carry the matter further, nor does the decision of Wallace, J., in *Pichakutti Pillai* v. *Doraiswami Moopanar*[3]. In that case, a decree had been passed jointly in favour of the manager of a joint Hindu family and certain minor coparceners represented by the manager as next friend and it was held that a payment to the manager cannot be recognised, unless leave of the Court had been obtained under Order 32, rule 6, Civil Procedure Code. The case directly fell within the ruling of the Judicial Committee in *Ganesh Rao* v. *Tuljaram Rao*[4]. The learned Judge however was also prepared to follow the view of the law enunciated in *Mahomed Silar Sahib* v. *Nabi Khan Sahib*[2].

It is not without significance that in none of the decisions beginning from *Mahomed Silar Sahib* v. *Nabi Khan Sahib*[2] was any reference made to the decision in *Duraiswami Sastri* v. *Venkatarama Iyer*[5] and *Krishna Hande* v. *Padmanabha Hande*[6].

Then, we finally come to *Muthuswami* v. *Narasimhan*[7] decided by Sundaram Chetti and Walsh, JJ. The facts of that case are practically identical with the facts of the case before us. The decree was obtained in the name of the firm represented by the managing partner. Subsequent to the decree, a brother of the managing partner, who was another partner, received a sum of Rs. 2,100 in full satisfaction of the decree, and put in a memorandum into Court to record satisfaction. The question was whether by reason of the payment a valid discharge of the decree-debt had been given, so as to bind the other partners of the firm. The learned Judge held that it had not been. Sundaram Chetti, J., who delivered the judgment of the Bench, discussed many of the decisions cited before us. But, curiously, the decisions in *Duraiswami Sastri* v. *Venkatarama Iyer*[5] and *Krishna Hande* v. *Padmanabha Hande*[6] were not referred to. We cannot presume that they were cited. The learned Judge starts with assuming that a decree in the name of a firm is a decree passed generally in favour of all the partners jointly even for the purpose of Order 21, rule 15, Civil Procedure Code. As I have already indicated, I have my doubts on this point. When the Code recognises a suit being filed in the name of the firm and therefore a decree being passed in the name of the firm, I fail to see why such a decree could not also be executed in the name of the firm and an application for execution signed by one of the partners. The learned Judge repeats the two reasons found in the observations of Bhashyam Aiyangar, J., in *Perrasami* v. *Krishna Ayyan*[8], namely, that the "decree-holder" includes "decree-holders", and under Order 21, rule 15, one of the joint decree-holders cannot, as a matter of right, execute the whole decree. I have discussed these two reasons above, and I am of opinion that neither leads to the conclusion that a payment made to one of the partners of a firm in whose favour a decree is passed, out of Court,

1 (1918) M.W.N. 507.
2 (1916) 31 M.L.J. 93.
3 (1924) 47 M.L.J. 498.
4 (1913) 25 M.L.J. 150: L.R. 40 I.A. 132: I.L.R. 36 Mad. 295 (P.C.).
5 (1911) 21 M.L.J. 1088.
6 (1913) 25 M.L.J. 442.
7 (1933) 66 M.L.J. 656: I.L.R. 57 Mad. 696.
8 (1902) 12 M.L.J. 166: I.L.R. 25 Mad. 431 (F.B.).

does not bind the other partners. The learned Judge, at page 701, concedes that a payment to one of the partners may, under the general law relating to partnership, be valid and binding on the firm But that circumstance, according to him, is not enough to validate the payment to one of them as against the other decree-holders, because of the principle of the decision of the Privy Council in *Ganesh Rao* v *Tuljaram Rao*[1] With great respect to the learned Judge, I must say that their Lordships of the Judicial Committee decided that case on the express provisions of Order 32, rule 7 They held that a managing member or father could not do any act in his capacity as managing member or father, which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment. I find nothing in Order 21, rule 1 or 2 or 15 which has even a remote similarly to the mandatory prohibition contained in Order 32, rule 7 I am clearly of opinion that the ruling of the Privy Council in *Ganesh Rao* v *Tuljaram Rao*[1] has no bearing on the question which falls for consideration in the case before us The learned Judge followed the decision in *Mahomed Sirai Sahib* v *Nabi Khan Sahib*[2] and *Lachman Das* v *Chaturbuj Das*[3], which I have already discussed *supra*

It cannot be disputed that if payment of the decree amount is made out of Court to a sole decree-holder or several joint decree-holders, it is that payment which will operate as a sufficient discharge of the debt and it is not the act of the Court in recording such payment as certified that operates as a discharge The Court only records satisfaction of the decree (vide *Periasami* v *Krishna Ayyan*[4], per Bhashyam Aiyangar, J) So, in my opinion, the legal effect of a payment out of Court to one of the partners of a firm must be determined by the general and personal law applicable to the parties. If before the passing of the decree one of the partners, by receiving payment of the debt which is the subject-matter of the suit, can give a valid discharge binding on the other members of the firm, logically, I fail to see why he cannot do so after the passing of the decree The debt no doubt has merged in the decree, but even thereafter it continues to be a debt No doubt, for the recovery of the debt, the machinery of the Court is also available after the decree. But that fact cannot destroy or prejudice the rights and liabilities of the partners *inter se*, and in relation to third parties It has been said in some of the decisions that the agency under the general law is not enough, it must be a special agency created subsequent to the decree for the purpose of receiving the decree amount on behalf of all, or an agency expressly declared in the decree itself It is not clear why the agency should be created subsequent to the decree Take, for instance, a case in which, before the passing of a decree, the partners of the firm had executed a power-of-attorney in favour of a person empowering him to recover monies due to the firm under decrees of Court Can it be contended reasonably that even in such a case the person holding such a power-of-attorney cannot receive payment of the decree amount on behalf of all? If it is sufficient that the agency is expressly declared in the decree itself, I am prepared to hold that the fact that the decree is expressed to be in favour of a firm amounts to a declaration that each partner is an agent of the other partners One can realise that, when the decree is merely in favour of two or more decree-holders without anything more appearing on its face, it is necessary to insist upon proof of special agency conferring the right to receive the decree amount on one of them. But when on the face of the decree it appears that the decree is in favour of the firm, that is, in favour of all the partners as such, I think it is reasonable to imply that the decree itself declares the rights which the partners would have under the general law.

After a consideration of the several decisions cited before us and the points which have been urged before us on either side, I have arrived at the conclusion that the answer to the question referred to the Full Bench, namely.

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1 (1913) 25 M L J 150 : L R 40 I A 132 I L R 36 Mad 295 (P C)
2. (1916) 31 M L J 93
3 (1905) I L R 28 All 252
4 (1902) 12 M L J 166 I L R. 25 Mad. 431 (F B)

"When a decree is passed in favour of a firm, can payment outside Court to one partner decree-holder bind the other partner decree-holders ?"

must be in the affirmative, provided that the other partners decree-holders would be at liberty to establish special circumstances why such a payment should not bind them

Viswanatha Sastri, J ·— The short point that arises for decision in this case is whether a payment of money due under a decree passed in favour of a firm to one of the partners of the firm is a valid discharge of the debtor's liability. In other words, is the payment binding on the other partners? An imposing array of cases has been presented to us to show that this Court has answered the question in the negative The cases are *Periasami* v *Krishna Ayyan*[1], *Mahomed Silar Sahib* v. *Nabi Khan Sahib*[2], *Thimmareddi* v *Subbareddi*[3], *Pichakutti Pillai* v *Doraiswami Moopanar*[4], *Arunachalam* v *Virappa*[5] and *Muthuswami* v *Narasimha*[6] The reasons for this conclusion are contained in the judgment of Bhashyam Aiyangar, J , in the first of the cases above referred to and the subsequent decisions have merely purported to follow the reasoning and conclusion of that learned Judge

Apart from precedents, how does the matter stand on principle and the statute law? When several persons enter into a partnership each individual partner constitutes the others his agents for the purpose of entering into contracts and transactions for him within the scope of the partnership concern and is liable on such contracts and transactions as if entered into personally by himself The fundamental idea is that partners when carrying on the business of the firm are agents as well as principals The definition of "partnership" in section 4 of the Indian Partnership Act (IX of 1932) is an epigrammatic statement of this established rule. Section 19 (1) of the same Act lays down that the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm Persons who have entered into partnership with one another are collectively called "a firm". If a firm lends out money it is open to a partner to receive payment in due course from the debtors of the firm and to give discharge so as to bind all the partners Indeed, the Madras High Court has gone so far as to hold that it is open to any one of two or more joint creditors to receive payment of a debt (other than a decree debt) so as to bind the other creditors and give a valid discharge to the debtor apart fron any question of agency, *Barber Maran* v. *Ramanna Goundan*[7], *Annapoornamma* v. *Akkayya*[8] and *Falla Satha* v *Mohamed Rashiduddin*[9]. This view has no doubt been dissented from by some of the other High Courts and it is unnecessary to canvass its soundness for the purposes of this case. Suffice it to say that if the debt in the present case had not been a decree-debt but an ordinary partnership debt, payment to one of the partners would be binding on the other partners and would operate as a discharge of the debtor's liability according to the view of all the High Courts

Does the interposition of a decree make any difference? In other words, is there anything in the Civil Procedure Code to preclude the applicability of the substantive law of agency and partnership as above stated to the realisation and discharge of decree-debts? It must be conceded that there are instances where rules of substantive law have been superseded by the specific and express provisions of the Civil Procedure Code Where, for instance, the manager of a joint Hindu family comprising minor coparceners or the father of minor sons in a joint family, is appointed guardian *ad litem* for the minor members in a suit, the powers of the manager or the father under the Hindu law are controlled by the provisions of Order 32, rule 7, Civil Procedure Code and he cannot, without the leave of the Court, enter into any agreement or compromise on behalf of the minors with reference to the suit and such an agreement or compromise

1 (1902) 12 M L J 166 · I L R 25 Mad 431 (F.B)
2. (1916) 31 M.L.J 93.
3. (1918) M W N. 507
4 (1924) 47 M L J 498
5 A I R. 1928 Mad. 800
6 (1933) 66 M L J 656 : I.L.R 57 Mad. 696
7 (1897) 7 M L J 269 · I.L R 20 Mad. 461
8. (1912) 24 M.L J 333 I L.R 36 Mad. 544
9 (1934) 40 L.W. 595.

would not be binding on the minors even if it was a *bona fide* settlement of a disputed claim and would have been quite within the authority of the manager or the father, if there had been no suit in which he functioned as the guardian *ad litem* of the minors. See *Ganesh Rao* v *Tuljaram Rao*[1], *Junna Bi* v *Vasantha Rao*[2] But the powers of the father or manager under the Hindu law would remain unaffected if he had not been appointed guardian *ad litem* for the minor members in the suit and he could receive payment and give a discharge of a decree-debt so as to bind the minor members unaffected by the provisions of Order 32, rule 6, see *Ramalinga Chettiar* v. *Radhakrishna Chettiar*[3] Similarly section 66, Civil Procedure Code, hits at *benami* purchases at execution sales by erecting a statutory bar to the maintainability of suits filed on such a *benami* title Are there any similar provisions in the Civil Procedure Code qualifying or displacing the substantive law of agency and partnership with reference to the realisation and discharge of decree-debts? There is no such positive or express mandate as is found in Order 32, rules 6 and 7, Civil Procedure Code, with reference to an agreement or compromise by a guardian *ad litem* or the receipt of money or other property by the said guardian

It is said, however, that the effect of Order 21, rules 1, 2 and 15, Civil Procedure Code, either singly or in combination, is to override the substantive law regulating the relations of partners and to disable one of the partners of the firm from receiving a decree-debt due to the firm and giving a valid discharge to the debtor Order 21, rule 1 directs that all money payable under a decree shall be paid as follows

> " (*a*) into the Court whose duty it is to execute the decree ,
> (*b*) out of Court to the decree-holder ; or
> (*c*) otherwise as the Court which made the decree directs "

By virtue of section 13, clause (2), General Clauses Act, words in the singular shall include the plural Therefore, the term " decree-holder " in Order 21, rule 1, clause (*b*) means " decree-holders " if there are two or more of them Similarly in Order 21, rule 2, clause (1) which speaks of a payment out of Court or adjustment to the satisfaction of the decree-holder, the expression " decree-holder " means " decree-holders " if there are two or more of them It may readily be granted that where a joint decree is passed in favour of two or more persons, not related as partners, a payment out of Court, in order to be binding on all, must be made to all the joint decree-holders and that one of several joint decree-holders cannot give a valid discharge of the entire decree without the concurrence of the others The cases cited at the beginning of this judgment are sufficient authority for the above proposition Order 21, rule 15, Civil Procedure Code, is a permissive or enabling provision which empowers the Court to execute a decree at the instance of one of several decree-holders safeguarding the interests of the others in a suitable manner. This rule recognises that even apart from any question of agency, express or implied, one of several decree-holders can execute the whole decree for the benefit of the all I do not see how the provision in Order 21, rule 15, relating to the executions of a joint decree by the Court at the instance of one of the decree-holders conclude the matter now under discussion It is no doubt the Court's duty where a partner decree-holder seeks its assistance for realising a decree by the process of execution to direct security to be given for protecting the interests of the other decree-holders, but this cannot, in my opinion, deprive a partner decree-holder of his right to receive the money outside Court, if it is paid, and to grant a discharge

In my opinion, there is nothing in the language of Order 21, rules 1 and 2 or rule 15 to preclude a decree-holder or decree-holders from receiving payment outside Court through an agent Let me take a simple case: Suppose all the decree-holders empower one of their number to receive payment of the decree amount and the judgment-debtor pays the decree debt to him who is so authorised to receive it. Can it be denied that there is a discharge or satisfaction of the decree in such a case? Does not the law of agency come into play and decide the rights of parties?

1 (1913) 25 M L J 150 : L R 40 I A 132 I L R 36 Mad 295 (P C)
2. (1916) 31 M L J 18 : L.R 43 I A 99 I L R 39 Mad 409 (P C)
3 (1935) 70 M L J. 700.

Again suppose there is a decree in favour of a money-lender *A*, who carries on his business through an agent empowered by a power of attorney to realise either amicably or by the process of execution, all debts due to *A* and the judgment-debtor pays a decree-debt to *A*'s agent. Is it not as good as a payment to the decree-holder *A* himself and is not the Court bound to record satisfaction if the payment is true? The answer can only be in the affirmative. In my opinion, it makes not the slightest difference whether the authority was given to the agent before or after the decree was obtained by *A* and I must express my very respectful, dissent from the following passage in the judgment of Sadasiva Aiyar, J., in *Mahomed Silar Sahib* v. *Nabi Khan Sahib*[1] quoted with approval in *Muthuswami* v. *Narasimha*[2]. The passage runs as follows:

"The status as agent must either appear expressly in the decree or should be expressly created after the passing of the decree."

In the converse case of a decree in favour of an agent as such, it is open to the principal always to step in and execute the decree or realise the decree amount out of Court by virtue of the realationship between him and the agent decree-holder. Assuming that a decree passed in favour of a firm without specifying the partners is a decree in favour of the partners, as joint decree-holders—a point on which I share the doubts expressed by my Lord—it cannot be said that the partners cease to hold a debt due to the firm as a partnership asset the moment a decree is passed for its recovery. Is it to be said that the moment that a decree is passed for a debt due to the partnership, the relationship of the partners *quoad* the decree-debt ceases and they become mere joint creditors entitled to the decree amount in such specific shares as they would be entitled to in the assets of the firm on a dissolution? It may be that on a dissolution, this asset, if it continues to exist as a decree, may have to be allotted to one of the partners as part of his share of the assets and that nothing is due to the other partners by reason of their overdrawings. This aspect of the matter has been referred to and relied upon by Sadasiva Aiyar, J., in *Mahomed Silar Sahib* v. *Nabi Khan Sahib*[1] to support a view contrary to that I am inclined to take. Says the learned Judge,

"I am very doubtful whether two out of three partners can in their individual capacities legally claim definite shares in a particular decree-debt belonging to themselves and the other partners jointly, such a decree-debt being only one asset out of the numerous partnership assets. I think that they cannot make such a claim to own separate shares in a particular asset any more than a member of a joint Hindu family can claim to receive in his individual capacity (or give a valid discharge for) his share of a particular debt due by one of the debtors of the joint Hindu family which possesses numerous other assets. Neither a partner nor a member of a joint Hindu family can claim and receive a definite share in a particular partnership debt or family debt, as the case may be."

If the reasoning is correct, the decree-debt continues to be an asset of the partnership like an ordinary debt and is not isolated and separated from the rest of the partnership assets. With the utmost respect I cannot see why the passing of a decree for a debt due to a partnership should effect such a vital or radical change in the relationship of the partners *quoad* that particular asset and sterilise the powers which each of them had to realise the debt for the benefit of the partnership. Nor can I see any compelling reason for construing Order 21, rules 1 and 2, Civil Procedure Code, as abrogating *pro tanto* or overriding the substantive law of partnership and agency.

The enactment of section 7 of the Limitation Act is a legislative recognition of the view that under the substantive law, one joint decree-holder might give a valid discharge of the entire decree. The section postulates that a co-decree-holder in addition to his capacity as a co-decree-holder can have such a legal capacity under the general law as would empower him alone to realise the decree-debt and give a discharge without executing the decree, even if the other joint decree-holder or decree-holders had been under no disability and had the requisite capacity to give their assent or concurrence. The most common instance of such legal capacity is to be found in the manager of a joint Hindu family or a partner in a

1 (1916) 31 M.L.J. 93. 2 (1933) 66 M.L.J. 656 : I.L.R. 57 Mad. 696.

firm as shown by the illustration to the old section 8 of the Limitation Act of 1877 which have been retained in the corresponding section 7 of the Limitation Act of 1908, though the illustrations are, as pointed out by my Lord during the course of the arguments, somewhat unhappy I consider that that part of the reasoning of Bhashyam Aiyangar, J, in *Periasami* v *Krishna Ayyan*[1] based on section 8 of the Limitation Act of 1877 is no longer of value in view of the enactment of section 7 of the Limitation Act.

It follows from the above reasoning that the decision in *Mahomed Silar Sahib* v *Nabi Khan Sahib*[2] and *Muthusami* v *Narasimha*[3] must be overruled. The decision in *Lakshman Das* v *Chaturbuj Das*[4] to the effect that one of several executors, though empowered by section 92 of the Probate and Administration Act (then in force) to give a discharge of a debt to the deceased, loses his statutory power when the debt gets merged in a decree in favour of all the executors is one from which I respectfully dissent The Civil Procedure Code primarily regulates procedure and in my opinion, there is no justification for extending the scope of Order 21, rules 1, 2 and 15 by a process of judicial interpretation so as to make serious inroads on substantive law and exclude a just defence of the judgment-debtor

I have not dealt with the situation that would arise if the alleged payment to a partner decree-holder is a fictitious, fraudulent or collusive arrangement intended to defraud the other partners decree-holders or if the firm had become dissolved and the authority of the partner to receive payment of the decree-debt on behalf of all the partners had been terminated to the knowledge of the judgment-debtor at the time of the payment The present case has proceeded on the assumption that there was a continuing or running partnership and the payment was *bona fide* made by the debtor to one of the partners decree-holders

After I prepared my opinion, I have had the advantage of reading the lucid and comprehensive judgment just delivered No less, however, than six learned Judges of this Court, past and present, have come to a different conclusion and I should be slow to differ from the reasons of those for whom I entertain a genuine respect, if I could feel any real doubt about the matter. As I differ from them, I deem it proper to state the reasons which have led me to an opinion, which, I am glad to find, coincides with that of my Lord. In other circumstances I should have been content merely to express my concurrence with him.

Raghava Rao, J—In his order recommending to the learned Chief Justice a reference to a Full Bench, Clark, J, has pointed out a conflict between the cases in *Doraiswami Sastrigal* v *Venkatarama Iyer*[5] and *Krishna Hande* v *Padmanabha Hande*[6], on the one hand and the cases in *Periasami* v *Krishna Ayyan*[1], *Mahomed Silar Sahib* v *Nabi Khan Sahib*[2], *Thimma Reddi* v *Subba Reddiar*[7] and *Muthuswami* v *Narasimha*[3] on the other The learned Judge has observed in relation to this latter line of decisions that they constitute an imposing list of authorities adverse to the appellant, in the present case, which he should have ordinarily felt compelled to accept, especially in view of the fact that the decision in *Muthuswami* v. *Narasimha*[3], the last of the latter line of decisions, was of the year 1934, whereas the later of the two decisions of the former line was a decision of 1913 Clark, J, has, however, pointed out, as the ground of his not adopting that course, that there was no discussion in the case in *Muthuswami* v *Narasimha*[3] of the decisions arrived at in *Doraiswami Sastrigal* v. *Venkatarama Iyer*[5] and *Krishna Hande* v. *Padmanabha Hande*[6], although the Bench which decided the earlier of these two cases consisting of Sundara Aiyar and Phillips, JJ, had expressly dissented from the observations of Bhashyam Aiyangar, J., in *Periasami* v *Krishna Ayyan*[1], which have been followed in the cases subse-

1 (1902) 12 M L J 166 : I L R 25 Mad. 431 (F B)
2 (1916) 31 M L J 93
3 (1933) 66 M L J. 656 I L R 57 Mad 696
4 (1905) I L R 28 All 252.
5. (1911) 21 M L J 1088
6. (1913) 25 M L J 442
7 (1918) M W N 507.

quent to *Duraiswami Sastrigal* v *Venkatarama Iyer*[1] and *Krishna Hande* v. *Padmanabha Hande*[2] The learned Judge also expressed a sense of regret that the point upon which the decision in *Doraiswami Sastrigal* v *Venkatarama Iyer*[1] was principally founded, which concerned section 7 of the Limitation Act and the inference properly to be drawn from the wording of that section, was not considered by the Bench which disposed of *Muthuswami* v *Narasimha*[3]

Before I actually deal with the point referred, I must, in fairness to the learned Judges who decided the case in *Muthuswami* v *Narasimha*[3], point out that although there is no reference in terms to the cases in *Duraiswami Sastrigal* v *Venkatarama Iyer*[1] and *Krishna Hande* v *Padmanabha Hande*[2] in the case in *Muthuswami* v *Narasimha*[3], there is an observation with reference to certain decisions quoted in the course of the argument before the Bench, as decisions given before the pronouncement of the Privy Council in *Ganesh Row* v *Tuljaram Row*[4], which would certainly include the decision in *Duraiswami Sastrigal* v *Venkatarama Iyer*[1], though not the decision in *Krishna Hande* v *Padmanabha Hande*[2]

The able argument of the learned advocate for the appellants based on the two cases in *Duraiswami Sastrigal* v *Venkatarama Iyer*[1] and *Krishna Hande* v *Padmanabha Hande*[2] has attempted to make two points (1) that the observations of Bhashyam Aiyangar, J, with reference to section 8 of the Limitation Act then in force have lost their significance as a result of the amendment of that section by section 7 of the Act of 1908 which takes in applications for execution as well as suits, and (2) that the interpretation placed by that learned Judge on section 231 of the Civil Procedure Code then in force, which corresponds to Order 21, rule 15 of the Civil Procedure Code of 1908, is erroneous

With reference to the first of the points, it falls to be observed *in limine* that, while section 8 of the Limitation Act then in force was held by Bhashyam Aiyangar, J, as well as his colleagues on the Full Bench not to be applicable to execution creditors for the reasons given by him at pages 441 and 442 of the case in *Periasami* v *Krishna Ayyan*[5], his discussion of the question of limitation involved in the case also proceeded, as would appear from pages 439 to 441 of the report on the basis that joint decree-holders might be regarded as joint creditors within the meaning of section 8 On the basis so assumed, the learned Judge points out that the application of the 25th February, 1899, is not obnoxious to the law of limitation, whether the same is regarded as an application for execution of the whole decree made by the youngest brother alone under section 231 of the Civil Procedure Code or by all the three brothers jointly, inasmuch as no discharge of the decree could validly be given either by the senior of the major brothers or by both without the concurrence of the youngest Such a disability to give a valid discharge on the part of the senior of the major brothers or on the part of both of them without the concurrence of the youngest was inferred by the learned Subordinate Judge from the language of section 237 of the Civil Procedure Code then in force Order 21, rule 1 of the present Code which expressly provided that

"all money payable under a decree should be paid unless otherwise directed by the decree either (*a*) into the court whose duty it is to execute the decree, or (*b*) out of court to the decree-holder"

With reference to the language of that section the learned Judge further observes that he need hardly add that the expression "decree-holder" in the singular will include also the plural, and that, if the decree be in favour of two or more persons as joint decree-holders, the amount should be paid to all of them, just as, if the amount were paid into Court, it would have to be drawn from the Court by all of them under a joint receipt The learned Judge lower down proceeds to consider the bearing of section 231 of the Civil Procedure Code then in force—Order 21, rule 15 of the present Code—on the question before them in a passage which I may extract here

1 (1911) 21 M L J 1088
2. (1913) 25 M L J 442
3 (1933) 66 M L J 656, I L R 57 Mad 696.
4 (1913) 25 M L J 150 L R 40 I A 132 I L R 36 Mad 295 (P C)
5 (1902) 12 M.L.J. 166, I L.R. 25 Mad. 431 (F.B)

"A payment made out of Court only to one of several joint decree-holders cannot bind the others unless he was also constituted, by them, an agent for the purpose, in which case alone the payment can be recorded as certified under section 258, Civil Procedure Code The mere fact that one of the joint decree-holders is the managing member of an undivided Hindu family consisting of the joint decree-holders will not empower him to give a valid discharge of the decree debt, without the concurrence of the remaining members, any more than it will empower him to execute the whole decree, as of right, without the concurrence of the remaining decree-holders Under section 231, Civil Procedure Code, any one of several joint decree-holders, constituting a Hindu family, whether he be the managing member or not, may, if the Court sees sufficient cause, be allowed to execute the whole decree and in that case the Court should pass such order as it deems necessary for protecting the interests of the persons who have not joined in the application As a general rule such order will be a direction to the applicant for execution to furnish sufficient security for the protection of the interests of such persons"

Such being the basis of the discussion at pages 439 to 441 of the report, however *obiter* the opinion expressed as a result of the discussion may have been, in view of the fact that the Full Bench held that joint creditors in section 8 of the Indian Limitation Act then in force did not include joint decree-holders, I am clearly of the opinion that the mere amendment of section 8 of the earlier Limitation Act by the Limitation Act of 1908 does not assist the case of the appellant, unless he is also able to establish the further point that the interpretation placed by Bhashyam Aiyangar, J, on section 231 of the Civil Procedure Code—Order 21, rule 15 of the present Code—is erroneous The amendment of the Statute of Limitation in 1908 does no doubt give legislative recognition to the competency of one joint decree-holder to give a valid discharge on behalf of the others. As the learned Judges who decided *Duraiswami Sastrigal* v *Venkatarama Iyer*[1] point out, and point out, if I may say so, with respect, correctly, section 7 of the present Limitation Act contemplates the existence of cases where one of several decree-holders can give a discharge without the concurrence of the others But does it follow from the amendment that the limits of such competency too stand enlarged—the limits, I mean, which are indicated by Bhashyam Aiyangar, J, in *Periasami* v *Krishna Ayyan*[2]? So much in my opinion does not follow *ex necessitate rei* Had an enlargement of such limits been contemplated by the Legislature, one should have found an amendment made by the Legislature, not merely of the language of section 8 of the earlier Limitation Act so as to extend its operation to cases of execution creditors, but also of the language of section 231 of the old Civil Procedure Code suitably enough to indicate legislative disapproval of Bhashyam Aiyangar, J's interpretation of section 231 of the old Civil Procedure Code craved by the learned Judge in aid of his conclusion with reference to the limits—of agency created by the decree or *post hoc*—within which only one joint decree-holder can give a valid discharge on behalf of others, as well as himself In the absence of any such latter amendment, the effect of the former amendment seems, to my mind, to be no more and no less than this that one out of many joint execution creditors can now give a valid discharge on behalf of the others as well as of himself but that the limits of the capacity of a joint execution creditor to give such a discharge remain still what Bhashyam Aiyangar, J, pointed them out to be in *Periasami* v *Krishna Ayyan*[2] The amendment of the provisions of the Limitation Act effected by the Legislature does not, by necessary implication, involve as amendment virtually, though not in terms, effected, of the relevant provisions of the Civil Procedure Code or the legislative repudiation of the reasoning employed by Bhashyam Aiyangar, J, for defining the limits of the competency of one of the joint decree-holders to give a valid discharge on behalf of the others as well as of himself It may be that, if Bhashyam Aiyangar, J's interpretation of section 231 of the Civil Procedure Code—Order 21, rule 15 of the present Code—is to be regarded as still correct, the amendment of the Statute of Limitation in 1908, which was only intended to place joint execution creditors on a line with the other joint creditors, will not be found to be as useful as otherwise it would be But it is no part of the function of this Court, in my opinion, to overrule such interpretation merely for the purposes of rendering the

1. (1911) 21 M L J 1088 431 (F B).
2 (1902) 12 M L J 166 I L R 25 Mad

amendment of the Indian Limitation Act in 1908 more practically purposeful After all, it is not as if the amendment of the relevant section of the Statute of Limitation in 1908 would be rendered altogether nugatory unless Bhashyam Aiyangar, J.'s interpretation of section 231 of the old Code of Civil Procedure should be overruled. Nor am I clear that the process of "assigning to the Legislature the interpretative functions of Courts," to use the language of Courts-Trotter, J , (as he then was) in *Chidambaram* v *Subramaniam*[1] should be so far pushed as to lead to the result contended for by the appellants Again, even in the case of Statutes in *pari materia*, as pointed out in Halsbury's 2nd edition of the Laws of England, volume 31 on Statutes at page 487, section 612, change of language is not necessarily conclusive that change of interpretation is intended Nor was it contended before us that a change of interpretation of section 231 of the old Civil Procedure Code—Order 21, rule 15 of the new Code—was intended by the Legislature by the very language of the amended section of the Indian Limitation Act

The point for consideration, then, is whether Bhashyam Aiyangar, J 's interpretation of section 231 of the old Code—Order 21, rule 15 of the present Code—is erroneous That, as already stated, is the second of the contentions raised by Mr Narasaraju It is true that the language of section 231 of the old Code—Order 21, rule 15 of the new Code,—is not, in the first part of it which uses the word "may" and does not run in the negative terms but positive, quite so explicitly mandatory or prohibitory as the language of section 461 of the old Code—Order 32, rule 6 of the present Code— But it is well known that even the word "may" may sometimes have to be treated as mandatory and cannot always be treated as only permissive or enabling It is relevant to notice further that an analogy between the two sets of provisions (*i e* , section 231 and section 461 of the old Code—Order 21, rule 15 and Order 32, rule 6 of the new Code) has from the very beginning entered into a discussion of the question now before us, in all the decided cases beginning with *Periasami* v *Krishna Ayyan*[2], and ending with *Muthuswami* v *Narasimha*[3], including even *Duraiswami Sastrigal* v *Venkatarama Iyer*[4], and *Krishna Hande* v *Padmanabha Hande*[5] Only, the case in *Duraiswami Sastrigal* v *Venkatarama Iyer*[4] differed from the interpretation of Bhashyam Aiyangar, J , of section 461 of the old Civil Procedure Code on the basis of the decision of Mr Justice Wallis as he then was on the original side of the High Court of Madras in *Ganesh Row* v *Tuljaram Row*[6] confirmed in O S A No 47 of 1908 in *Ganesh Row* v *Tuljaram Row*[7] So the learned Judges who decided the case in *Duraiswami Sastrigal* v *Venkatarama Iyer*[4] held that the analogy of the provisions of Order 32, rule 6 no longer existed in support of the decision of Bhashyam Aiyangar, J , in *Periasami* v *Krishna Ayyan*[2] The curious thing to notice however is that when, by the date of the decision in *Krishna Hande* v *Padmanabha Hande*[5], the High Court's ruling in O S A No 47 of 1908 *Ganesh Row* v *Tuljaram Row*[7] had been definitely reversed by the Privy Council in *Ganesh Row* v *Tuljaram Row*[8], the learned Judge who decided the case in *Krishna Hande* v *Padmanabha Hande*[5] still adhered to the decision in *Duraiswami Sastrigal* v *Venkatarama Iyer*[4] notwithstanding that one part of its reasoning had disappeared on account of the ruling of the Privy Council in *Ganesh Row* v *Tuljaram Row*[8] which *pro tanto*, rehabilitated the reasoning behind Bhashyam Aiyangar, J 's view in *Periasami* v *Krishna Ayyan*[2] It seems to me that Bhashyam Aiyangar, J 's view of section 461 of the Civil Procedure Code—Order 32, rule 6—rightly anticipated the decision of the Privy Council in *Ganesh Row* v *Tuljaram Row*[8] and the only question is whether the analogy of that provision drawn upon by the learned Judge is well founded

The force of the analogy as applicable to the case on hand is brought out very lucidly and more elaborately than even in the judgment of Bhashyam Aiyangar, J ,

1 (1915) 3 L W 86 at 88
2 (1902) 12 M L J 166 I L R 25 Mad 431 (F B)
3 (1933) 66 M L J 656 I L R. 57 Mad 656
4 (1911) 21 M L J 1008
5 (1913) 25 M L J 442
6 (1908) 19 M L J 4
7 (1911) 21 M L J 1093
8 (1913) 25 M L J 150. L R 40 I A 132 : I L R 36 Mad 295 (P C)

by Sundaram Chetti, J., in the case in *Muthuswami* v. *Narasimha*[1] in the following passage at pages 701 and 702:

"We have no doubt that one of the joint decree-holders though they are partners cannot give a valid discharge by receiving the decree amount out of Court without the concurrence of the other decree-holders. A payment to one of them may under the general law relating to partnership be valid and binding on the firm, but that circumstance is not enough to validate the payment made to one of them as against the other joint decree-holders, according to the principle of the decision of the Privy Council reported in *Ganesh Row* v. *Tuljaram Row*[2], though the particular provision of the Civil Procedure Code which their Lordships had to consider was rule 6 of Order 32, Civil Procedure Code. It is observed at page 303 as follows:

'The Courts in India seem to think that because Rajaram was a party to the suit of 1886 and was also guardian *ad litem* for his minor son, who was a member of the joint family whom Rajaram was representing, it was open to him to enter into the compromise in his personal capacity, and, as it was a *bona fide* settlement of a disputed claim, it became binding on the minor by virtue of his having acted as the managing member of the family. ... But they consider it to be clear that when he himself is the next friend or guardian of the minor, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment.'

After such a clear pronouncement by the Privy Council the fact that Narasimha Ayyar happened to be one of the partners in the present case does not help to make the payment to him of the decree amount a valid discharge binding on the other decree-holders."

Whatever might be said against the correctness of this interpretation of Order 21, rule 15, Civil Procedure Code, based especially on the analogy of Order 32, rule 6 of the Civil Procedure Code if the matter were *res integra*, I should think that, although, we, sitting as a Full Bench, have the power to overrule this interpretation, we ought to hesitate to do so on the principle of *stare decisis* especially because the point under consideration is one belonging to the domain of procedural law.

On the whole, I am not satisfied that the view taken in *Periasami* v. *Krishna Ayyan* and later decisions which have followed it, is founded upon such plainly erroneous construction of the relevant provisions of the Civil Procedure Code as to merit a reversal by this Bench. That is the consideration which we bear in mind, having regard to the statement of the law in Halsbury's Laws of England, 2nd edition, volume 19 on "Judgments and Orders", at page 257, article 557. The view taken in *Periasami* v. *Krishna Ayyan*[3] is founded on a very carefully reasoned exposition of the law by that very distinguished Judge, Bhashyam Aiyangar, J., and has been followed amongst other Judges by another distinguished Judge, Sadasiva Aiyar, J. It has stood the field for more than four decades, and it is not, in my opinion, desirable that we should at the present juncture upset it. After all, the intrusion of the general substantive law into the region of an adjectival enactment such as the Civil Procedure Code (like its intrusion if I may make a parenthetical observation into the region of special enactments of substantive law such as the Negotiable Instruments Act which adapts the law Merchant of England) must, in my opinion, be kept within the strictest possible limits, as such intrusion is calculated to create complexity and even engender confusion, to impair the certainties of the procedural law and open the door to fraud. It was on this kind of consideration that the observations of Bhashyam Aiyangar, J., in *Periasami* v. *Krishna Ayyan*[3] apparently proceeded, in inferring from the milder language of section 231 of the old Code, a prohibition analogous to that contained in the stronger language of section 461. It is manifest that Clark, J., in the present case would not himself have declined to follow the view taken in *Periasami* v. *Krishna Ayyan*[3] and *Muthuswami* v. *Narasimha*[1], but for the considerations adverted to by him in his order recommending a reference to a Full Bench which I have endeavoured to prove in the foregoing to be lacking in sufficient foundation.

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1. (1933) 66 M.L.J. 656 : I.L.R. 57 Mad. 696.
2. (1913) 25 M.L.J. 150 : L.R. 40 I.A. 132 : I.L.R. 36 Mad. 295 (P.C.).
3. (1902) 12 M.L.J. 166 : I.L.R. 25 Mad. 431 (F.B.).

I accordingly answer the question referred in the negative.

This judgment so far read out I had prepared before the judgments of the learned Chief Justice and my learned brother, Viswanatha Sastri, J, were circulated to me After reading those judgments I have entertained no doubt but that the case for a view contrary to that taken by that eminent Judge, Bhashyam Aiyangar, J, could not have been put more strongly than in those judgments I remain unconvinced however that the way to approach the decision of the question referred to us is not what I have indicated in the foregoing part of my judgment How far the general law should be permitted to encroach upon the region of processual law and hamper, if not altogether frustrate, the obvious object and broad purpose of the provisions of Order 21, rules 1 and 15, Civil Procedure Code, how far the catena of decisions which have sprung up in this Court after the decision in *Duraiswami Sastrigal* v *Venkatarama Iyer*[1] and *Krishna Hande* v *Padmanabha Hande*[2] on the basis of the observations of Bhashyam Aiyangar, J, which those two decisions, in my opinion, unnecessarily dissented from, should be disturbed in the interest of justice at this hour of day—these are the considerations which have determined the perspective from which I have approached the decision of the question referred and which account for the difference of opinion between the majority of the Bench and myself as revealed by our judgments Founding myself as I have done—I hope correctly—on these considerations, I find myself forced to disagree with respect with the view of the majority and abide with respect by the view of Bhashyam Aiyangar, J, and Sadasiva Aiyar, J, which has prevailed in this Court more or less uniformly for about half a century subject only to the dissident note struck in *Duraiswami Sastrigal* v *Venkatarama Iyer*[1] and *Krishna Hande* v *Padmanabha Hande*[2], which has been, not altogether without reason, as I have endeavoured to show in the foregoing, taken no notice, or serious notice for over 35 years

(After expression of the opinion of the Full Bench, this appeal coming on for final disposal on 16th March, 1949, before Govinda Menon, J, the Court delivered the following Judgment)

Following the opinion of the Full Bench, it has necessarily to be held that the satisfaction of the decree to the extent of Rs 2,750 (Rupees two thousand seven hundred and fifty only) should be recorded As regards the balance amount due, execution will proceed The decision of the lower appellate Court is reversed to that extent and the appeal allowed so far The appellant will get seven-eighths of his costs in the appeal payable by the respondent

K S *Appeal allowed in part.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR P V RAJAMANNAR, *Chief Justice*, MR JUSTICE VISWANATHA SASTRI AND MR JUSTICE BALAKRISHNA AYYAR

Molugu Lakshminarasimhacharyulu and others . *Petitioners**

v

Marisetti Ratnam and others . *Respondents*

Civil Procedure Code (V of 1908), Order 45, rules 4 and 7—Consolidation of appeals—Requisite conditions for ordering—Deposit of separate amounts for security and printing and translation charges in each of the appeals consolidated—If necessary

Where several suits out of which several appeals have arisen involve the same question for determination and were in effect decided in the trial Court by almost the same judgment (though separate judgments were delivered), and by a common judgment in the First and Second Appeals and Letters Patent Appeals, the case falls directly within the scope of Order 45, rule 4, Civil Procedure Code and the petitioners for leave to appeal against the judgment in the Letters Patent Appeal would be entitled to an order for consolidation of the several suits for the purpose of pecuniary valuation

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1 (1911) 21 M L J 1088 2 (1913) 25 M L J 442

* C M Ps Nos 3751 to 3756 of 1947 22nd April, 1949

Ramachandra Raju v *Appayya*, (1915) 2 L W 916, explained, *Pethu Reddiar* v *Rajambu Ammal*, (1948) 2 M L J 25 L R 75 I A 153 (P C), relied on

The petitioners will not be precluded from showing that the real value of the subject-matter in the appeals is different from the Court-fee value

Chandra Mouleswara Prasad Bahadur v *Secretary of State for India*, (1931) 61 M L J 692 I L R. 55 Mad 106, referred to

There is no doubt no express provision of law corresponding to Order 45, rule 4, Civil Procedure Code, permitting consolidation in respect of deposit of printing charges or furnishing security But the proper way of looking at the matter is not to search for a special provision of law permitting consolidation for purposes of security As after consolidation, the position is that there is only one appeal to the Privy Council or the Federal Court, the applicant or applicants can be asked to furnish security and deposit printing and translation charges only once It may be that having regard to the number of appeals consolidated and the number of respondents in the several appeals the Court may direct security for a sum in excess of Rs 4,000 So far as printing and other charges are concerned, except in special cases, one deposit would suffice

Ponnammal v *Rajambu Ammal*, (1945) 1 M L J 73 I L R 1945 Mad 672, not approved on this point

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to consolidate C M Ps Nos 3752 to 3756 of 1947 for leave to appeal to His Majesty in Council against the judgment of the High Court in L P A Nos 55 to 59 for purposes of valuation, hearing, furnishing security and paying deposit for the printing of records

P Somasundaram and *K Mangachari* for Petitioners

P Satyanarayana Raju for Respondents

The Court made the following

ORDER —Of the above applications C M. Ps Nos 3752 to 3756 are applications for leave to appeal to His Majesty in Council against the common judgment and respective decrees in Letters Patent Appeals Nos 55 to 59 of 1946 They must be now treated as applications for leave to appeal to the Federal Court. C M P No 3751 of 1947 is an application for the consolidation of the several appeals for purposes of pecuniary valuation, furnishing of security and deposit of printing charges and hearing It is represented that the matter involved in C. M P No 3756 has been settled.

These petitions have been posted before a Full Bench for a decision on the main question arising from C M P No 3751 of 1947, namely, whether the several appeals could be consolidated for the purposes of pecuniary valuation There is a further question if leave is eventually granted, whether the appeals could be consolidated even for purposes of security and deposit of printing and other charges provided in Order 45, rule 7 of the Code of Civil Procedure, so that one set of security and printing and other charges would be sufficient It is admitted that the subject-matter of each appeal by itself is not of the value of Rs 10,000 or upwards

The only provision of law directly applicable to the matter is Order 45, rule 4, of the Code of Civil Procedure which runs thus

"For the purposes of pecuniary jurisdiction, suits involving substantially the same questions for determination and decided by the same judgment may be consolidated, but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination"

It cannot be denied that the several suits out of which the appeals have arisen involve the same question for determination, namely, whether the lands situate in the village of Moggulla agraharam are lands situate in an "estate" within the meaning of the Madras Estates Land Act as amended by Madras Act XVIII of 1936 and Madras Act II of 1945 The determination of this question would depend upon whether the original grant in favour of the predecessor of the several plaintiffs was the grant of an entire village

It is also clear that the suits were decided by the same judgment Certainly there is a common judgment in the Letters Patent Appeals, in the Second Appeals and in the First Appeals to the Subordinate Judge's Court In the District Munsiff's Court, the suits were tried together and evidence was adduced only in one of the

suits as evidence common to all the suits What the District Munsiff did was to deliver a judgment in the suit in which the evidence was recorded and to incorporate extracts of the findings from that judgment in the judgments of the other suits In substance, however, it must be considered that the suits were all decided by the same judgment In *Chandra Mouleswara Prasad Bahadur* v *Secretary of State for India*[1] it was held that the word 'judgment' in Order 45, rule 4, means the judgment appealed against, that is, the judgment of this Court and that the provision of that rule applies to a case in which the suits were decided by the High Court by the same judgment though they were not decided by the same judgment in the lower Court But in our opinion, even if it is necessary for an application of that rule that the suits should have been decided even in the lower Courts by the same judgment, that condition is satisfied in this case In that case though there were two separate judgments in the lower Court, a comparison of the so-called separate judgments showed that the second judgment was practically a copy of the first judgment re-written omitting a few sentences or paragraphs We respectfully agree with the observations of Ramesam, J, as regards the nature of such judgments

"In a matter of this kind we think we should look to the spirit of the rule and not the letter . I think that the judgments of the lower Court must be regarded as the same judgment"

On the plain language of Order 45, rule 4, it appears to us that the case before us directly falls within its scope and the petitioners would be entitled to an order for consolidation of the several suits for the purposes of pecuniary valuation

A decision of a Bench of this Court in *Ramachandra Raju* v *Appayya*[2], was brought to our notice as leading to a different conclusion In that case there were four petitions for leave to appeal to His Majesty in Council against the decrees of the High Court in four appeals In none of the appeals taken separately was the amount or value of the subject-matter Rs 10,000 or upwards, but a common judgment was pronounced in all the suits and the aggregate value of the suits exceeded Rs 10,000 But the learned Judges held that this fact would make no difference and that the applicants were not entitled to a certificate under section 110 One important fact cannot be overlooked in dealing with this decision, namely, that there was no application to the Court for a consolidation of the appeals for purposes of pecuniary valuation under Order 45, rule 4 of the Code of Civil Procedure Though no doubt it was argued for the petitioners that the judgment was common to all the suits and their aggregate value was over Rs 10,000, the provisions of Order 45, rule 4 do not appear to have been brought to the notice of the Court In our opinion, this decision cannot be treated as authority for the position that even when several suits are decided by a common judgment and involve substantially the same questions for determination, they cannot be consolidated for purposes of pecuniary valuation If so treated, it would be in direct conflict with the statutory provision of Order 45, rule 4

The latest pronouncement of the Privy Council in *Pethu Reddiar* v *Rajambu Ammal*[3] supports our view In that case the High Court decreed a suit setting aside fourteen sales and a power of attorney and granted leave to appeal to the Privy Council to three vendees only as regards the sales in their favour (*Pethu Reddiar* v. *Rajambu Ammal*[4]) The value of all the properties in dispute on appeal to the Board exceeded in the aggregate the sum of Rs 10,000 though the subject-matter of the appeals separately did not exceed that amount in each case A preliminary objection was taken before the Privy Council that the High Court had no power to grant leave, because the case of each appellant must be regarded separately and so regarded the appeals were not of the required value This objection was overruled as on the facts of the case there was indeed only one matter in dispute and therefore plurality of appellants was not material

Even if the petitioners are allowed to consolidate the suits for the purposes of pecuniary valuation, the requirements of section 110 of the Code of Civil Procedure

1 (1931) 61 M L J 692 I L R 55 Mad 106.
2 (1915) 2 L W 916.
3 (1948) 2 M L J 25 L R 75 I A 153 (P C)
4 (1946) 1 M L J 245

will not be satisfied on the valuation in the Courts below But the petitioners will not be precluded from showing that the real value of the subject-matter in these appeals is different from the Court-fee value (vide *Chandra Mouleswara Prasad Bahadur* v *Secretary of State for India*[1]) A report must therefore be called for from the District Munsiff of Bhimavaram on the market value of the Kudivaram interest in the lands forming the subject-matter of the four appeals covered by C M Ps Nos. 3752, 3753, 3754 and 3755 The report should be sent up before 18th July, 1949. One week for objections After the receipt of the report, the applications will be posted before a Division Bench

There still remains the question whether as a result of the consolidation of the four appeals which we have permitted under Order 45, rule 4, in case eventually the petitioners are able to obtain leave to appeal to the Federal Court, they should furnish the security and deposit the amount required to defray expenses of translation, etc , separately in each of the appeals under Order 45, rule 7 of the Code of Civil Procedure In *Ponnammal* v *Rajambu Ammal*[2] a Bench of this Court consisting of Somayya and Chandrasekhara Ayyar, JJ , held that there was no provision of law empowering the High Court to consolidate appeals for the purposes of furnishing security for costs and depositing printing charges in connection with appeals to the Privy Council The learned Judges followed the ruling of the Bombay High Court in *Venkat Rao* v *Srinivas Rao*[3], in which reliance was placed on an earlier case of the Patna High Court in *Mussamat Bibi Nabi Zohra* v *Rai Baijnath Goenka Bahadur*[4]. It is quite true that there is no express provision of law corresponding to Order 45, rule 4 permitting consolidation in respect of deposit of printing charges or furnishing security. Rule 7 of the Privy Council Rules of 1920 ran as follows

> " Where there are two or more appeals arising out of the same matter and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the appeals should be consolidated, the Court may direct the appeals to be consolidated ".

But it will be noticed that this does not expressly refer to security or printing deposit

With great respect to the learned Judges in *Ponnammal* v *Rajambu Ammal*[2], we think that the proper way of looking at the matter is not to search for a special provision permitting consolidation for purposes of security Under Order 45, rule 4, two appeals each of which might not be of the required value of Rs 10,000 and above may, for the purposes of pecuniary valuation, be consolidated and when the aggregate value fulfils the condition as to valuation, leave may be granted The result would be that notionally the two appeals after such consolidation would amount to one appeal, *i e* , one consolidated appeal Actually in practice only one number is given by the Privy Council in such cases If that is the position, then, the proper construction of rule 7 of Order 45 would be that the applicant or applicants who has or have been granted leave to file a consolidated appeal should furnish security and deposit the amount required to defray the expenses of translation, etc , in respect of the consolidated appeal If after consolidation, the position is that there is only one appeal to the Privy Council or the Federal Court, then the applicant or applicants can be asked to furnish security and deposit printing and translation charges only once It may be that having regard to the number of appeals consolidated and the number of respondents in the several appeals, the Court may direct security for a sum in excess of Rs 4,000 Rule 108 of the Appellate Side Rules provides that

> "The security to be furnished under Order 45, rule 7 (1) (*a*) of the Code of Civil Procedure, *shall, unless otherwise ordered*, be in the sum of Rs 4,000 in cash or in Government securities of the approximate market value in the sum of Rs 4,000 "

The Court can order in a proper case that a sum in excess of Rs 4,000 shall be furnished as security So far as printing and other charges are concerned, it appears to be unreasonable that separate amounts should be deposited in each of the appeals

1 (1931) 61 M L J 692 I L R 55 Mad 672
2 (1945) 1 M L J 73 I L R 1945 Mad 3
3 (1944) 46 Bom L R 724
4 (1919) 4 Pat L J 198

which have been consolidated into one appeal. Except in special cases, one deposit would suffice

Though this question does not arise in this case immediately we have answered it because it is concerned with the practice to be followed in a number of cases

V S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SATYANARAYANA RAO

C M Mathu Kutty *Appellant**

v

Varee Kutty *Respondent*

Arbitration Act (*X of* 1940), *sections* 34 *and* 33—*Application for stay of suit alleging existence of arbitration agreement—Other party pleading agreement to be unenforceable by reason of fraud, undue influence and coercion—Duty of Court to try that question in that proceeding itself—Other side, if bound to apply under section* 33 *of the Act—Relative scope of sections* 33 *and* 34

Where an application under section 34 of the Arbitration Act is made alleging that there is an arbitration agreement the existence of which bars the trial of the suit and the respondent to such a petition raises the contention that the alleged agreement is unenforceable by reason of fraud, undue influence or collusion or even misrepresentation, it is incumbent upon the Court to try that question in that very proceeding It cannot be said that it is obligatory on the part of the person raising such a defence to make an independent application under section 33 of the Act The very foundation of the jurisdiction of the Court to stay the trial of a suit under section 34 is the existence of an arbitration agreement and when the truth of such an agreement itself is disputed or while admitting its truth it is pleaded that it is invalid by reason of other vitiating circumstances, there is no reason why in such an event when the question is raised and the validity of the jurisdiction of the Court depends upon the result of its decision on that question, the Court should not try that issue The scope and the jurisdiction of the Court acting under section 34 does not depend upon the nature of the defence raised Section 33 of the Act gives an independent right to a person who wishes to challenge the existence or validity of an arbitration agreement or award and to anticipate the other side and to initiate proceedings to have those questions determined beforehand It does not prohibit the Court acting under section 34 of the Act from deciding a question which is raised before it for its decision and the decision on which alone would depend the exercise of its jurisdiction

Bhagwandas v *Atmasing*, A I R 1946 Bom 494, followed

Appeal against the order of the Court of the Subordinate Judge, Ottapalam, dated 24th September, 1947, in I A No 467 of 1946 in O S No 15 of 1946

K Kuttikrishna Menon and *D H Nambudripad* for Appellant

S Venkatachala Sastri and *N Sundara Aiyar* for Respondent

The Court delivered the following

JUDGMENT —This is an appeal by the plaintiff in O S No 15 of 1946 Subordinate Judge's Court, Ottapalam, against the order of the learned Subordinate Judge staying the trial of the suit under section 34 of the Indian Arbitration Act, X of 1940

The plaintiff and the defendant are brothers and are the sons of one Cheeran Mathu who died in February, 1944 After the father's death, there were disputes between the brothers regarding the property left by the father and the suit for partition was instituted for division of the properties The defendant filed an application under section 34 of the Indian Arbitration Act for stay of trial of the suit on the ground that there was an agreement between the parties to refer the disputes to five named arbitrators and that in pursuance of the agreement there was a reference to arbitrators It was also alleged in the petition filed by the defendant that the parties filed detailed statements regarding the disputes before the arbitrators The agreement to refer the disputes before the arbitrators, is dated 19th December, 1945 The detailed statement was filed before the arbitrators by the parties on the 20th December, 1945 The arbitrators met and recorded depositions on the 20th January, 1946 On the 23rd January, 1946, according to the case of the defendant there was also a razinama between the two brothers, whereunder

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*A A O No 481 of 1947 22nd April, 1949

some of the disputes between them were actually settled and the arbitrators were authorised to carry out the partition of the properties to give effect to the settlement of the date He therefore claimed in the petition that in view of the existence of an arbitration agreement between the parties under which a reference was made to the arbitrators and which reference was pending enquiry before them, the trial of the suit should be stayed under section 34 of the Act This application was opposed by the plaintiff on various grounds, the most important of which was the denial of the existence of a valid agreement referring the disputes to arbitration

The sum and substance of the plaintiff's case is that some signatures on some papers were obtained by fraud and misrepresentation, particulars of which were given in the counter-affidavit filed by him In paragraph 2 of the counter, he categorically stated that no reference to arbitration was made to the arbitrators and that he had not signed and in paragraph 5 he added that he did not even sign any deed of reference knowing the same to be a deed of reference to arbitration or understanding the nature of the deed He also denied the existence of the razinama between them and that he did not even sign any such document He also raised some other legal contentions which were overruled by the lower Court and which have not been now pressed before me

The learned Subordinate Judge who heard the application refused to take evidence on the case of fraud and misrepresentation put forward by the plaintiff on the ground that under section 34 of the Act no evidence on the question of the validity of an arbitration agreement could be taken as the only right of the person raising such defence was to apply under section 33 of the Act, and as the plaintiff had not followed that course, it was not incumbent on him to take evidence He therefore overruled the objections of the plaintiff and passed an order directing stay of the trial of the suit as, in his opinion, there was a *prima facie* valid arbitration agreement entered into between the parties

In this appeal by the plaintiff the only argument raised on behalf of the appellant is that the learned Judge was not justified in refusing to take oral evidence to establish his plea that the agreement was vitiated by fraud and misrepresentation

The Indian Arbitration Act (X of 1940) consolidates and amends the law relating to arbitration in British India Before this Act, the law relating to arbitration in Presidency Towns was contained in the Indian Arbitration Act, 1899 and so far as the mofussal was concerned, the law was embodied in Schedule II to the Code of Civil Procedure All these provisions have now been consolidated and certain alterations were also introduced in the law relating to arbitration in India by the Act of 1940

By section 32 of the Act a suit to contest the existence or validity of an arbitration agreement or award on any ground whatsoever is barred and the only manner by which those questions can be decided is by following the procedure laid down in the Act These sections were introduced for the first time by the Act of 1940 Section 33 enables a party to an arbitration agreement or persons claiming through such a party to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined by an application to the Court That therefore is the procedure indicated by the Act to get a decision upon the existence, effect or validity of an arbitration agreement or an award Then follows section 34 which entitles a party to an arbitration agreement or a person claiming under such a party against whom a legal proceeding by way of suit or otherwise is taken to apply under the section before filing a written statement or taking any other steps in the proceeding for stay of trial of those proceedings on the ground that there is an arbitration agreement between the parties which the applicant is ready and willing to carry out

The question that arises for consideration now is where an application under section 34 is made alleging that there is an arbitration agreement the existence of which bars the trial of the suit and when the respondent to such a petition raises the contention that the agreement is unenforceable by reason of fraud, undue

influence or collusion or even misrepresentation, is it incumbent upon the Court to try that question in that very proceeding or is it obligatory on the part of the person raising such a defence to make an independent application under section 33 of the Act ? The learned Subordinate Judge was of opinion that in such a case the only course open to the person is to apply under section 33 to have the matter tried and decided and this is also the argument advanced on behalf of the defendant-respondent in this Court The very foundation for the jurisdiction of the Court to stay the trial of a suit under section 34 is the existence of an arbitration agreement. The applicant comes to Court and asserts that there is such an agreement while the other side either disputes the truth of such an agreement or admitting its truth pleads that it is invalid by reason of other vitiating circumstances which are open under law for the objector to raise and prove. I do not see any reason why in that event when the question was raised and the validity of the jurisdiction of the Court depends upon the result of its decision on that question, the Court should not try that issue Section 33, in my opinion, gives an independent right to a person who wishes to challenge the existence or validity of an arbitration agreement or award and to anticipate the other side and to initiate proceedings to have those questions determined beforehand It does not, in my opinion, prohibit the Court acting under section 34 of the Act from deciding a question which is raised before it for its decision and the decision on which alone would depend the exercise of its jurisdiction From this point of view it seems to me that the learned Subordinate Judge was not justified in preventing the plaintiff from adducing evidence on the question of fraud and misrepresentation put forward by him If necessary the counter filed by the plaintiff may be treated as an application under section 33, but I think even this is not required

I am supported in my view of the sections (32, 33 and 34) by a decision of a Bench of the Bombay High Court in *Bhagwandas* v *Atmasing*[1] The judgment of the Court was delivered in that case by Kania, J (as he then was) In that case when the defendant in a suit made an application for stay under section 34 alleging an arbitration agreement, the plaintiff denied the existence of such an agreement The argument on behalf of the defendant who filed the application under section 34 was that in view of sections 32 and 33 of the Arbitration Act, 1940, the plaintiff was not entitled to challenge the existence of an arbitration agreement in that proceeding and that it was incumbent upon the plaintiff if he wanted to have that question decided to take out a substantive application under section 33 of the Act challenging the existence of the arbitration agreement and obtain a decision of the Court on that point This argument found favour before the trial Judge, Coyajee, J, but his decision was reversed on appeal by the Bench At page 495 of the report, it was stated that the effect of these sections was not to preclude the respondent in an application under section 34 to set up the defence of the non-existence of an agreement which was propounded by the other side The defendant who applies under section 34, in order to succeed in his application has to establish the existence of an agreement If the plaintiff denies the existence of an agreement, then it raises an issue between the parties which should be tried under section 34 of the Act and the learned Judges saw no impediment for the Court to adjudicate upon that issue The question now raised in this appeal, in my opinion, is clearly covered by the decision of the Bombay High Court above referred to The learned Subordinate Judge before whom this case was cited, however, thought that it had no application to the facts of the present case as the dispute there was about the existence of the agreement itself but, as in the present case, the plea taken was that it was vitiated by fraud, the principle of that case had no application I see no difference in principle whether the defence raised was the non-existence of the agreement or the validity of an agreement The scope and the jurisdiction of the Court acting under section 34 does not depend upon the nature of the defence raised, i e, whether the existence of the agreement itself is disputed or whether the existence having been admitted, its invalidity on the ground of fraud and misrepresentation was

1 A I R 1945 Bom 494

raised. It is only on this ground the learned Subordinate Judge thought that the decision of the Bombay High Court had no application For the reasons already stated, I differ from the opinion of the learned Subordinate Judge and hold that the decision in *Bhagwandas* v *Atmasing*[1] applies to the present case

The learned advocate for the respondent drew my attention to some of the cases of the other High Courts *Narsingh Prasad Boobna* v *Dhanraj Mills*[2] was a decision under the Indian Arbitration Act of 1899 and arose out of an application for stay under section 19 of that Act It was held in that case that it is not within the jurisdiction of an arbitrator to decide whether a contract as propounded by one of the parties contained forged clauses or interpellations or contained clauses which were inserted as a result of fraud or mistake and that such disputes which go to the root of the matter should be decided in a suit The decision itself, it may be pointed out, was under an Act which did not contain provisions analogous to sections 31 to 33 of the present Arbitration Act and the decision in that case is not relevant for the decision of the present question There are two decisions of the Calcutta High Court in *Manick Lal* v *Shiva Jute Bailing*[3] and *Baijnath Narseria* v *Chhotu Lal Sethi*[4] In both the cases the question considered was whether in view of sections 32 and 33 of the Indian Arbitration Act, a party had a right to file a suit to establish that there was in fact no agreement to refer to arbitration The answer given by the Calcutta High Court was that such a suit was not barred The decision of the Bombay High Court was referred to in the course of the judgment In the first of these cases, the difficulty in reconciling the language of sections 32 and 33 of the Act was pointed out Section 32 of the Act as stated above bars the right of a suit even if the existence of the agreement was denied and compels the party wanting to raise the dispute to follow the procedure laid down under the Act, and the procedure even in such a case is to make an application under section 33 of the Act challenging the existence of the agreement But the section opens with the words " any party to an arbitration agreement " and gives to such a party desiring to challenge the existence of the agreement a right to apply under the section. It was asked in that case with considerable force,

" If the existence of the agreement itself was disputed, how could the applicant disputing the existence of an agreement be aptly described as a party to an arbitration agreement and how could such a person apply under section 33 "

The solution suggested by Das, J , was that the word "existence" should be interpreted in a restricted sense as

" implying the legal existence as opposed to apparent or mere factual existence, *i e* , as opposed to a mere semblance of existence "

The same view was also adopted in the later case I am, however, not called upon to decide in this case and resolve the conflict referred to in the judgments of the Calcutta Court The expression " any party to an arbitration agreement ' in section 33 taken along with the fact that he is the person who challenges the existence of the agreement must be understood as having reference to a person who is put forward as being a party to an arbitration agreement but who does not admit its existence It is not necessary, in my opinion, to restrict the meaning of the word " existence " in the manner in which the Calcutta Judges have done, but may be taken as referring in the context to an agreement which is apparent and not real The expression only describes the agreement and does not assume the truth of the agreement If so understood, there is no inconsistency in the language of the section However this may be, it is really unnecessary for the purpose of the decision of this case to express any final opinion on the point As the matter was, however, argued at length and the decisions were cited before me, I have thought it proper to refer to them in my judgment

It follows therefore that the procedure adopted by the learned Subordinate Judge in disposing the application without recording the evidence which the plaintiff was ready and willing to tender cannot be justified The order of the learned

1 A I R 1945 Bom 494
2 (1942) I L R 21 Pat 544
3 52 C W N 389
4 52 C W N 397

Subordinate Judge is therefore set aside and this appeal should be allowed and the application remanded for disposal according to law and in the light of the observations contained in this judgment The appellant is entitled to the costs of the appeal here from the respondents and the costs of the appellant in the lower Court will be provided for in the revised order of the learned Subordinate Judge

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE GOVINDA MENON

Koduri Narayana Reddi and others *Appellants**

v

Lebur Gopalareddi and others *Respondents*

Costs—Appeal as to costs only—When lies—Scope of the powers of the appellate Court—Competency of the appellate Court to go into merits of the case and come to a different conclusion from that of the trial Court

An appeal lies against an order of costs only when that order involves a matter of principle or where there has been no real exercise of discretion in making the order of costs If the discretion was exercised in fact, the appellate Court would not interfere merely because it would itself have exercised the discretion in a different way

The trial Court while decreeing a plaintiff's suit and declaring that he was entitled to irrigate his lands from a particular canal negatived his right to cut a vent in the canal at a particular point and suggested that the plaintiff should seek the help of the Government in the matter and allowed the plaintiff only half the costs of the suit In an appeal by the plaintiff against the order of costs the lower appellate Court in holding that trial Court was not justified in disallowing the plaintiff half the costs, went into the whole question and came to the conclusion that the plaintiff was entitled to cut a vent in the channel at the place claimed by him In second appeal,

Held As it could not be said that the exercise of discretion by the trial Court was not proper, in the circumstances, the lower appellate Court was not justified in going into the merits and coming to a different conclusion from what the trial Court came to, in an appeal for costs only without there being any appeal on the other parts of the decree

Appeal against the decree of the Court of the Subordinate Judge, Nellore, in A S No 189 of 1945, dated 14th December, 1945, preferred against the decree of Court of the District Munsif, Kavali, in O S No 56 of 1943, dated 20th January, 1945

P Ramachandra Reddi and *P Chandra Reddi* for Appellants

K Umamaheswaram for Respondents

The Court delivered the following

JUDGMENT —In this second appeal preferred by defendants 4 to 6 and 8 in O S No 56 of 1943 in the Court of the District Munsif of Kavali against the decision of the Subordinate Judge of Nellore in A S No 189 of 1945, the only question that has been canvassed is whether the lower appellate Court was right in differing from the trial Court and holding that the plaintiff is entitled to cut a vent at the place marked C in the channel mentioned in the plan filed along with the plaint

What happened was that in the trial Court the plaintiff was given a decree that he was entitled to irrigate his lands specified in the plaint schedule and marked yellow in the plan from the channel CE and the defendants were restrained by a permanent injunction from interfering with the said right of the plaintiff In giving this decree the learned District Munsif towards the end of paragraph 8 of his judgment, observed as follows

"I therefore hold following the order, Ex P-5, that the plaintiff is entitled to irrigate his lands from the canal demarcated as CE But he has obviously no right to cut the main canal at point C It is especially so as that canal has to irrigate a very large extent of land The proper persons to order such a cutting and cross bunding of the canal especially when there is an aqueduct at that point are the Government themselves and interference of such things by the civil Court will jeopardise the rights of various people As I have already said, the evidence on behalf of the plaintiff is all interested There may be some truth in what the second commissioner said , when there is abundance of water,

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*S A No 954 of 1946 6th July, 1949.

water flows over the small aqueduct into CE The plaintiff is perfectly at liberty to use such water for irrigating his lands But it may be said that at ordinary times unless the cutting is ordered at C, the plaintiff will not be in a position to irrigate properly I can only say that the plaintiff is at liberty to file this judgment before the appropriate authorities It is certainly open to him, if this can be done without any effect upon the irrigation system, it may be so ordered It will also be possible then that the cutting can be done at the times and for the duration as indicated by the authorities "

The learned District Munsif allowed the plaintiff only half the costs of the suit The contesting defendants were content to take the decree as it stood, circumscribed as it was with the condition mentioned in the judgment of the learned District Munsif extracted above But the plaintiff having been aggrieved in getting only half the costs of the suit, preferred an appeal, and the lower appellate Court in holding that the District Munsif was not justified in disallowing the plaintiff half the costs, went into the whole question and came to the conclusion that the plaintiff was entitled to cut a vent in the channel at the place marked C in the plan It is this conclusion of the learned Subordinate Judge that is attacked by defendants 4 to 6 and 8 in the second appeal, and the question is whether the learned Subordinate Judge was justified in going into the merits and coming to a different conclusion from what the District Munsif came to, in an appeal for costs only without there being any appeal on the other parts of the decree

At the very outset it has to be remarked that the law is quite clear that an appeal lies against an order of costs only when that order involves a matter of principle, as where a formal party to the suit against whom no relief is claimed is made to pay the costs of the suit, or where there has been no real exercise of discretion in making the order of costs This may happen when the successful party is deprived of his costs or is made to pay the costs of the losing party If the discretion was exercised in fact, the appellate Court would not interfere merely because it would itself have exercised the discretion in a different way An appeal would also lie where the order as to costs proceeds up on a misapprehension of fact or law

The above principles are well settled, and what has to be now decided is whether the learned Subordinate Judge exercised those principles in coming to the conclusion he did The plaintiff, as P W 4, deposed that the suit lands were irrigated by the Thamba channel by taking water into it by cutting an opening in the southern channel and by crossbunding it to the east He also deposed that the Thamba belongs to the Government P W 6, the owner of Survey Nos 223 and 224 corroborated the evidence of the plaintiff that the water was taken by an opening in BCD and through the Thamba channel to the plaintiff's land and not through Survey Nos 221 and 222 Though it is not specifically mentioned in the plaint that the water was being taken by cutting a vent at the place C and through the main aqueduct GEE, the definite case put forward by the plaintiff was that he was entitled to irrigate his lands by taking water by cutting the vent Rightly or wrongly, the learned District Munsif for the reasons given by him which have been extracted by me above was of opinion that at the exercise of his own will the plaintiff is not entitled to have the vent cut into the channel but that it is open to him to approach the Governmental authorities to properly work out the decree by taking such steps as the authorities deemed fit It may be that this decision was wrong But, is the appellate Judge entitled to differ from that decision in an appeal by the plaintiff only as regards the costs disallowed to him ?

Applying the principles which are so well known and which have been mentioned by me above, it cannot be said that the exercise of discretion by the District Munsif was not proper It was not done in any haphazard manner, nor was it done without giving his attention to the case before him In the circumstances it seems to me that the learned Subordinate Judge should not have gone into the question as regards the rights of the plaintiff to cut the vent in the channel at the place marked C The plaintiff was given the proper guidance in being asked to approach the authorities for getting such reliefs as he may be entitled I am inclined to agree with the District Munsif that in the circumstances of the case the proper order was that he had directed, for it cannot be said that in a Government channel every party is entitled to cut vents at the place which he thinks is proper for taking water

to his lands In the circumstances of the case it seems to me that the learned Subordinate Judge was not justified in differing from District Munsif

Such being the case, the second appeal is allowed, the decree of the lower appellate Court is set aside and the decision of the District Munsif is restored As it is merely a matter of discretion, I direct that both the parties do bear their costs in the second appeal

Leave to appeal is refused

V S. *Appeal allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE RAGHAVA RAO

The Revenue Divisional Officer, Tanjore *Petitioner* *

v

S Venkatarama Iyer *Respondent*

Land Acquisition Act (I of 1894), section 9—Claimant failing to specify amount of compensation—Revenue Divisional Officer, if bound to draw claimant's attention to the omission and require him to supply it

When a claimant fails to mention the amount of his claim in the memo filed by him before the Collector in pursuance of the notice issued to him under section 9 of the Land Acquisition Act, it is wrong to say that it is the duty of the Revenue Divisional Officer to draw the claimant's attention to the omission and require him to supply it There is no provision anywhere in the Act casting any such obligation on that officer

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Subordinate Judge's Court, Tanjore, dated 7th January, 1949, in I A No 212 of 1948 in O P No 29 of 1948

The Government Pleader (*K Kuttikrishna Menon*) for Petitioner

K Venkataramani for Respondent

The Court delivered the following

JUDGMENT —A claimant who had failed to mention the amount of his claim in the memorandum filed by him before the Collector in pursuance of the notice issued to him under section 9 of the Indian Land Acquisition Act sought to make good the omission by presenting an application to the Judge under section 25 (3) praying that for the reasons stated in the affidavit filed therewith the Court may be pleased to allow that there was sufficient reason for the omission The learned Subordinate Judge ordered the petition, and I am not prepared in revision to interfere In ordering the petition, the learned Subordinate Judge however observed that it was the duty of the Revenue Divisional Officer, where a claimant failed to specify the amount of compensation, to draw his attention to the omission and require him to supply it To this observation the learned Government Pleader takes exception on the ground that there is no provision anywhere in the Act casting any such obligation on the officer The learned Government Pleader seems to be right in his submission True, there are observations of Curgenven, J , in *Venkatarama Iyer* v *Collector of Tanjore*[1] to be found at page 936 which support the view expressed by the learned Subordinate Judge It is difficult however to find any warrant in the statute or on general legal principle for such a view The civil revision petition is dismissed, but, in the circumstances without costs

V S *Petition dismissed*

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*C R P No 233 of 1949 22nd April, 1949

1 (1930) I L R 53 Mad 921

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE MACK.

Bysani Krishniya Chetty .. *Petitioner**

v.

Dr. Varadachari .. *Respondent.*

Civil Procedure Code (V of 1908), Order 22, rules 4, 9 and 11 and Limitation Act (IX of 1908), section 5—Application to set aside abatement of appeal condoning delay—Duty of advocate of the deceased party to report the death of his client—Sufficient cause for not making application in time.

There is no doubt, no rule of law or procedure which casts a duty on a member of the bar appearing for a client to report to the Court that he is dead. But it is not open to an advocate, knowing that his client is dead, to make no report about it and to wait for the statutory period of 90 days to expire and then come forward on behalf of the legal representatives in strenuous opposition to a petition to set aside the abatement condoning the delay.

The failure of the legal representative of the deceased party to instruct his advocate about his death can be taken into consideration in deciding whether under section 5 of the Limitation Act the other party has sufficient cause for not making the application in time.

Petitions praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to set aside the abatement of the City Civil Court Appeal No. 28 of 1947, High Court (O.S. No. 371 of 1948, City Civil Court, Madras) caused by the death of V. Satagopachari, the respondent therein and cause Dr. Varadachari the legal representative of the said V. Satagopachary to be made respondent in the said appeal.

C. Srinivasachari for Petitioner.

K. S. Champakesa Aiyangar and *K. Srinivasan* for Respondent.

The Court made the following

ORDER :—These are applications by the appellant in C.C.C.A. No. 28 of 1947 who was the defendant in a suit in the City Civil Court to set aside the abatement of his appeal consequent to the death of the plaintiff on 8th May, 1948 and to bring on record his legal representatives. These petitions were filed on 29th September, 1948, one month and 22 days beyond the prescribed period of 90 days under Article 177 of the Limitation Act. The reason given for the delay is the appellant's ignorance of the plaintiff's death.

An important point to be considered in condoning this delay under section 5 of the Limitation Act is that the plaintiff filed a memorandum of objections in which he appeared by the learned advocate who now strenuously contests these petitions on behalf of his legal representatives. No report was made to the Court about the death of the plaintiff in connection with the cross-objections filed on which the Court was quite entitled to presume that the appellant was alive so long as the learned advocate who continued to appear for him did not report that he was dead. An adverse party is also reasonably entitled to make an inference that his adversary who is represented by his learned advocate with a subsisting vakalat is alive unless the advocate reports to the Court that he is dead. The learned advocate has argued that there is no duty cast on a member of the bar appearing for a client to report to the court that he is dead. There is of course no rule of law or procedure enjoining a simple obligation of this kind on a member of the bar. I have no hesitation in expressing my view that immediately an advocate is informed that a client for whom he appears in a pending matter is dead, it is his simple duty to report it to the Court, as all court procedure and posting of cases proceeds on the assumption that advocates with subsisting vakalats represent living clients. Of course, if the learned advocate is not informed by the legal representatives of his client, he can make no such report. The point I would emphasise here is that it is not open to an advocate, knowing that his client is dead, to make no report about it and to wait for the statutory period of 90 days to expire and then come forward

* C.M.Ps. Nos. 7205 and 7206 of 1948. 21st April, 1949.

on behalf of the legal representatives in strenuous opposition to a petition to set aside the abatement condoning the delay The failure of the legal representatives of the defendant to instruct his advocate about his death—for I assume in this case that the learned advocate had he known of the death of the defendant, would have made a report to the Court—can be taken into consideration in deciding whether under section 5 the present petitioner has sufficient cause for not making these applications in time I have no hesitation in finding that in the circumstances he had ample and sufficient cause for not applying within the 90 days prescribed.

The two petitions, in the circumstances, are allowed, but without any order as to costs

V.S *Petitions allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR P V RAJAMANNAR, *Chief Justice* AND MR JUSTICE BALAKRISHNA AYYAR

V M R Malaiperumal Pillai *Petitioner* *

v

The Deputy Registrar of Co-operative Societies, Mount Road, Madras and others *Respondents*

Madras Co-operative Societies Act (VI of 1932), section 51 (1)—Claim under, made to Deputy Registrar of Co-operative Societies—Disposal of claim by Deputy Registrar in the capacity of an arbitrator—Award—Legality

A claim under section 51 (1) of the Co-operative Societies Act was filed before the Deputy Registrar of Co-operative Societies He considered himself both as a Registrar and an arbitrator under section 51 (2) of the Act and made an award purporting to be by the Deputy Registrar and arbitrator. On a question as to the legality of the procedure adopted and award made,

Held, that the award was made in complete disregard of the provisions of the statute and so could not be deemed to be an award in law The Deputy Registrar exceeded his jurisdiction in professing and proceeding to dispose of the case as an arbitrator and as he had clearly acted without jurisdiction the order passed by him in pursuance of which the award was made must be quashed

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling on the first and third respondents for the records in Claim No 42/47-48 on their files and quash all proceedings of the first or third respondents, as the case may be in the said claim including the award therein purported to be dated 4th November, 1948

T. G Aravamudhan for Petitioner

P. Veeraswami instructed by Crown Solicitor and *T Venkatadri* for Respondents

The Order of the Court was made by

The Chief Justice —These are two applications for the issue of a writ of *certiorari* and a writ of *prohibition* respectively and relate to certain proceedings commenced by the Triplicane Metal Workers' Co-operative Production and Sales Society in the following circumstances The petitioner in the two petitions was the president of the Society On 27th June, 1947, the Society represented by its president filed before the Deputy Registrar of Co-operative Societies, Madras, a claim for Rs 8,963-5-7 alleged to be due and owing to the Society by the petitioner This claim was apparently made under section 51 of the Madras Co-operative Societies Act (Act VI of 1932), sub-section (1) of which says that if any dispute touching the business of a registered society arises *inter alia* between the society and its officers, past and present, such dispute shall be referred to the registrar for decision

Now, what should have happened under the provisions of section 51 (2) read with Rule XV of the rules made under the Act, was, the Registrar should, on receipt of such a reference, have decided to do one of three things, namely,

* C M Ps Nos 573 of 1949 and 6622 of 1948 12th April, 1949

(1) to decide the dispute himself, or (2) to transfer it for disposal to any person who has been invested by the Local Government with powers in that behalf, or (3) subject to such rules as may be prescribed, to refer it for disposal to an arbitrator or arbitrators. The rules prescribe that where on receipt of a reference under sub-rule (1) the Registrar decides under clause (*c*) of sub-section (2) of section 51 of the Act, to refer it for decision by arbitration, it shall be made either to a single arbitrator appointed by the Registrar or to a body of arbitrators of whom one shall be nominated by the Registrar and one by each of the parties to the dispute.

It is contended on behalf of the petitioner that the provisions of the Act have not been substantially complied with in the course of the proceedings commenced as aforementioned. Two contentions were raised on his behalf. The first is that the Registrar referred to in section 51 (1) and section 51 (2) of the Act is the person appointed to perform all the duties of a Registrar of Co-operative Societies under the Act, and reliance was placed for this contention on the definition of "Registrar" in section 2 (*g*) of the Act. Section 3 of the Act empowers the Local Government to appoint a person to be Registrar of Co-operative Societies for the Presidency of Madras, and also empowers it, by general or special order, to confer on any other persons all or any of the powers of a Registrar under the Act. Learned counsel for the petitioner contended that a person appointed under this provision on whom some of the powers of a Registrar are conferred by the Provincial Government will not be a person who can be deemed to be a Registrar within the meaning of the definition in section 2 (*g*), because, according to him, it is only when a person is appointed to perform *all* the duties of a Registrar that he can be deemed to be a Registrar within the meaning of that definition.

His next contention was that even assuming that a person on whom some of the powers of a Registrar have been conferred by order of Government—and it is common ground that the Deputy Registrar in this case is such a person on whom the powers under section 51 (1) and (2) have been conferred—the procedure laid down in sub-section (2) has not been followed. It is clear from a perusal of some of the relevant documents to which reference was made by counsel that the Deputy Registrar considered himself to be both a Registrar and an arbitrator within the meaning of sub-section (2) of section 51. In his memorandum dated 27th September, 1948, which was communicated to the petitioner, the Deputy Registrar specifically says that he was deciding the dispute as an arbitrator. On the face of it, this communication is based on an obvious confusion of the relevant provisions. If the Deputy Registrar had decided to decide the dispute under section 51 (2) (*b*), he could only decide it as a person to whom it had been transferred for disposal by the Registrar. He could not in that event dispose of the case as an arbitrator. It is also clear that the procedure laid down in Rule XV (2) has not been followed. There is nothing on record to show, and it was represented to us by counsel on behalf of the Deputy Registrar that there is nothing outside the record to show, that at any time after the receipt of the reference by the Society, either the Registrar or the Deputy Registrar decided under clause (*c*) of sub-section (2), section 51 of the Act, to refer it for disposal by arbitration. Obviously, if there had been such a decision, the reference must have been made either to a single arbitrator appointed by the Registrar or to a body of arbitrators of whom one shall be nominated by the Registrar and one by each of the parties to the dispute.

On 4th November, 1948, eventually an award was made purporting to be by the Deputy Registrar and arbitrator, directing the petitioner to pay to the Society Rs. 6,600 with interest at one pie per rupee per mensem from 1st July, 1947, until realisation. This award made in complete disregard of the provisions of the statute cannot be deemed to be an award in law. The Deputy Registrar exceeded his jurisdiction in professing and proceeding to dispose of the case as an arbitrator. In his reasons given for the award, the Deputy Registrar says that the question raised as to his jurisdiction to try the case as an arbitrator is irrelevant. On the other hand, it appears to be extremely relevant to us; and as in this case he has clearly acted without jurisdiction, the order passed by him in pursuance of which

the award was made must be quashed. C M P No 573 of 1949 is allowed The petitioner will be entitled to his costs from the first respondent. (Advocate's fee Rs 150)

No orders need be passed on C M P No 6622 of 1948 because apparently before the receipt of the order of interim stay passed on 20th November, 1948, and award was made on the 4th November, 1948

V S *C M P No 573 allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE MACK

Sreeman Madabusi Vadi Matheba Kanteeravam Satagopa-ramanujacharyulu *Appellant**

v

Madepalli Venkatarayudu and others *Respondents*

Madras Estates Land Act (I of 1908), *section* 3 (2) (d), *Explanation* 1 *(as amended by Act II of* 1945)—*Inam grant of named village—Exclusion of poramboke—Whether an estate*

Where the inam register extract shows the village described as Medupalli Agraharam as consisting of 208 acres of land granted as inam for the personal benefit of the holder, and it also shows 10 acres of poramboke lands ' as included in the village site, etc ' and the personal and service inams comprising 44 acres,

Held, that the grant is of a named village and the mere fact that it is exclusive of poramboke will not take it out of the category of an estate within the meaning of the Madras Estates Land Act

Case-law discussed

Appeal against the decree of the Court of the Subordinate Judge, Eluru, in A S No 246 of 1944 preferred against the decree of the Court of the District Munsif, Kovvur in O S No 397 of 1942

M S Ramachandra Rao for Appellant

K Bhimasankaram for Respondents

The Court delivered the following

JUDGMENT —This second appeal and these batches of civil revision petitions raise the same point for determination, namely, whether Medupalli Agraharam is an estate within the meaning of section 3 (2) of the Estates Land Act It has now two landlords who originally belonged to the same family, Venkataranga-charyulu, and Ramanujacharyulu S A No 2235 of 1946 arises out of a suit for rent filed by the latter claiming nearly Rs 585 as rent from three tenants The District Munsif holding that Medupalli Agraharam was not an estate decreed the suit The civil revision petitions arise out of batches of suits for ejectment by these landlords in which on a finding that this agraharam was an estate and that the tenants had occupancy rights, the plaints were returned for presentation to the Revenue Court The learned Subordinate Judge of Ellore heard all the resulting appeals along with other batches of appeals arising out of two other villages, Penta-padu Agraharam and Devaracheruvu Kandrika in a common judgment in which he held that these were all estates under section 3 (2) of the Act He accordingly dismissed all the Civil Miscellaneous Appeals as regards return of the plaints for re-presentation to the Revenue Court and allowed Appeal No 246 of 1944 in which the District Munsif decreed the suit for rent out of which second appeal No 2235 of 1946 arises

The learned Subordinate Judge saw no grounds for differentiating between these three Agraharams and treated them all on the same footing on the basis of Explanation 1 to section 3 (2) As amended by Madras Act II of 1945, it reads as follows

" Where a grant as an inam is expressed of a named village, the area which forms the subject-matter of the grant shall be deemed to be an estate notwithstanding that it did not include certain

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* S A No 2235 of 1946 and C R Ps Nos. 1362 to 1365 of 1946 and 120 to 123 of 1947 — 19th April, 1949

lands in the village of that name which have already been granted on service or other tenure or been reserved for communal purposes "

There has been a complication as regards this omnibus finding by the learned Subordinate Judge as the tenants from these three Agraharams have filed separate revision petitions as regards which separate treatment was necessitated In a batch of civil revision petitions (Nos 1432 to 1437 of 1946) arising out of this common judgment filed by the landlords of Pantepadu Agraharam and Devaracheruvu Kandrika, I held that they were not estates within the meaning of section 3 (2) (*d*) of the Act, holding myself bound by an unreported Bench decision by Patanjali Sastri and Bell, JJ ; in *Venkatarangacharyulu* v *Mukku Ganganna*[1], in which Pentapadu Agraharam was held to be not an estate even within the meaning of Explanation 1 as amended by Act II of 1945 In that litigation the original grant of Pentapadu Agraharam was produced describing the subject-matter as " Patha Pentapad hamlet of Pentapad village " As regards Devaracheruvu Kandrika, it was an inam in Pentapad itself though not included in two Pentapād Agraharams, which were confirmed under two title deeds The word " Kandrika " itself means part of a village In that batch of revision petitions the tenants of those two agraharams made no appearance, doubtless in view of the tenure of Pentapad Agraharam having been conclusively determined by the unreported Bench decision to which I have referred

It is now contended that on the basis of that Bench decision, Medupalli Agraharam is similarly not an estate under section 3 (2) (*d*) of the Act The inam register extract, however, shows the village described as Medupalli Agraharam consisting of 208 acres of land granted as inam for the personal benefit of the holder It also shows 10 acres of poramboke lands " as included in the village site, etc" and other personal and service inams comprising 44 acres *Prima facie*, there is therefore nothing in the description in the inam fair register extract which would take this village out of the definition of an " estate " under Explanation 1 in Act II of 1945, it being clearly a named village It is, however, contended that this same Medupalli Agraharam has already been found by Panchapagesa Sastri, J , in an unreported decision in *Rangachaiyulu* v *Venkanna*[2] to be not an estate That decision has been placed before me Panchapagesa Sastri, J , there considered himself bound by *Venkanna* v *Lakshmipathi Razu*[3], a Bench decision by Leach C J , and Lakshmana Rao, J , in which there was an extent of 90 45 acres described as "waste " "including the site of the village " out of which subsequently the zamindar granted 7 98 acres to an individual for his personal benefit The *ratio decidendi* of that decision was that the earlier grant was not therefore of the whole village and therefore the amending Act of 1945 could not apply to make it an estate Panchapagesa Sastri J , while applying this decision to Medupalli Agraharam gave leave to appeal but subsequently the landlord and the tenant concerned compromised, and any attempt to make that an authoritative test case failed in its objective

Ordinarily the finding of Panchapagesa Sastri J , in that decision following a principle laid down in a Bench decision would be binding on me In a subsequent decision, however, *Suryanarayana* v *Venkatadu*[4], Panchapagesa Sastri J himself in a precisely similar village of Cheru Chintala held it to be an estate covered by the amended Explanation 1, following another Bench decision in *Lakshminarasimhachaiyulu* v *Ratnam*[5], also by Leach C J and Lakshmana Rao J , in which it was clearly held that where the grant is of a named village the mere fact that the words " exclusive of poramboke" are used in that grant will not take it out of the category of an estate within the meaning of the Madras Estates Land Act, and this is irrespective of whether some of the lands in the village are already held under inam or service grants or whether there has been a reservation of part of the village for communal purposes It was specifically observed there that the words " exclusive of poramboke " should not be read as reserving the poramboke Panchapagesa

1 A A O No 584 of 1944 and A A O No 373 of 1945
2 S A No 2349 of 1945
3 (1946) 1 M L J 300
4 (1949) 1 M L J 520
5 (1947) 2 M L J 289

Sastri, J., holding himself bound by this Bench decision accordingly found Cheru Chintala to be an estate though 44 acres of land was shown in that grant as "poramboke". In the case of Medupalli Agraharam only 10 acres is shown as poramboke lands "including the village site, etc." This description cannot possibly by itself take this Agraharam out of the definition of an estate under the amended Explanation. The finding of the learned Subordinate Judge, therefore, on an interpretation of the amended Explanation 1, by itself, was correct so far as Medupalli Agraharam was concerned that it is an estate within the meaning of section 3 (2) (*d*) of the Act.

It is interesting to note that in another case arising from this village even long prior to Explanation 1 as amended by Act II of 1945, Chandrasekhara Aiyar, J. in *Venkataranganacharyulu* v. *Nagayya*[1] upheld in revision the finding of the District Munsif that this Agraharam was an estate. I can see no grounds therefore for acceding to the request of the learned Advocate for the landlord either to refer the status and tenure of Medupalli Agraharam for determination by a Bench nor in fact, can I even see any reasons which could justify granting any leave for a further appeal. In the course of the argument I was asked to grant leave if I should find this Agraharam to be an estate following the precedent of Panchapagesa Sastri, J., in his first decision in *Rangacharyulu* v. *Mukku Ganganna*[2]. He however has clearly revised that opinion in his subsequent decision in *Suryanarayana* v. *Venkatarao*[3]. Nor can there be any doubt now as regards the correctness of the position that this Agraharam is an estate.

Second Appeal No. 2235 of 1946 is dismissed with costs and the plaint in the suit will be returned by the District Munsiff for presentation to the Revenue Court. The batches of Civil Revision Petitions are also dismissed with costs and an Advocate's fee in each Civil Revision Petition. Leave refused.

V.P.S. *Second Appeal and Revision Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE GOVINDA MENON.

Vemasani Narasamma .. *Appellant**

v.

Vemasani Rama Naidu and another .. *Respondents.*

Lunacy Act (IV of 1912), section 38—Order directing inquisition into a man's state of mind—Judicial determination—Must be on adequate materials.

An order directing an inquisition into a man's state of mind is a very serious thing, and such an order is intended by the statute to be a judicial determination carefully made upon adequate materials.

Where the Judge has *prima facie* evidence before him, which consists of affidavits and documents filed by consent, there is nothing wrong in his ordering the production of the lunatic, directing his examination by a Medical Officer and adjudging him a lunatic on the strength of the medical report.

Saroj Basani Debi v. *Mahendranath Bhaduri*, (1927) I.L.R. 54 Cal. 836, *Muhammad Yakub* v. *Nazir Ahmed*, (1920) I.L.R. 42 All. 504, referred to.

Appeal against the Order of the District Court, Nellore, in O. P. No. 137 of 1946, dated 23rd January, 1947.

T. Venkatadri for Appellant.

K. Umamaheswaram for Respondents.

The Court delivered the following

JUDGMENT:—This appeal arises out of proceedings in the District Court of Nellore in O. P. No. 137 of 1946, which was a petition filed under section 62 of the Indian Lunacy Act, praying the Court to make an inquisition about the lunacy of one

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1. C.R.P. 536 of 1940.
2. A.A.O. 584 of 1944 and A.A.O. 375 of 1945.
3. (1949) 1 M.L.J. 520.

*A. A. O. No. 135 of 1947. 16th March, 1949.

Vemasani China Rama Naidu and to adjudge him as a lunatic. The further prayers were that in case he is adjudged a lunatic, a manager to manage his estate may be appointed.

The learned District Judge after following a certain procedure about which it will be necessary to mention something hereafter, came to the conclusion that this China Rama Naidu was a lunatic and he was adjudged as such As a result of this finding, he appointed the mother, Vemasani Narasamma, who was the first respondent in the Court below and the appellant in this appeal, as the personal guardian of the lunatic and the Government Pleader of Nellore as the manager of the properties of the said lunatic.

Mr T. Venkatadri appearing for the appellant, who, as stated already, is the mother of the lunatic, raises a question regarding the procedure adopted by the Court below. It arises this way The petitioner in the lower Court, who is the contesting respondent in this appeal, is the paternal uncle's son of the lunatic and O P No 137 of 1946 was filed on the 24th August, 1946. There are quite a large number of endorsements on the petition showing that it was returned for the rectification of mistakes and corrections of various matters and finally after various vicissitudes the defects were remedied and the petition was re-presented on 28th September, 1946 It came up before the learned District Judge for orders on 5th October, 1946, when the learned Judge heard arguments on the maintainability and the *prima facie* merits of the petition and reserved orders. The learned Judge was of opinion that notice had to be given under section 40 of the Indian Lunacy Act to the respondents in whose custody the alleged lunatic was said to be living, to produce him before the Court, and thereafter he would, if necessary, examine the lunatic and direct the District Medical Officer at Nellore to examine him and send a report about his mental capacity and condition under section 41 On hearing the parties further, the learned Judge would decide whether he would hold the inquisition with the aid of two or more assessors or conduct it himself With this object in view, he issued notice to the respondents to produce the alleged lunatic in Court on 30th October, 1946 This order was pronounced on 8th October, 1946 On 30th October, 1946, there is an endorsement that the first respondent, the mother, was served in person The second respondent, the brother-in-law of the alleged lunatic, was said to have refused notice. Substituted service was also ordered, but there is also the endorsement that Mr A H R appears for R. 2 and B R S appears for R 1 After a further adjournment to 18th November, 1946, on which date the Judge was on casual leave, on 21st November, 1946, the advocate for the first respondent undertook to produce the alleged lunatic in Court on 29th November, 1946 On that date the alleged lunatic was produced in Court and the Judge was of opinion that *prima facie* he appeared to be a person of unsound mind Therefore he was directed to be produced before the District Medical Officer, Nellore, and the petition was adjourned to await the medical report. Accordingly the alleged lunatic was examined by P W 1 and his report is to the effect that this Vemasani China Rama Naidu was incapable of acting for himself that he is to be taken care of by others both as regards his person and his property and that he can be certified as a lunatic The doctor gave evidence on 6th January, 1947. Thereafter the parties filed documents in Court but no other oral evidence was adduced The result was that on 23rd January, 1947, orders were pronounced allowing the petition in the manner as stated above by me at the outset of the judgment

Reliance is placed upon the dicta of Rankin, C.J, in *Saroj Basani Debi* v. *Mahendranath Bhaduri*[1], where that learned Judge was of opinion that where an application is made for directing an inquisition for the purpose of ascertaining whether a person is of unsound mind and incapable of managing his own affairs, the first thing which has to be done is that the learned Judge, either with notice to the lunatic or without notice, should carefully consider whether the case is one which

1. (1927) I L.R. 54 Cal. 836.

calls for an order directing an inquisition In the words of the learned Judge, an order directing an inquisition into a man's state of mind is a very serious thing, and such an order is intended by the statute to be a judicial determination carefully made upon adequate materials If the Judge considers that it calls for an order directing an inquisition, then it is his obvious duty to record an order directing an inquisition When once that is done, then the petition is a spent petition, which has served its primary purpose. The Judge should then, by the combined operation of section 64 read with sections 40, 41 and 42 of the Indian Lunacy Act, take certain steps with regard to notice and such notice should be given as provided by section 40 of the Act. Thereafter he should hold the inquisition either by himself or with the aid of assessors This decision to a certain extent is based upon the observations contained in the judgment of the Bench of the Allahabad High Court in *Muhammad Yaqub* v *Nazir Ahmed*[1] where Piggot and Walsh, JJ, came to the conclusion that an application for an inquisition should ordinarily be supported by an affidavit or by examination on oath of the applicant, and by a medical certificate of some doctor as to the condition of the alleged lunatic It would also be desirable, in many cases, that the Judge should seek some personal interview with the alleged lunatic with a view to satisfy himself that there is a real ground for supposing the existence of an abnormal mental condition which might bring the person within the Lunacy Act. Both these judgments as well as certain English cases, *viz*, In re *E S*,[2] and In re *John Mclaughlin*[3] were considered by Tek Chand, J, in *Tekadevi* v. *Gopaldas*[4] The learned Judge also came to the conclusion, similar to that arrived at by the Judges of the Calcutta and the Allahabad High Courts and made certain observations which are highly useful to Courts in dealing with such lunacy applications.

What we have therefore to see is whether the learned District Judge in this case has directed his judicial attention to the proper procedure that should be followed in matters of this kind Mr Venkatadri says that before the learned Judge directed the mother to produce the lunatic before the Court, he ought to have been satisfied by taking evidence *prima facie* or by other papers placed before him that there is a case for him to enquire. Not having done so, the entire procedure is vitiated by the initial irregularity in his action It seems to me that having regard to the course which the petition took and having regard to the previous history of the fight between the appellant and the respondents which had gone through the gamut of a Sub-Court suit as well as an appeal in the High Court, the learned Judge need not have gone into the elaborate procedure to find out whether *prima facie* it was proved that this China Rama Naidu was a lunatic or not Ex P-2, filed in the lower Court was the deposition of the present appellant in O S. No 58 of 1942 which came up to this Court in A S. No. 545 of 1944 This deposition was filed by consent of parties and was treated as admissible in evidence by the learned Judge We find there the appellant, the mother, stating that her son is mad and that she had to borrow money for his upkeep There are also other statements, especially those contained in the counter-affidavit here, that this China Rama Naidu was a person of unsound mind, incapable of taking care of himself and such being the case, I am satisfied that the learned Judge had *prima facie* evidence before him before he directed the examination of the lunatic by the Assistant District Medical Officer. In Ex P-2 the appellant also says that she had been getting her son treated by borrowed money. There is further, the recital contained in the judgment of the Subordinate Judge in O S. No. 58 of 1942, which judgment also has been filed by consent of parties, that the second plaintiff therein who is the alleged lunatic was a person who was incapable of looking after himself and therefore a lunatic The learned Subordinate Judge found that P W 1, the mother, was the guardian of the lunatic, the second plaintiff In these circumstances, it seems to me that there was nothing wrong in the procedure adopted by the learned District Judge before he directed the production of the lunatic by the mother in whose custody

1 (1920) I L R 42 All 504
2 (1876) 4 Ch D. 301
3 (1905) A C 343
4 A I R 1930 Lah 289

he was then It is worthy of note that the appellant's counsel did not dispute the fact that this China Rama Naidu was a person who could not take care of himself. In fact the undertaking to produce the lunatic itself is proof enough that China Rama Naidu was not a person in his ordinary senses and was more in the nature of a person who could be directed by volitions and wills other than that of himself. I am therefore of opinion that the preliminary point urged by the learned advocate for the appellant is unsustainable and has to be rejected

The next question is whether on the materials placed before the lower Court the learned District Judge was justified in making the order he did As stated already, the only piece of oral evidence that was before him was the evidence of the Assistant District Medical Officer who kept the alleged lunatic under observation for a period of nearly two weeks and came to the conclusion that he should be declared and certified as a lunatic There was no serious cross-examination of the doctor The only answer that was elicited from him in cross-examination was that his observations were confined to the present condition of the lunatic. Before the learned Judge, the petitioner filed Exs P-1 to P-4, and the respondents filed Exs. D-1 to D-7 The learned Judge has exhaustively considered the scope and effect of these documents and was of opinion that it was eminently a fit case for the application of the Indian Lunacy Act I have not been shown any reasons why I should disagree from the learned District Judge in this conclusion The judgments in O S No 58 of 1942, and the appeal therefrom do not in any way help the present contention of the appellant Her own deposition in O. S. No. 58 of 1942, cuts the ground under her feet now when she disclaims that her son is a man of unsound mind Having carefully considered the judgment of the learned Judge I see no reason to come to a different conclusion from him.

Mr. Venkatadri then contends that there was no justification for appointing the Government Pleader of Nellore as the manager of the property of this lunatic. According to him the first respondent who initiated the proceedings in the Court below was actuated by malice and ill-will and the petition therefore should not have been entertained I would certainly have agreed with that contention were it not for the fact that it has now been proved that China Rama Naidu should be looked after both as regards his person and property by somebody other than himself It is very difficult to probe into the minds of men and find out the motives that actuate human actions. But in the present case, whether the first respondent is actuated by ill-will against the appellant or not, I cannot say that he was not justified in applying to the lower Court for the appointment of a guardian for China Rama Naidu It is contended that the appellant had alienated the share of the property which she got by hard and strenuous fight with the paternal uncle for the purpose of meeting the food and the treatment expenses of this lunatic The learned advocate strenuously argues that the outcome of appointing a person as manager would be that litigation will be started to invalidate the same, but for which it would have been difficult to feed the lunatic at all These are matters which have to be decided in the fresh litigation if any that the manager of the property may or may not undertake to bring hereafter. I do not think that I can dismiss the petition in the present conditions on account of the fact that an alienation about the validity of which the High Court on a previous occasion did not express any opinion might be re-opened and old matters of controversy would be resuscitated. In these circumstances I am unable to accept the argument put forward by the learned Counsel for the appellant.

The appeal therefore fails and is dismissed with costs.

V P S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE SOMASUNDARAM

M Ganesan *Petitioner* *

Motor Vehicles Act (IV of 1939), section 116—Scope of—Driving in a narrow place and knocking down a person—Risk taken through error of judgment—Criminal liability

In cases of accidents one must keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused This prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision The task of keeping out the prejudice is no doubt a difficult one, but it has got to be performed

Under section 116 of the Motor Vehicles Act driving a motor vehicle on a road recklessly, *per se* is not punishable, but only dangerous driving Where a motor bus driver thinks he could get the bus through the interspace available without hitting against any alien body, but in spite of it an accident takes place, he is not to blame He will be guilty not of dangerous driving but of only an error of judgment which is not punishable under the Act

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Chief Presidency Magistrate, Egmore, Madras, dated 3rd March, 1948, in C C. No. 3657 of 1947

Basi Reddi, A C Muthanna and *R. Ramachandra Reddi* for Petitioner

The Public Prosecutor (*V L Ethiraj*) for the Crown Prosecutor for the Crown.

The Court made the following

ORDER —The petitioner in this case has been convicted by the Chief Presidency Magistrate of offences under section 338, Indian Penal Code, and section 116 of the Motor Vehicles Act and sentenced to three months' rigorous imprisonment for the offences under section 338, Indian Penal Code and one month rigorous imprisonment under section 116 of the Motor Vehicles Act, the sentences to run concurrently

The case relates to an accident which happened at about 11 A M, on 22nd October, 1947, and the facts are these, On the day of occurrence, a tram car proceeding towards Mylapore stopped at the tram stop opposite the Wellington cinema A bus, M S C No 8751 was also going towards Mylapore The petitioner was the driver of that bus A head constable who was travelling in the tram was trying to get down through the front left passage of the tram As he was attempting to alight keeping his legs on the footboard, the rear right side body of the accused's bus dashed against the foot board of the tram and as a result, the constable was injured in the leg He was taken to the hospital and it was found that four bones in the left leg had been fractured Ten days later he died on account of Pneumonia and weak heart According to the medical evidence, the injuries would not have been fatal but for the other two complications that the constable had The injuries were therefore grievous in nature The accident, as stated already, happened while the tram was stationary at the Wellington stop It is in evidence that paint from the rear right side of the body of the bus was scraped to an extent of about one foot long and four inches broad and some paint from the bus was also found sticking to the left front side of the tram At the time of the accident some hand carts laden with charcoal were going on the left side of the road in the same direction as the tram and the bus The evidence is not quite clear at what distance from the tram these hand carts were going But there is evidence that there was a line of cars parked on the left side of the road. On the evidence and according to the admission of the accused, the Chief Presidency Magistrate finds that .

" there was only just enough space for his bus to pass " and that " he should not have taken the risk of elbowing his way along the interspace He did so at his risk, and if such a course should result in an accident, which really happened, he must answer for it "

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* Cr R C No 303 of 1948 8th April, 1949.
(Cr R P No 274 of 1948)

In cases of accidents as pointed out by Mukherji, J, in *Smith* v. *Emperor*[1]:

"The difficulty is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that lives have been lost and the responsibility for the same ultimately rests with none else but the accused This prejudice is bound more or less to reflect on the question of the culpability of the accused and give rise to false issues which tend to cloud judicial vision"

The task no doubt of keeping out the prejudice is a difficult one but it has got to be performed Keeping this observation of Mukherji, J, in mind, it has to be seen how far the petitioner in this case is guilty of the offences of which he has been convicted

As stated already, the finding of the Chief Presidency Magistrate is that

"there was only just enough space for his bus to pass"

and that:

"he should not have taken the risk of elbowing his way along the interspace"

The question is whether the act of the accused in the circumstances falls within the scope of the provisions of section 116 of the Motor Vehicles Act and section 338, Indian Penal Code I will first deal with section 116, Motor Vehicles Act, as in my view, if the petitioner is not guilty of the offence under that section, he would not be guilty of the offence under section 338, Indian Penal Code

Section 116 of the Motor Vehicles Act runs as follows —

"Whoever drives a motor vehicle at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the place where the vehicle is driven and the amount of traffic which actually is at the time or which might reasonably be expected to be in the place, shall be punishable . "

This section is practically a reproduction of section 11 of the Road Traffic Act, 1930, of England which runs as follows.

"If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable "

A reading of these two sections will show, that except for the words,

"if any person drives a motor vehicle on a road recklessly"

word for word, section 116 of the Motor Vehicles Act, is practically the same as section 11 of the English Act It is significant that the words,

"if any person drives a motor vehicle on a road *recklessly*"

found in section 11 of the English Act are omitted in the Indian Act. It is obvious therefore that driving a motor vehicle on a road recklessly, *per se*, is not punishable under the Indian statute. Apart from this, under the English Act, there is another provision which makes careless driving punishable and it is found in section 12 of that Act That section is as follows

"If any person drives a motor vehicle on a road without due care and attention or without reasonable consideration for other persons using the road he shall be guilty of an offence"

There is no corresponding provision in the Indian statute The absence of a provision similar to section 12 of the English Act is not without significance, particularly when our laws relating to motor traffic are modelled on English statutes. The only inference that could be drawn from the absence of a provision in the Indian statute similar to section 12 of the English Act is that under the Indian law careless driving as such is not made punishable. The reasons for not introducing such a provision in the Indian statute may be manifold; but it is unnecessary for me to go into that question Suffice it to say that there is a distinction between dangerous driving mentioned in section 11 and careless driving mentioned in section 12 of the English Act both of which are made punishable under the English law whereas under section 116 of the Motor Vehicles Act, only dangerous driving is made punishable Even reckless driving is excluded from the purview of section 116. Apart from the class of cases which fall within the scope of sections 11 and

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1 (1925) I L R 53 Cal. 333.

12 of the English Act, which may be stated to be (1) reckless driving, (2) dangerous driving, and (3) careless driving, there is a class of cases which fall under category of what is called "guilty of error of judgment." Acts which fall within the last class, *viz*, guilty of error of judgment, are not punishable As it is not an offence it could not find a place in the statute book, but it is only laid down in decisions of English courts In *John Joseph Howell*[1], on a trial for manslaughter, the Judge when dealing with a possibility of a conviction of dangerous driving, directed the jury

> "If you think that (the prisoner) was guilty of a mere error of judgment, then you should find him not guilty"

But when the foreman of the jury stated that the jury found the prisoner not guilty of manslaughter, the Clerk of the Assize asked him

> "Do you find the prisoner guilty or not guilty of dangerous driving?"

to which the jury replied ·

> "Yes, we find him guilty of dangerous driving owing to an error of judgment"

The Judge then asked whether they found him guilty or not guilty of dangerous driving and the foreman replied ·

> "Guilty of dangerous driving"

The Lord Chief Justice held that the jury meant to find that the prisoner was guilty of a mere error of judgment and therefore was in no other sense guilty of dangerous driving In paraphrasing the verdict of the jury the Lord Chief Justice stated as follows :

> "In other words, the jury meant to say "We know, when we look at the consequences and see the results of the event, that the driving was in fact dangerous, but, so far as the driver is concerned, we impute to him no more than a mere error of judgment"

The Lord Chief Justice then held that on that verdict, the accused was entitled to be acquitted and he was acquitted

The question now in this case is under what category does the present case fall It is clear from the evidence that the major portion of the bus had passed through and it is only the rear right side that hit the foot board of the tram It is well known that when the front portion of the bus can pass through a passage, the rear portion also could pass through and unless something happens which turns the car or bus, there need be no occasion for the rear portion to touch any other body when the front portion had gone through without touching it The finding of the Chief Presidency Magistrate also is to the effect that there was just enough space for the bus to pass Only, according to him, he should not have taken the risk of elbowing his way along the interspace In the circumstances, in my opinion, the act of the petitioner falls properly within that class of cases, *viz*, guilty only of error of judgment. This is not a case where the petitioner acted,

> "With the consciousness that the mischievous legal consequences may follow but with the hope that they will not and often with the belief that the actor has taken sufficient precautions to prevent that happening"

I should say that the petitioner thought that he could get the bus through the interspace and the fact that the major portion of the bus went through the interspace without hitting against any alien body, supports him in his judgment But if in spite of it this accident took place, he is not to blame I therefore find the petitioner only guilty of error of judgment and not guilty of dangerous driving under section 116 of the Motor Vehicles Act If he is not guilty, under this section, I do not see how he can be guilty under section 338, Indian Penal Code. I refrain from referring to the English decisions on this question as the Crown Prosecutor has fairly conceded in this case that it may be difficult to sustain a case under section 338, Indian Penal Code I find him not guilty under section 116, Motor Vehicles Act and section 338, Indian Penal Code The convictions and sentences are set aside and the petitioner is acquitted.

V.P.S. ——— *Petition allowed Convictions and sentences set aside.*

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1. Crl Appeal Rep, Vol XXVII, 5

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE GOVINDA MENON

Perla Sattayya Chetti — *Appellant**

v

Gandhi Venkataramanayya — *Respondent*

Practice—Suit filed in the Subordinate Judge's Court with proper vakalat—Finding of overvaluation—Return of plaint and re-presentation to Munsiff's Court—Vakalat not returned and not re-presented—Suit dismissed as no vakalat was filed—Legality of dismissal—Proper procedure.

A plaint was presented in the Court of the Subordinate Judge with a proper vakalat and it was numbered The defendant contested that it had been overvalued for the purpose of pecuniary jurisdiction and the Court found that the value of the suit properties was below Rs 3,000 The plaint was, thereupon, directed to be returned and it was taken back and re-presented in the Munsiff's Court But as there was no direction to return the vakalat it was not taken back and when the plaint was filed before the District Munsiff no vakalat was filed The District Munsiff dismissed the suit as no vakalat had been filed by the plaintiff, when the plaint was re-presented to his Court On appeal, the Subordinate Judge admitted the original vakalat lying in his Court as additional evidence, but holding that the proceedings before the Munsiff were new proceedings, came to the conclusion that in the absence of a proper vakalat the suit was properly dismissed On second appeal.

Held, that the retention of the vakalat in the Subordinate Judge's Court would not in any way detract from the fact that when the plaint was subsequently presented in the Munsiff's Court it was a continuation of the suit that had been originally instituted Even though the vakalat was not produced before the District Munsiff, still its existence being now proved to be correct, the District Munsiff and the Subordinate Judge should not have dismissed the suit on this technical point There is no provision in the Civil Procedure Code or in the rules of practice making it obligatory that along with the presentation of the plaint, *eo instanti* a vakalat also should be filed If the Court is convinced that at the time the plaint was presented, the pleader had in his possession or power a properly executed and attested vakalat, then the Court is entitled to come to the conclusion that though there was some irregularity in the procedure adopted, it is a matter which can be cured under section 151, Civil Procedure Code What is necessary and essential is the existence of the power in the possession or power of the person who acts In the circumances, the dismissal of the suit was not justified in law

Appeal against the decree of the Court of the Subordinate Judge of Vishakapatnam in A S No 136 of 1945, preferred against the decree of the Court of the District Munsiff of Vishakapatnam in O S No 146 of 1943

T V R Tatachari for Appellant

B C Seshachala Aiyar for Respondent

The Court delivered the following

JUDGMENT —This raises a question of some importance regarding the practice and procedure observed in the lower Courts, though instances like the one in question are not of common occurrence

The plaintiff in O S No 146 of 1943, on the file of the District Munsiff, Vizagapatam, is the appellant in the second appeal He filed the suit, out of which this second appeal arises, in the first instance in the Court of the Subordinate Judge, Vizagapatam, for the recovery from the defendant of 55 cents of land on the ground that the same was encroached upon by the defendant The plaint was presented in the Court of the Subordinate Judge on 3rd February, 1942, by two petitioners, Messrs C V Somayajulu and P Gangadharam, with a properly executed and attested vakalat in their favour The suit was numbered as O S No 10 of 1942, in the usual course and summons was ordered to the defendant The defendant who appeared contested that the suit has been overvalued for the purpose of pecuniary jurisdiction It was his case that if the land had been properly valued the suit could have been filed in the District Munsiff's Court of Vizagapatam as the property, the subject-matter of the contest, would be worth only a sum below Rs 3,000 The learned Subordinate Judge appointed a commissioner to value the properties and the result of the valuation by the commissioner was that it was found that the suit was of the value of below Rs. 3,000 and therefore should have been presented in the Court of the District Munsiff as the Court of the lowest pecuniary jurisdiction.

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* S. A No 928 of 1946. — 8th April, 1949

Thereupon the learned Judge directed the return of the plaint on 13th July, 1943. The original plaint was taken back on the same date as it was returned and presented immediately thereafter on the very date itself before the District Munsiff of Vizagapatam, but as there was no direction to return the vakalat filed in the Sub-Court along with the plaint it was not taken back at all by the pleaders When the plaint was presented again before the District Munsiff, no vakalat was filed The reason for not doing so is not apparent from the records and neither of the lower Courts gives any reason why such a procedure was resorted to After the evidence was let in, and during the course of the arguments before the District Munsiff, it was pointed out by the defendant's vakil that the suit should be dismissed because no vakalat was filed on behalf of the plaintiff when the plaint was presented in the District Munsiff's Court Apparently, this defect was not noticed till then Arguments were heard on this aspect of the case and the learned District Munsiff holding that the proceedings before his Court cannot be said to be a continuation of the proceedings in the Subordinate Judge's Court, came to the conclusion that the provisions of rules 1 and 4 of Order 3, Civil Procedure Code, have not been complied with and hence held that the plaint was not properly presented and on that ground the suit was dismissed In his judgment the learned District Munsiff considered *in extenso* the evidence on issues 1 to 3 also and gave a finding that the plaintiff was entitled to recover possession from the defendants of 27 54 cents of land encroached upon by the latter Even so, in view of his opinion that the whole proceedings were void as the plaint had not been properly presented, the suit was dismissed

The plaintiff took up the matter in appeal and the learned Subordinate Judge of Vizagapatam during the course of the hearing of the appeal admitted the original vakalat which had been lying in his own Court as additional evidence under Order 41, rule 27, Civil Procedure Code, after examining Mr P Gangadharam, the junior vakil who presented the plaint as P W 4 The learned Judge was therefore satisfied that when the plaint was originally filed in the Sub-Court, there was a proper vakalat, though it was not taken back when the plaint was returned and the same was not re-presented before the District Munsiff According to the learned Subordinate Judge, the pendency of the plaint before the District Munsiff cannot be said to form a continuation of the proceedings before the Subordinate Judge's Court It should be deemed to be new proceedings, and such being the case in the absence of a proper vakalat which only could initiate such proceedings the order of dismissing the suit by the District Munsiff was correct and the Subordinate Judge confirmed the same The learned Judge did not accept the contentions put forward by the defendant's counsel, nor did he agree with the decision in *Debi Lal* v *Krishnaji*[1], cited before him The result, according to both the lower Courts, was unfortunate, but as both of them viewed that legally the plaintiff was not entitled to any relief the suit was dismissed

The plaintiff comes up in a second appeal, and Mr Tatachari appearing for the appellant raises before me various contentions to the effect that the procedure adopted by the lower Courts was wrong and that he is entitled to a decision of the case on the merits Before I discuss the legal aspect of the question in issue one observation falls to be made and that is that when it was discovered during the course of the trial in the Munsiff's Court that no vakalat had been filed it was the duty of the counsel appearing for the plaintiff to have immediately made an application to the District Munsiff to call for the vakalat from the Subordinate Judge's Court or to have applied straightaway to the Subordinate Judge's Court for the return of the vakalat and after getting it back present the same to the District Munsiff's Court Mr Tatachari is not able to explain why this obvious procedure, which ought to have occurred to any legal practitioner, was not adopted in the lower Courts Anyhow that does not matter in the light of the opinion which I am expressing in this case

1 (1922) 67 I C 296

The question, therefore, for consideration is whether the proceedings before the District Munsiff could be deemed to be a continuation of the proceedings before the Subordinate Judge's Court. As already stated, the presentation before the Subordinate Judge's Court was without any formal defect as the suit was numbered as O. S. No. 10 of 1942. Further proceedings were resorted to as is evidenced from the circumstance that the value of the properties was fixed by that Court after consideration of the evidence before that Court. Leach, C.J. and Krishnaswami Ayyangar, J., had to consider a case in *Ramaswami Aiyar v. Veeraraghavan Raja*[1], where a plaint which should have been filed in a Munsiff's Court was, in fact, presented to the Sub-Court and after various proceedings before the Sub-Court was returned for presentation to the proper Court, *viz.*, the District Munsiff's Court. It was contended in that case that the re-presentation of the plaint in the Munsiff's Court should be deemed to be the actual genesis of the proceedings and that all the previous pendency and proceedings before the Sub-Court should be deemed to have been wiped off in order that the plaintiff may be confronted with the objection regarding certain new rights which the defendants had acquired by the subsequent passing of the Malabar Tenancy Act. The learned Judges expressed the opinion that the presentation of a plaint to a Court which had no jurisdiction to try the suit cannot be said to be the institution of the suit even though the plaint had been accepted as being in order and registered. But, when a plaint is presented to a Court having jurisdiction as the Subordinate Judge's Court in that case, and that Court accepted the plaint as being in order it must be held that the suit had been instituted. Further they were of opinion that because at some later stage as the result of a finding on the value of the subject-matter of the suit it was found that the plaint should have been presented to a Court having lower jurisdiction and the plaint is returned for presentation to that Court it does not mean that the suit had not been instituted and therefore when a plaint has been so returned and re-presented to the Court having jurisdiction the date of the original institution of the suit is the date on which the plaint was filed and not the date on which it was re-presented. As I read the judgment of the learned Judges it seems to me that the principle enunciated there is that if the Court in which the suit was first instituted was having territorial and pecuniary jurisdiction, though not the lowest jurisdiction, it cannot be said that the suit was not instituted at all.

It is not disputed that the Sub-Court of Vizagapatam has territorial jurisdiction over the locality in which the plaint property is situate and but for the provision of the Suits Valuation Act that a suit should be instituted in the Court of the lowest pecuniary jurisdiction, the Subordinate Judge would have jurisdiction to receive the plaint and try the suit. The Subordinate Judge will also have jurisdiction if the suit is transferred to him by the District Court for disposal by him. Therefore, it seems to me, that the presentation of the plaint in this case was to a Court having jurisdiction and there is no initial defect of jurisdiction as regards the original proceedings. Now, if that is so, can it be said that the subsequent return of the plaint and its presentation in the Court of the District Munsif are not a continuation of the proceedings in a suit which has been properly instituted. There is a paucity of authority of this Court on this aspect of the question. But Mr. Tatachari invites my attention to two decisions of the Judicial Commissioner of Nagpur, Hallifax, A. J. C., in which the question akin to the one for consideration now had been discussed.

In *Debi Lal v. Krishnaji*[2], the learned Additional Judicial Commissioner held that where a plaint which was returned for presentation to the proper Court was on the very day presented to the proper Court and the pleader who thought that his power to act for the plaintiff had expired and asked for time to produce a fresh vakalatnama and the District Munsif accepted the plaint and treated it as presented and the case was decided on the merits, it was a proper presentation. In that case objection was taken in appeal that the District Munsif had wrongly exercised

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1. (1941) 1 M.L.J. 629.

2. (1922) 67 I.C. 296.

his jurisdiction under section 151, Civil Procedure Code, in having given time to the pleader to file a proper vakalatnama before him The learned Judicial Commissioner was of opinion that it was a proper case for the application of section 151, and that the Court had power under that provision to allow the plaintiff time for the production of the vakalatnama and such an act would not nullify the provisions of Order 3, rules 1 and 4, Civil Procedure Code He further held that a vakalatnama once executed remains in force till all the proceedings in the suit have ended Various earlier decisions were referred to by the learned Additional Judicial Commissioner and he came to the conclusion that there was nothing wrong in the District Munsif having given time to the plaintiff's pleader to file a fresh vakalat At page 126 there are observations to the following effect

"The fundamental assumption made by the learned pleader for the plaintiff, to which both Judges who dealt with the case and both parties have all along assented, is that the vakalatnama executed for the purposes of the suit in the senior Munsiff's Court expired with the return of the plaint and did not enure for the purposes of the further proceedings in the junior Munsiff's Court. This appears to be wrong Under rule 4 (2) of Order 3, the original appointment of the pleader in the senior Munsiff's Court remained in force till all proceedings in the suit were ended so far as regards the plaintiff"

Later on in the same page there are these observations

"All that is necessary, and therefore all that is permissible for me to say is that in this particular case the proceedings in the suit instituted in the Court of the senior Munsiff did not end so far as regards the plaintiff for the purposes of rule 4 (2) of Order 3, when that Court returned the plaint to his pleader, but were continued by and in the proceedings in the Court of the junior Munsiff"

Now, the observations contained in this case are of direct bearing so far as the facts in our case are concerned The retention of the vakalat in the Subordinate Judge's Court would not in any way detract from the fact that when the plaint was subsequently presented in the District Munsif's Court it was a continuation of the suit that had been originally instituted The same Additional Judicial Commissioner in another case, *Maharashtraya Jnan Kosh* v *Bijjulal*[1], expressed the opinion that the practice of not returning the vakalat when the plaint is returned is wrong The original vakalat enures for the purpose of the suit in the Court in which the plaint is subsequently filed under rule 4 (2) of Order 3, even if it contains no express provision to that effect, and, therefore ought in every case to be returned along with the plaint There are other points, discussed by the learned Judicial Commissioner, *viz*, that a vakalat in which the pleader's name is not mentioned is a valid vakalat I am not called upon to express any opinion regarding the correctness of that view in this case It seems to me, therefore, that even though the vakalat was not produced before the District Munsif, still its existence being now proved to be correct, the District Munsif should not have dismissed the suit on this technical point.

There is another aspect which has to be considered and that is whether the presentation of a vakalat along with the plaint is absolutely necessary in order to make the presentation a valid one We have the opinion of Roe and Coutts, JJ, of the Patna High Court in *Sheik Palat* v *Sarwan Sahu*[2] to the effect that though it may not be necessary to file a vakalatnama with a petition of appeal it is certainly necessary that there should be at the time of the presentation of the appeal a vakalatnama *in existence* bearing the signature of the appellant or his attorney The *raison de'etre* of this decision is that the plaint or memorandum of appeal should be presented by a person with a duly authorised power of agency There is no provision in the Civil Procedure Code or in the Rules of Practice, so far as my attention has been invited to, making it obligatory that along with the presentation of the plaint *eo instanti* a vakalat also should be filed If the Court is convinced that at the time the plaint was presented the pleader had *in his possession or power* a properly executed and attested vakalat then the Court is entitled to come to the conclusion that though there was some irregularity in the procedure adopted it is a matter which can be cured under section 151, Civil Procedure Code What is necessary and essential is the existence of the power in the possession or power of

1. A I R 1923 Nag. 182

2 (1918) 55 I C 271 (1)

the person who acts My attention has been invited to a decision of Burn and K. S. Menon, JJ, in *Sri Sri Sri Nandamani Ananga Bhima Deo* v *Sri Madana Mohana Deo* [1] There the learned Judges had to consider a case where at the time an execution petition was presented there had been no vakalat at all executed in favour of the advocate and, therefore, the learned Judges held that that was not a mere irregularity but was an illegality, or a voidness which cannot be cured or condoned. They were of opinion that it is not a case of any defect in the particulars of any document, it being a case simply of want of authority on the part of the pleader to act I respectfully agree with these observations, but this decision cannot be said to run counter to the cases discussed by me above whereas here in our case as a matter of fact, there was a proper vakalat in favour of the pleader and that vakalat had been already presented to a Court having jurisdiction In the view which I am taking it is unnecessary for me to consider the observations contained in *Hirabai* v *Bhagirath Ramachandra*[2], as to whether the failure to comply with the provisions regarding the presentation of a plaint is a mere irregularity or not so that if the person presenting it is not as a fact authorised by a document to do so whether the presentation would be illegal as would oust the jurisdiction of the Court The learned Judges Mr Justice Divatia and Justice Lokur were of opinion that in such a case the Court would have discretion to permit the irregularity to be cured and if the pleader had acted in good faith and without gross negligence the Court would allow that irregularity to be cured They further held that the suit must be deemed to have been filed when it was first instituted and under section 99, Civil Procedure Code, the decree passed in favour of the plaintiff should be confirmed on appeal on the ground that there was no irregularity In that case it would appear that the counsel who presented the plaint did not have or file a vakalat along with it Still the learned Judges held that it is a matter which can be cured under section 99, Civil Procedure Code It seems to me, therefore, that the learned District Munsif was wrong in dismissing the suit on the ground of this alleged illegality Moreover when once the lower appellate Court had admitted the vakalat as additional evidence in appeal it should be deemed to be as if the vakalat was in existence even in the trial Court

Mr B C Seshachalam, counsel for the respondent, contended that on the merits the plaintiff has no case to succeed If both the lower Courts had come to the conclusion on the merits that the plaintiff's suit was unsustainable there would have been no necessity to interfere on this technical point But the only finding now before me on the merits is in favour of the plaintiff's case

In these circumstances, as the dismissal of the suit was not justified in law, I would set aside the decision of both the lower Courts and remand the suit to the trial Court to be tried afresh after taking evidence The plaintiff is responsible for the plight in which he finds himself He should have taken steps to get the vakalat transmitted from the Sub-Court to the District Munsif's Court and should have applied to that Court for the condonation of any irregularity, if there had been one I am of opinion that if such a thing had been done, there would have been no irregularity at all Such being the case, the plaintiff should be liable irrespective of the ultimate result of the suit for all the costs which the defendant had to incur up till now in the trial Court, in the Court of appeal and in this Court and the fresh trial of the suit will be conditional upon the plaintiff paying to the defendant within one month after the receipt of the records in the trial Court such amount of costs If the plaintiff does not pay the costs to the defendant within one month after the receipt of the records in the trial Court the suit will stand dismissed If he conforms to this order the District Munsif will restore the suit to its original number on his file and dispose it of according to law The Court-fee in the memorandum of second appeal will be refunded and if the plaintiff is so advised he may move the lower appellate Court for the refund of the court-fee paid there

No leave.

V P S ——— *Appeal allowed.*

1. (1936) 71 M L J. 604: I L.R 1937 Mad 320 2 I L R (1945) Bom 819

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE PANCHAPAKESA AYYAR

P Venkatachala Udayan *Petitioner**

v

The Executive Officer, Rasipuram Panchayat Board, Rasipuram, Salem district *Respondent*

Madras Local Boards Act (XIV of 1920), *sections* 194 (1) (b) *and* 212 (ii)—*Scope and applicability—Installing a motor power pump in a field-well without licence—If an offence—Nature of the provisions of section* 212 (*ii*)

Section 194 (1) (*b*) of the Madras Local Boards Act will apply only to installations in premises for the purposes of industries and factories, the minor head under which this section comes, and will have no possible application to a pump installed in a field-well for irrigation purposes and as such a conviction for such installation without a licence cannot be upheld and has to be quashed

The provision as to the time of 30 days given in section 212 (*ii*) of the Act is a mandatory one passed by the Legislature after mature consideration and it is not for a Magistrate to ignore it and stretch a point against a person accused of a criminal offence for having acted as if his request for a licence had been granted When the accused had applied for a licence on 10th September, 1946, and the order of refusal was only on 12th February, 1947, but he had installed the pump after waiting for 30 days, he must be deemed to have been granted the licence for the pump for that year and cannot be convicted for installing the pump without the licence

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Namakkal, in C A No 15 of 1948 (C C No 1828 of 1947, Stationary Sub-Magistrate's Court, Rasipuram).

V V. Srinivasa Aiyangar for *K Sankara Sastri* for Petitioner.

The Crown Prosecutor (*S Govind Swaminathan*) for the Public Prosecutor for the Crown

The Court made the following

ORDER —The petitioner, a ryot living within Rasipuram Panchayat limits, has been convicted under sections 212 and 194 (1) (*b*) of the Madras Local Boards Act, 1920, for installing a five horse power motor and a pump set in R. S No 25/5 (Moolai well) in Koneripatti village within the Rasipuram Panchayat limits without having been granted a licence by the Panchayat and has been fined Rs 100 Mr V. V Srinivasa Aiyangar, for the petitioner, urged six reasons for quashing the conviction I need consider only two of them as either of them is enough to quash the conviction The first is that section 194 (1) (*b*) will apply only to installations in premises for the purpose of industries and factories, the minor head under which this section comes, and will have no possible application to a pump installed in a field-well for irrigation purposes The learned Crown Prosecutor agreed. On this ground alone the petitioner's conviction must be quashed All the considerations of inconvenience to neighbours by this petitioner's drawing away by means of his pump all the subsoil water are irrelevant for the purpose of this criminal case

The next contention was that under section 212 (ii) of the Local Boards Act, the application for the licence must be deemed to have been allowed as the petitioner applied for a licence on 10th September, 1946, and orders on it were not communicated to him, within thirty days The order of refusal was only on 12th February, 1947 Such cataleptic sleeps over petitions are the very things disapproved of and provided in section 212 (ii). The lower Courts went wrong in stating that the thirty days given in section 212 (ii) were not sufficient to consult the Health Officer and others and so the provision in section 212 (ii) must be ignored The provision is a mandatory one passed by the Legislature after mature consideration It is not for Magistrates to ignore it and stretch a point against a person accused of a criminal offence and fine him It is only the Legislature which can amend

* Cr R C No 740 of 1948. (Cr R P. No 697 of 1948) 14th July, 1949

it and extend the time if it deems fit. And why should it do so when thirty days are ample in all conscience to pass orders on such applications, and cars and air mail make communication quicker? So the petitioner must be deemed to have been granted the licence for the pump for that year even if one was required and must be acquitted on that ground also

In the end, I set aside the conviction and sentence, acquit the petitioner, and order the fine, if paid, to be refunded

V S *Conviction set aside*

[PRIVY COUNCIL]

[On appeal from the High Court of Judicature at Madras[1]]

PRESENT .—LORD OAKSEY, LORD REID, SIR MADHAVAN NAIR, SIR JOHN BEAUMONT AND SIR MALCOLM MACNAGHTEN

Sri Rajah Ravu Venkata Mahipathi Gangadhara Rama Rao Bahadur, Yuvarajah of Pithapuram and another *Appellants* *

v

The Commissioner of Income-tax, Madras *Respondent*

Income-tax Act (XI of 1922), *sections* 2 (1) (a) *and* (b) *and* 4 (3) (viii) *and Madras Permanent Settlement Regulation (XXV of* 1802)*—Income derived from permanently settled estates—Imposition of income-tax in respect of—Not a breach of the Madras Permanent Settlement Regulation—Income from trees of spontaneous and wild growth—Not agricultural income*

The imposition of income-tax in respect of income derived from a permanently settled estate would not be a breach of the Madras Permanent Settlement Regulation of 1802

Probhat Chandra Barua v *The King-Emperor*, (1930) 59 M L J 814 L R 57 I A. 228 (P.C) followed

Chief Commissioner of Income-tax, Madras v *Zamindar of Singampatti*, (1922) I L R 45 Mad 518 (F B) and *Maharajadhiraj of Dharbhanga* v *Commissioner of Income-tax*, (1924) I L R 3 Pat 470, overruled

Income derived from sale of wood, bark, leaves, usufruct of trees situated in the forest and non-forest areas of a Zamindari governed by the Madras Permanent Settlement Regulation of 1802 where the trees are found to have grown wild and spontaneously would not be agricultural income within the meaning of section 2 (1) (*a*) or (*b*) of the Income-tax Act and therefore would not be exempt under section 4 (3) (*viii*) of the Act from taxation under the Act

Raja Mustafa Ali Khan v *Commissioner of Income-tax, U P, Ajmer and Ajmer-Merwara*, (1949) 1 M L J. 165 L R 75 I A 268 (P C), followed

Decision in (1946) 1 M L J 120 I L R 1946 Mad 745, affirmed

Cyril King for Appellants

J. M. Tucker, K C , for Respondent

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR —This is an appeal from a judgment of the High Court of Judicature at Madras, dated 10th December, 1945,[1] delivered on a reference made to it under section 66 (1) of the Indian Income-tax Act (Act XI of 1922), as amended by various amending acts including the Indian Income-tax (Amendment) Act of 1939 (Act VII of 1939)

The appellants are the assessees

The assessment was made with respect to the year 1942-1943, the previous year being 1941-42

The question arising for determination in this appeal is whether the appellants are exempt from taxation in respect of a part of their income amounting to Rs. 7,612, derived from the sale of wood, bark, leaves, usufruct of trees, etc , on the ground that (*a*) the income was derived from a permanently settled estate and (*b*) the income was agricultural income within the meaning of section 2 (1) of the Indian Income-tax Act, 1922.

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1 (1946) 1 M L J 120 I L R (1946) Mad 745

* P C Appeal No 15 of 1948

Before stating the facts, it will be convenient to refer to the relevant provisions of the Madras Permanent Settlement Regulation (XXV of 1802), and of the Indian Income-tax Act bearing on the question

Madras Permanent Settlement Regulation (XXV of 1802)

This regulation was passed

"for declaring the proprietary right of lands to be vested in individual persons, and for defining the rights of such persons, under a permanent assessment of the Land-Revenue in the British territories subject to the Presidency of Fort St George"

Articles 1, 2 and 4 of this Regulation are as follows —

Article 1 For the reasons stated in it, Article 1 says

" the British Government has resolved to grant to Zamindars and other landholders, their heirs and successors, a permanent property in their land in all time to come, and to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances".

Article 2 "In conformity to these principles, an assessment shall be fixed on all lands liable to pay revenue to the Government, and, in consequence of such assessment, the proprietary right of the soil shall become vested in the Zamindars or other proprietors of land, and in their heirs and lawful successors for ever"

Article 4 "The Government having reserved to itself the entire exercise of its discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included, according to the custom and practice of the country, under the several heads of salt and saltpetre—of the sayar, or duties by sea or land—of the *abkari* or tax on the sale of spirituous liquors and intoxicating drugs—of the excise on articles of consumption—of all taxes personal and professional, as well those derived from markets, fair or bazaars of *lakhiraj* lands (or lands exempt from the payment of public revenue,) and of all other lands paying only favourable quit-rents—the permanent assessment of the land-tax shall be made exclusively of the said articles now recited"

The Indian Income-tax Act (Act XI of 1922).

The relevant provisions of the Indian Income-tax Act are as follows .—

"*Section* 2 - *Definitions* —In this Act, unless there is anything repugnant in the subject or context,—

(1) 'agricultural income' means—

(*a*) any rent or revenue derived from land which is used for agricultural purposes and is either assessed to land-revenue in British India or subject to a local rate assessed and collected by officers of the Crown as such,

(*b*) any income derived from such land by—

(i) agriculture

* * * * * * *"

"*Section* 4 (3) Any income, profits or gains falling within the following classes shall not be included in net total income of the person receiving them —

(i) to (vii)

(viii) Agricultural income"

"*Section* 6 *Heads of income chargeable to income-tax* —Save as otherwise provided by this Act, the following heads of income, profits and gains, shall be chargeable to income-tax in the manner hereinafter appearing, namely —

(i) Salaries

(ii) Interest on securities

(iii) Income from property

(iv) Profits and gains of business, profession or vocation

(v) Income from other sources

Section 12 *Other sources* —(1) The tax shall be payable by an assessee under the head 'income from other sources' in respect of income, profits and gains of every kind which may be included in the total income (if not included under any of the preceding heads)

* * * * * *"

The appellants are the sons of the Maharajah of Pithapuram, the proprietor of the zamindary of Pithapur, which was permanently settled under the Madras Permanent Settlement Regulation. A part of the permanently settled estate known as Pulivela was settled upon the appellants by their father. This estate includes forest and non-forest areas of spontaneous growth from which the appel-

lants derive income by the sale of wood, bark, leaves, minor forest produce, usufruct of trees including *Jadivala* in *Jiarayati* lands, and levy of licence fees They also derive income from the sale of proceeds of trees which are also of spontaneous growth in non-forest areas It is admitted that the trees in the forest and non-forest areas have grown wild, and that agricultural operations are not carried on in any of the areas from which the income in question was derived

For the year of account 1941-1942 the income derived by the appellants from the sources mentioned above amounted to Rs 7,612, and the appellants were taxed on this sum for the year 1942-1943 The material part of the assessment Order made by the Income-tax Officer is as follows —

"It is stated that the income from forests as well as miscellaneous income from non-forest areas referred to above are in the nature of agricultural income and not liable to be taxed It is however admitted that the entire income from various sources detailed above relates to trees of spontaneous growth in forests as well as in non-forest areas, that no trees are grown by the assessees and no agricultural operation are carried on in any of the areas The income from these sources does not then fall under 'agricultural income' as defined in section 2 (1) (*a*) and (*b*) (1) of the Income-tax Act and is not exempt from tax The total income of Rs 7,612-1-5 will therefore be taxed"

The above Order was objected to before the Appellate Assistant Commissioner on two grounds —(1) that as the Government have fixed the public assessment for ever under the Madras Permanent Settlement Regulation, any further taxation will be illegal; and (2) that the income sought to be taxed was agricultural income within the meaning of section 2 (1) of the Indian Income-tax Act and exempt from the levy of the tax by virtue of section 4 (3) (*viii*) Both contentions were rejected by the Appellate Assistant Commissioner, and also on appeal from his Order by the Income-tax Appellate Tribunal

At the request of the appellants the Tribunal referred two questions to the High Court. These are

"(1) Whether the imposition of income-tax in respect of income derived from a permanently settled estate would be a breach of Regulation XXV of 1802 relating to Permanent Settlement.

(2) Whether the income of Rs 7,612 derived from the sale of wood, etc (as detailed herein above) is exempt under section 4 (3) (viii) read with section 2 (1) of the Indian Income-tax Act, 1922"

Both these questions were answered against the appellants by the High Court.

In a recent decision of the Board, viz., *Raja Mustafa Ali Khan, through Special Manager, Court of Wards, Utraula, District Gonda* v *Commissioner of Income-tax, United Provinces, Ajmer and Ajmer-Merwara*[1], it was held that .

"Income derived from the sale of forest trees growing on land naturally and without the intervention of human agency, even if the land is assessed to land revenue, is not 'agricultural income' within the meaning of section 2, sub-section 1 (*a*) or (*b*) of the Indian Income-tax Act, 1922, and is not therefore exempt from income-tax under section 4, sub-section 3 (viii) of the Act"

In view of this decision, Mr Cyril King, learned counsel for the appellants, stated frankly that he was not prepared to argue that the income in the present case is exempt from taxation on the ground that it is "agricultural income."

Therefore, their Lordships have to consider in this appeal only one question, namely, whether the income should be held to be exempt from taxation under the Indian Income-tax Act on the ground that it arose from a permanent settled estate which must be presumed to have been exempted from all taxation, beyond the *peishkush* (*jama*) payable to Government, fixed under Regulation XXV of 1802

The argument of the learned counsel proceeded on these lines —The forest and the non-forest areas from which the income is derived have all been included in the *zamin* lands on which the zamindar has to pay *peishkush*, and as such *peishkush* has been fixed for ever no increase in the *peishkush* can ever be made under any circumstances, as the tax levied on the income from the produce of the forests will in effect amount to an addition to the *peishkush* and will thus be contrary to the terms of the *sannad* It is admitted that the forest and non-forest areas were all included in the zamindari at the time of the settlement.

1. (1949) 1 M L J 165 L R 75 I A 268 (P C).

In support of the above argument reliance was placed on *The Chief Commissioner of Income-tax, Madras* v *Zamindar of Singampatti*[1] and *Maharajadhiraj of Darbhanga* v. *Commissioner of Income-tax*[2], both of which support the appellants It is not necessary to discuss these decisions, or to consider further the arguments of the learned counsel, for it was decided by the Board in *Probhat Chandra Barua* v *The King-Emperor*[3],—a case under the Bengal Permanent Settlement Regulation—that ·

" While the Bengal regulations contain assurances against any claim to an increase of the *jama*, based on an increase of the zamindari income, they contain no promise that a zamindar shall in respect of the income which he derives from his zamindari be exempt from liability to any future general scheme of property taxation, or that the income of a zamindari shall not be subjected with other incomes to any future general taxation of incomes

Under the Indian Income-tax Act, 1922, section 6 (iv) ('other sources'), and section 12, sub-section 1, the zamindar of a permanently settled estate is assessable to tax under the Act in respect of income, profits, and gains derived from his zamindari, subject to the exemptions in section 4, sub-section 3, the assessment should be computed after making proper allowance, under section 12, sub-section 2 in respect of the *jama* assessed and paid "

Ten items were mentioned in that case, those being

" (i) *Jalkar* or rents received from fisheries

(ii) Ground rent from land used for potteries

(iii) Ground rent from land used as brick fields

(iv) Fees received from the tying up of boats against the assessee's land

(v) Fees received from land used for storing purchases of crops (*ualiali*)

(vi) Fees received from cart-stands

(vii) *Punyaha nazar* or *nazar* paid by tenants of agricultural holding at the beginning of the zamindari year

(viii) *Nazar* for petitions presented to the zamindar, dealing with questions of succession, settlement and partition

(ix) Ground rent for permanent shops at *hauts* and *bazars*

(x) Stall fees paid by temporary (daily) settlers at *hauts* and *bazars* "

The Bengal Permanent Settlement Regulation is Bengal Regulation I of 1793 Though the two Regulations are differently worded it was conceded by the learned counsel, and their Lordships think rightly, that the language of both the Regulations is to the same effect The decision of the Board was sought to be distinguished by the learned counsel on the ground that the items mentioned in the case before the Board had been excluded from the assessment of the *jama* at the time of the permanent settlement. If that was so, no doubt the decision would be inapplicable to the present case As pointed out by Mr Tucker, the learned counsel for the respondent, from the " case " stated by the Commissioner of Income-tax, Bengal, for the opinion of the High Court (*see* Volume II, I T C 392 at 394), it clearly appears that some of the items were admittedly taken into account in assessing the *jama* It appears from it that some of the items

" such as '*jalkar*' were admittedly taken into account in assessing the *jama* at the time of the Permanent Settlement, some were not, such as the *abwabs* The cases of some of the remaining items are not free from doubt . "

In the circumstances, the learned counsel for the appellants stated that it was not possible for him to press his contention based upon the Permanent Settlement Regulation any further, but he pointed out that the decision in *The Chief Commissioner of Income-tax, Madras* v. *Zamindar of Singampatti*[1], on which he relied strongly has not been referred to in the judgment of the Board, though as will appear from the arguments reference had been made to it Their Lordships have no doubt that though the case is not mentioned by name it must have been considered by the Board In view of the decision in *Probhat Chandra Barua* v. *The King-Emperor*[3], it must now be held that the decisions in *The Chief Commissioner of Income-tax, Madras* v *Zamindar of Singampatti*[1] and *Maharajadhiraj of Darbhanga* v *Commissioner*

1 (1922) I L R 45 Mad 518 (F B)
2. (1924) I L R 3 Pat 470
3 (1930) 59 M L J 814 L.R 57 I A. 228 (P C).

of Income-tax[1], are no longer good law Following the decision in *Probhat Chandra Barua* v *The King-Emperor*[2], their Lordships hold that the decision of the High Court on the question referred to it is right; and that the tax was rightly levied on the amount of Rs 7,612 in the present case

For the above reasons, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs

V S *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE VISWANATHA SASTRI

(On a difference of opinion between SATYANARAYANA RAO, J AND PANCHAPAGESA SASTRI, J)

Adiyalath Kàtheesumma and another *Appellants**

v

Adiyalath Beechu *alias* Umma and others *Respondents*

Hindu Law—Partition—Division in status—Mitakshara Hindu joint family—Marumakkathayam tarwad —Member seeking a partition—Division in status—Notice to manager or karnavan—Sufficiency—Notice to other members not essential

A member of a Mitakshara Hindu joint family or a member of a tarwad governed by the Marumakkathayam law can become divided in status by issuing notice of his intention to separate to the manager of the joint family or the *karnavan* of the tarwad without issuing notice to the other members

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in O S No 69 of 1944

K V. Venkatasubramania Aiyar, D A Krishna Variar and *T V Raman* for Appellants

K P. Ramakrishna Aiyar for Respondents

Judgments of Satyanarayana Row and Panchapagesa Sastri, JJ —

Satyanarayana Rao, J—This appeal arises out of a suit for partition by 15 out of 20 members of a Moppla Marumakkattayam tarwad The first defendant in the suit is the karnavan of the tarwad, and defendants 2 to 5 are the remaining members The sixth defendant was impleaded in the suit on the allegation that the first defendant had created a sham lease in his name over an item of the family property in anticipation of the suit for partition The plaintiffs claimed a share in the properties described in Schedules B and C attached to the plaint A preliminary decree for partition was passed by the learned Subordinate Judge of Tellicherry directing a division of the properties belonging to the tarwad as found by him into 20 equal shares and of delivery of possession of 15 out of such 20 shares to the plaintiffs He also granted other reliefs which are not material for the purpose of this appeal and which are not now in dispute

The appeal is by defendants 3 and 4 and is confined to three points raised on their behalf The first point is whether the tarwad house and the paramba attached to the house should be left undivided for the common residence and use of the members or whether it should be divided The point is covered by issue two in the case, and the learned Subordinate Judge upholding the contention of the plaintiffs held that it should not be divided The parties being Mopplas governed by the Marumakkattayam law and the right to claim partition is governed by the Mappilla Marumakkattayam Act, 1938 (Madras Act XVII of 1939) With reference to the division of tarwad house, section 16 of that Act provides

"In a partition of tarwad properties, unless two-thirds of the members of the tarwad desire to the contrary, the tarwad house including the site or sites of any building appurtenant thereto, and such other land as is necessary for the convenient enjoyment of the tarwad house shall be kept undivided for the common use of all the members of the tarwad in which case, the charges of upkeep and maintenance of the tarwad house shall be borne by the member or members that live in the house"

1 (1924) I L R 3 Pat. 470 2 (1930) 59 M L J 814 L R 57 I A 228 (P C)

* Appeal No 61 of 1947 4th March, 1949

Besides the site of the tarwad house there is land of the extent of 89 cents appurtenant to the house. The contention of the appellants is that so much of the land is not required for the convenient enjoyment of the tarwad house and that therefore the Court should have reserved only a reasonable portion of that extent for the convenient enjoyment of the tarwad house and divided the rest. The plaintiffs and the other defendants are opposed to such division. No material was placed before the lower Court to enable it to decide what proportion of the 89 cents of the land was essential for the convenient enjoyment of the tarwad house, and whether all of it is not required for the common use of all the members of the tarwad. In the absence of such evidence it is impossible to hold that the entire extent was not required for the convenient enjoyment of the tarwad house and that a portion alone would suffice. It was incumbent upon the appellants to establish by evidence that all the extent was not required for the convenient enjoyment of the tarwad house by the members. This they neglected to do and in the circumstances it cannot be said that the conclusion of the learned Judge on issue 2 is erroneous.

The second point raised by the third defendant is that four items of the plaint B schedule, items 9, 21, 22 and 23 should not have been divided as tarwad property, and that the Court below should have held that it was her absolute property. The property was gifted to the third defendant on the 19th of July, 1909, under Exhibit D-10 as marriage gift. The husband of the third defendant died in or about the year 1923. The contention of the plaintiffs is that such stridhanam gifts revert back to the tarwad after the death of the husband and that therefore the tarwad is entitled to these properties notwithstanding the gift in favour of the third defendant. The gift in terms purports to be an absolute gift for the benefit of the third defendant, her husband and her children. The operative part of the deed states :-

> "I have hereby granted to you in Danam Teer on receipt of no consideration whatsoever the aforesaid four items of properties for your enjoyment as stridhana, so as to enable you to give it for the enjoyment of your husband Pannambath Mayan. You and your descendants shall therefore hold and enjoy the aforesaid properties in jenmam right for ever and ever, and on the expiry of the demises of the tenants, pay to them the value of their kuzhikanoms and recover possession of the properties and until the properties are recovered possession of you shall collect the pattam and sundry items (of purappad) in accordance with the terms of the aforesaid marupats, pay the Government assessment and enjoy the balance left over. Hereafter I shall have no claim whatever either in respect of the aforesaid properties or of anything contained therein."

According to these recitals the donee is directed to hold and enjoy the aforesaid property in jenm right in perpetuity and gives a right to the husband also to enjoy the property. The tarwad gave up under this document all claims in respect of that property. If the deed were to be given effect to, the third defendant undoubtedly gets an absolute right to the properties. Is there any warrant for the contention urged on behalf of the plaintiffs that by the customary usage the properties gifted under such circumstances would revert back to the tarwad after the death of the husband. No such custom or usage has been established in this case. In Sundara Ayyar's Malabar Law at page 237 the following passage occurs :

> "There is also the practice for the relations of the wife to make what is called a Stridhana gift to the husband to enable him to maintain her. The gift ordinarily reverts to the family though not invariably on death of the wife without issue or on divorce. This gift seems to correspond to *Kasi* in South Kanara which has similar incidents."

According to this passage if the stridhanam gift is to the husband with a view to enable him to maintain the wife, the gift on the death of the husband or on divorce reverts back to the tarwad, the reason obviously being that the duty of maintaining the wife is on the tarwad. In *Pakrichi* v *Kunhacha*[1] a case where the parties who were also Mopplas but were governed by the Muhammadan Law it was pointed out by Benson and Sundara Ayyar, JJ., at page 386 :

> "It would appear that amongst the Marumakkattayam Moplas of Malabar gifts are often made to the husband of a girl given in marrigae apparently as a contribution towards the maintenance of the girl and her future children. It was held in *Mariyam* v *Abdulla*[2] (unreported), that such a

1. (1911) 22 M.L.J 122 : I.L.R 36 Mad 385. 2. Second Appeal No 1746 of 1895.

gift became void on the death or divorce of the girl Now according to Marumakkattayam law the tarwad is bound to maintain the women of the tarwad even after their marriage, and, if property is given to a husband for the support of his wife it stands to reason that, when he divorces her he should give back the property to the donor "

In the present case the gift was not to the husband but was an absolute gift to the third defendant It is always open to the karnavan of the tarwad to make allotments of property for maintenance (*See* Sundara Ayyar's book at page 149). The gift need not necessarily be restricted to the life of the donee, and may be an absolute gift for the benefit of the donee and her children Even under Hindu law, it is within the competence of the manager to make a reasonable gift of property at or about the time of the marriage of the daughter of the family.

The property was enjoyed by the third defendant, and Exhibits P-6 dated 29th March, 1923 and Exhibit P-5 dated 12th April, 1933, are two marupads executed by a tenant in favour of the third defendant These documents do not contain any admission by the third defendant that the property belonged to the tarwad as was erroneously thought by the learned Subordinate Judge Even if the contention of the plaintiffs that after the death of the husband the property reverts back to the tarwad is well-founded, in this case the husband having died in 1923 and the third defendant having held the property and enjoyed it in her own right adversely to the tarwad, the rights, if any, of the tarwad became extinguished long ago, and the members of the tarwad cannot now claim a share in these items. We are therefore unable to agree with the conclusion of the learned Subordinate Judge that these items should be brought into the hotchpot and should be divided between the members Items 9, 21, 22 and 23 therefore should be excluded from the partition and must be declared to be the absolute property of the third defendant

The third point is whether the fourth defendant is entitled to claim the share of his deceased mother who died before the suit. According to the fourth defendant he and his mother became divided in status by a notice issued on their behalf to the karnavan, the 1st defendant, on the 27th of October, 1941 (Exhibit D-12). As the mother therefore became divided in status, the share which she held in severalty devolved upon him as her heir, and the property should be divided into 21 shares and 2 shares out of them should be allotted to him in the partition The question for consideration is whether the notice, Exhibit D-12, brought about a division in status between the mother and the other members of the tarwad In the case of Nayar tarwads, the Madras Act XXII of 1933 conferred a right upon a member of such a tarwad to claim a partition of the properties and thus introduced an innovation in that law As an extension of that right it has been held in *Kunchi Amma* v *Minakshi Amma*[1], that the doctrine of severance in status by a definite and unambiguous expression of the intention either by declaration or conduct and communicated to the other coparceners and which was recognised and established by judicial decisions under the Mitakshara Law was also extended to tarwads and tavazhis governed by the Marumakkattayam law In the case of Mopplas governed by the Marumakkattayam law an indefeasable right to claim partition by a member of the tarwad was conferred for the first time by the Mappilla Marumakkattayam Act, 1938 (XVII of 1939). The provisions of the Nayar Marumakkattayam Act and the Mappilla Marumakkattayam Act being analogous, there is no reason for not applying the principle of *Kunchi Amma* v *Minakshi Amma*[1] to members of Moppla tarwads The contention of the learned advocate for the appellant is that even under Mitakshara law in order to bring about a severance in status by the exercise of the individual volition of a member to become separate by expressing a definite and unambiguous intention to get severed such intention need not be communicated to the other members, and even if such a communication were necessary, a communication made to the manager or karnavan would be sufficient compliance with the requirements of the rule. The question is whether this contention is well-founded

1. (1935) 70 M L J 114: I L R 59 Mad 693

Under Mitakshara Law the word "partition" or "vibagha" is used in a two-fold sense. It denotes a division of title or the right and also a physical division of the property A physical division of the property may be brought about either by a suit for partition or by an agreement between the members dividing the properties The division of the right may also be brought about by an agreement between the parties The decisions of the Judicial Committee have now firmly established a further mode, by which a right can be divided, or in other words, by which the disruption of the joint status may be brought about without a *de facto* division of the property into specific shares and without the consent on concurrence of the other members of the family A member possesses the liberty of deciding for himself, whether he should continue to be joint in status or sever himself from the joint family, that is, whether he wishes to continue to hold an undefined and unspecified share in the family property in jointness or wishes to hold it separately without being subjected to the obligations that arise and accrue from the joint status If he once makes up his mind to get himself severed in this sense, all that he has to do is to express his decision to so sever in unequivocal terms and intimate the same to his co-sharers, that is, to convey to the other co-sharers his decision to possess the right in severalty along with the other co-sharers As has been repeatedly pointed out by the Privy Council in several decisions no member is entitled to question this decision , nor is he entitled to ask him for the reasons which induced him to make the choice Immediately the communication is made, it results in the disruption of the status of that member and severs him from the rest of the family The decisions bearing on this question have been recently examined, very exhaustively, by the Chief Justice and myself in the case reported in *Radhakrishna* v *Satyanarayana*[1], but that was for a different purpose In *Suraj Narain* v *Iqbal Narain*[2], the doctrine was formulated by the Judicial Committee at page 87 in these terms —

> "What may amount to a separation or what conduct on the part of some of the members may lead to disruption of the joint undivided family and convert a joint tenancy into a tenancy in common must depend on the facts of each case A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation But to have that effect the intention must be unequivocal and *clearly expressed* "

This was further amplified in the next case in *Girja Bai* v *Sadashiv Dhundiraj*[3], where the point was elaborately considered by Mr Ameer Ali At page 1047 after discussing the Hindu law texts in the earlier portions of the judgment the requirements of the rule are thus stated

> "Once the decision has been unequivocally expressed and *clearly intimated to his co-sharers*, (Italics are mine) his right to obtain and possess the share to which he admittedly has a title is unimpeachable "

This passage therefore clearly emphasises the necessity of a member communicating or intimating his intention to his co-sharers To the same effect are the decisions of the Privy Council in *Syed Kasam* v *Jorawar Singh*[4], *Balakrishna* v *Ram Krishna*[5] and *Ram Narain Sahu* v *Mussamat Makhna*[6] It is unnecessary to extract passages from these decisions, the real foundations for which is the decision in *Girja Bai* v *Sadashiv Dhundiraj*[3] In the latest of the decisions *Ram Narain Sahu* v *Mussamat Makhna*[6], their Lordships of the Judicial Committee quote at page 685 the passage from the judgment of Sir George Lowndes in *Balakrishna* v *Ram Krishna*[5], which reads as follows —

> "It is now settled law that the separation may be effected by a clear and unequivocal *intimation* on the part of one member of a joint Hindu family to his *co-sharers* of his desire to sever himself

1 (1948) 2 M L J 331
2 (1912) 24 M L J 345 L R 40 I A 40 : I L R 35 All 80 (P C)
3 (1916) 31 M L J 455 L R 43 I A 151 I L R 43 Cal 1031 (P C)
4 (1922) 43 M L J 676 L R 49 I A 358 I L R 50 Cal 84 (P C)
5 (1931) 61 M L J 362 . L R 58 I A 220 : I L R 53 All 300 (P C)
6 I L R (1939) All 680

from the joint family This was laid down in *Suraj Narain* v *Iqbal Narain*[1]. The question was further examined in *Girja Bai* v *Sadashiv Dhundiraj*[2], and the principle was reaffirmed; and the last mentioned case was followed in *Kawal Nain* v *Budh Singh*[3], where Lord Haldane says, ' the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate ' "

The necessity for communication to the other co-sharers is also considered and laid down by the decisions of our High Court *Soundararajan* v *Arunachalam Chetty*[4], was decided immediately after *Suraj Narain* v *Iqbal Narain*[1] and before *Girja Bai* v *Sadashiv Dhundiraj*[2] The passage already extracted from *Suraj Narain* v *Iqbal Narain*[1], was interpreted to mean that communication to the other co-sharers was necessary, and that in the case of a suit the service of summons on the other members was such a communication

The expression of intention may be by declaration or by conduct In the case of conduct the intimation is given by the conduct which is brought to the knowledge of the other members Where the coparcener is a minor the volition to become separate may be exercised on his behalf by his lawful guardian ; but in that event in order to effect the severance it should be followed by a suit and a decree. When once the option exercised by the guardian is followed by a suit which ends in a decree, the division in status dates back to the date of the notice See *Kotayya* v. *Krishna*[5] If there are only two coparceners in the family and one of them is a minor, the major member, it would seem, may communicate the intention to the natural guardian of the minor See the observation in *Rangasayi* v *Nagaratnamma*[6], *Venkateswara Pattar* v *Manikyammal*[7] and *Kamepalli Ayilamma* v *Mannam Venkataswamy*[8] If, however, the minor has no guardian it cannot be that the adult member is prevented from separating himself It would seem that it is sufficient if the intention is made known to the other relations of the minor See *Venkateswara Pattar* v *Manikyammal*[7] (at page 422), though the point was not expressly decided

Dnaneshwar Vishnu v *Avant Vasudeo*[9], was a case where the paternal grandfather of the minor happened to be his guardian also, there being only two coparceners It was not a case of notice by which the intention was communicated but was a case where the grandfather by a long course of conduct indicated his intention to sever The minor had also his mother and maternal grandfather who were made aware of the conduct and declarations of the grandfather The minor was also a party to certain proceedings in which he was properly represented Having regard to those circumstances the Court held that the grandfather became severed in status from the minor Broomfield, J , at page 745 states his opinion as follows —

" When the judgments of the Privy Council are read as a whole, it may well be doubted, I think, whether their Lordships intended to make it an essential condition that the declaration of intention to separate should be *formally notified* to every member of the family No doubt the intention must be published in some way An act of volition which is kept secret could not be legally effective There would indeed be no evidence in that case that it was genuine But no formal declaration or notice is required The intention may be evidenced by conduct, as held in *Girja Bai's case*[2] [at page 162] where reference is made to the case of *Joy Narain Giri* v *Grish Chunder Myti*[10] I do not think that anything more is essential than publication in the manner appropriate to the circumstances of the case "

As I understand the passage, all that the learned Judge should have meant by the use of the word " formal " is that it need not be expressly communicated by notice or other document. It is enough if it is intimated and brought to the knowledge of the other coparcener by some means This is made clear by the sentence in

1 (1912) 24 M L J 345 L R 40 I A 40 I L R 35 All 80 (P C)
2 (1916) 31 M L J 455 L R 43 I A 151 I L R 43 Cal 1031 (P C)
3 (1917) 33 M L J 42 L R 44 I A 159 I L R 39 All 496 (P C)
4 (1915) 29 M L J. 816. I.L R 39 Mad. 159 (F B.).
5 (1945) 1 M L J 74 I L R 1945 Mad 710.
6 (1933) 65 M L J 630 I L R 57 Mad 95 (F B)
7 (1934) 69 M L J 410
8 (1917) 33 M L J 746
9 (1936) I L R 60 Bom 736
10 (1878) L R 5 I A. 228 . I L R 4 Cal. 434 (P C).

which the learned Judge says that "no formal declaration or notice is required" I do not think the learned Judge intended by this passage to go behind the Privy Council decisions in which their Lordships have definitely laid down that there should be an intimation of the intention to the other co-sharers I do not therefore treat this as an authority supporting the contention of the appellant that no communication is necessary to the other co-sharers For the foregoing reasons I am clearly of opinion that in order to bring about a severance in status it is essential that there should be a communication of the intention to the other co-sharers

Reference was made to the decision in *Narayana Rao* v *Purushothama Rao*[1], but the question now before us did not arise for decision in that case All that was decided was that in order to effect a severance in status it is not necessary that the communication should have been received by the other coparcener, it is enough if it is posted The facts in that case were somewhat peculiar The registered notice by which severance in status was intended to be effected was posted at Bezwada on 3rd August, 1926, to the other coparcener who was living at Guntur and would have in the usual course been received on the 4th but it was actually received by him only on the 9th On the 4th the coparcener who issued the notice executed a will and died on the 5th The question was whether the share could be disposed of by the will If he was divided in status, of course the will could validly operate on his share Otherwise the property would have passed by the survivorship to the other coparcener Varadachariar, J, in answer to the contention that until the receipt of the notice on the 9th the severance could not have been effected and as meanwhile the testator died resulting in the consequence of the property passing by survivorship said —

> "The answer is that the issue of notice, is, so far as the testator is concerned, sufficient to prevent the operation of the principle of survivorship He was certainly justified in expecting that in the ordinary course his notice would have been delivered to the first defendant on the 4th or at least on the 5th It is unnecessary for us to say what the legal result would be in a case where a notice is posted in circumstances when it will be obviously impossible for it to reach the addressee before the testator's deeath"

In the case where the intention was expressed by conduct it may sometimes be difficult to fix the exact date when the severance was effected, as pointed out by the Privy Council in a recent case in *Mussamat Inder Kuer* v *Mussamat Pirthipal Kuer*[2]. The decision referred to by the learned Subordinate Judge in his Judgment, *Jagannatha Rao* v *Ramanna*[3], has obviously no bearing upon the question now in issue In that case an agreement between two brothers which was not intended to be acted upon was held not to be sufficient to effect a division in status This was affirmed by the Privy Council in *Ramanna* v *Jagannadha*[4]

The communication to the other coparceners being therefore an essential condition of the doctrine it cannot be said that the communication to the manager or the karnavan is sufficient compliance In Mayne's Hindu Law, 10th edition at page 562 the learned author says in paragraph 451 —

> "It is open to an adult coparcener to express his intention to separate from a minor coparcener by communicating his intention to the mother or other natural guardian of the minor On principle it is difficult to see why the intention should be communicated to every member of the family It would seem to be sufficient if the intention is clearly intimated to the managing member, or where it is by the managing member to some of the members of the family No doubt, the expression of intention must be published in some way so as to be legally effective"

The learned counsel for the appellant strongly relied upon this passage in support of his contention that notice to the managing member is sufficient compliance, as the managing member represents the other coparceners With greatest respect I am unable to agree with the view of the learned author It is difficult to perceive what the principle is which the learned author had in mind A manager of a joint family has the undoubted right and power to represent the family in all trans-

1 (1938) 1 M L J 45 I L R 1938 Mad 315
2 (1945) 2 M L J 182 (P C).
3 (1937) 2 M L J 386
4 (1941) 2 M L J 58 L R 68 I.A 75 I L R 1942 Mad 886 (P.C)

actions and in suits by or against the family As representing the family he has also the right to alienate family property so as to bind the members subject to certain restrictions recognised by law He has also the power to borrow on behalf of the family so as to bind the shares of the other members, which power also is equally subject to certain restrictions All these powers are excercisable by him on behalf of the family treating it as a unit In transactions or suits *inter se* between the members however he has no such right, and the law has not recognised it In suits for partition all the coparceners have necessarily to be impleaded as parties to the action The Privy Council pointed out in *Palani Ammal* v *Muthuvenkatachala Moniagar*[1]

"It appears to be obvious to their Lordships that in a suit for partition no effective decree can be made for a partition unless all the coparceners whose addresses are known, are parties to the suit and that it is the decree alone which can be evidence of what was decreed"

Even if the separation that was sought in the suit for partition was only of the plaintiff in the action and not between the other coparceners *inter se* the manager of the family is not entitled to represent the coparceners who are defendants in the action If the family however consists of several branches the head of a branch is entitled to represent the branch, as in such case no question of any division between the members of the branch *inter se* arises for consideration Similarly in a case of agreement to partition no binding agreement can be reached or entered into without the concurrence and the consent of the other coparceners, and the manager's consent alone will not be sufficient It is difficult therefore to see on what principle can the opinion of the learned author be based so as to justify the representation by the manager of the other coparceners to receive the notice The division in status even if it be of one member carries with it the consequence of putting an end to the right of survivorship between the separating member and the other coparceners The separating member from the moment of his severance is immune from the obligations of the family and is not liable for any of the debts incurred after that date and will not equally be bound by alienations made afterwards. The extension of the principle in the manner contended for would lead to very inconvenient results and would seriously prejudice the rights of the other members Without their knowledge the manager may manipulate notices severing status so as to throw the burden upon the other coparceners It would be open to the other members, after notice was received, to consider whether they should continue joint or separate The manager can act only for and on behalf of the joint family as a unit In my opinion, therefore, in view of the express language employed by the Privy Council in the decisions already referred to, a communication to the manager alone is insufficient to disrupt the status of the family The communication must be to all the other coparceners, and in the case of minors to their natural guardian As in the present case the notice was issued only to the first defendant, the karnavan, and not to other members of the tarwad there was no division in status, and the fourth defendant is not entitled to claim the share of his mother In my view, therefore, the view of the learned Subordinate Judge on this point is correct

The result is, the appeal is allowed only to the extent of excluding items 9, 21, 22 and 23 from the partition In other respects the appeal is dismissed The parties will pay and receive costs in proportion to their success in this appeal

As we have differed on the third point dealt with in my judgment the question has to be referred to a third Judge and for this purpose the matter may be placed before His Lordship the Chief Justice

The point on which we have differed may be stated as follows —

Whether a member of a Mitakshara Hindu joint family or a member of a tarwad governed by Marumakkathayam law can become divided in status by

1. (1924) 48 M L J 83 L R 52 I A 83 I L R 48 Mad 254 at 259 (P C)

issuing notice of his intention to separate to the manager of his joint family or the karnavan of his tarwad without issuing notice to the other members

Panchapagesa Sastri, J—This appeal raises an important question of law The suit was one for partition by 15 out of 20 members of a Moppilla Marumakkathayam tarwad Section 13 of the Madras Act XVII of 1939 confers a right on any individual member of a tarwad to claim to take his or her share of the properties of the tarwad over which the tarwad has power of disposal and separate from the tarwad Section 14 gives a similar right to two or more persons belonging to the same tavazhi to take their share of the properties of the tarwad over which the tarwad has power of disposal, separate from the tarwad and enjoy the same jointly, with all the incidents of tarwad property Section 17 provides for division *per capita* among all the members of the tarwad then existing. Section 18 is to the effect that succession to the property obtained by an individual member on partition shall be governed by the Islamic law of inheritance The Madras Marumakkathayam Act (Act XXII of 1933) which applied to all the Hindus in the presidency of Madras governed by the Marumakkathayam law of inheritance had conferred a similar right on a tavazhi represented by the majority of its members to claim to take its share of all the properties of the tarwad over which it has power of disposal and separate from the tarwad The share so obtained by the tavazhi is taken by it with all the incidents of the tarwad property (*See* Section 38, clauses 1 and 2) These rights of partition are statutory rights conferred on the parties in respect of properties which until then were by customary law impartible except by agreement amongst the members to divide the properties If the matter were *res integra* it is open to doubt whether this statutory right of partition of tarwad properties is not confined only to a division by metes and bounds alone It has, however, been held in *Kunchi Amma* v *Minakshi Amma*[1] that the right of partition conferred by the Madras Marumakkathayam Act XXII of 1933 being an indefeasible right of every tavazhi to demand partition of its own share in the tarwad property to which the other tavazhis must submit, whether they like it or not, the said right covers not merely a division by metes and bounds but also a division in title leading to severance of joint status The language of section 13 of the Madras Act XVII of 1939 being the same as in section 38 of Madras Act XXII of 1933 and the provisions of the two Acts relating to partition being analogous, the principle of the aforesaid decision would be equally applicable to the members of the Mopilla tarwads as well Notwithstanding the references in section 14 of the later Act to *enjoyment* of the properties with incidents of the tarwad property and in section 18 to property *obtained* by an individual member on partition it would follow that the individual member's right to a division of title or the right as distinguished from the right to physical division of the property, or in other words a division in status, has to be recognised even in the case of Mopilla tarwads. The statute, however, throws no further light as to the manner in which this individual right of a member to bring about a division in status has got to be exercised So far as the substantive right is concerned the position is analogous to the right of a member of a Mitakshara joint family to bring about a disruption of his joint status by his individual volition alone without the concurrence of the other members In the case of Mitakshara joint families the Judicial Committee have in a series of decisions affirmed the existence of this individual right and adverted to the manner of its exercise by any one of the coparceners These have been developed from out of the original principles of Hindu law formulated in the texts relating to partition of property The pronouncements of the Judicial Committee are based on an examination of the texts and are developments of the law implied and implicit in them on a proper interpretation thereof So far as the statutory rights conferred by the two Madras Acts are concerned it is common ground between the learned advocates on both sides that the same rules should be applicable to the exercise of the right under the Acts as in the case of the exercise of a right by a member of the Mitakshara joint family.

1 (1935) 70 M L J 114 I L R 59 Mad page 693

With these prefatory remarks I shall now proceed to state a few facts which are necessary to understand the point which emerges out of them. In 1941 the tarwad in question consisted of 21 members, the present fourth defendant and his mother being members thereof. On 27th October, 1941, the said two persons issued a notice through their advocate to the present first defendant who was the karnavan even then, claiming partition and delivery of their share of the tarwad properties. The first defendant through his advocate sent a reply, Exhibit D-13, dated 3rd November, 1941, wherein it was stated that his client was entirely agreeable to the partition of the tarwad properties. The fourth defendant and his mother filed O.P. No. 50 of 1941 in the Court of the Additional District Munsif, Tellicherry, under section 5 sub-section 2 of the Madras Moppilla Marumakkathayam Act XVII of 1939 (*See* Exhibit D-14). Paragraph 4 of the said petition states that the petitioners are quite prepared to file a suit for partition and delivery to them of the tarwad properties under the Moppilla Marumakkathayam Act XVII of 1939.

The first defendant was the sole respondent to that petition. When the present suit was instituted on 6th September, 1944, the tarwad consisted of only 20 members as the fourth defendant's mother had died by that time. Hence the plaintiffs who are 15 in number claimed each 1/20th share of the properties only. The fourth defendant, however, contended that the virtue of the notice Exhibit D-12 given on behalf of his mother and himself to the first defendant, the karnavan of the tarwad in 1941, there has been a division of status so far as they were concerned which would result in their being entitled each to 1/21 of the tarwad properties and that consequent on the death of the fourth defendant's mother, thereafter, her 1/21 share devolved upon the fourth defendant exclusively with the result that in the present partition suit he is entitled to 2/21 shares of the tarwad properties, the other members being entitled only to 1/21 share each. The lower court held against this contention on the ground that the notice given on behalf of the fourth defendant and his mother was insufficient in law to bring about a division of status inasmuch as it was given only to the karnavan, the first defendant and not communicated to the other members of the tarwad.

The point that now comes up for decision is, as regards, the legal effect of a notice claiming partition and asserting divided status, and communicated only to the karnavan of the tarwad or manager of the Hindu family and not communicated or intimated to the other members. The question of law acquires additional importance as it is one really dealing with the right in Hindu law of a junior member of the Mitakshara family to become divided from the other members of the family by a clear and unambiguous declaration to separate himself from the rest. The exposition of the law on this subject is found in two leading decisions of the Judicial Committee. One is *Suraj Narain* v. *Iqbal Narain*[1] and the other is *Girja Bai* v. *Sadashiv Dhundiraj*[2]. Subsequent decisions of the Judicial Committee have re-affirmed the same. It is not necessary to refer to them in detail as they are carefully reviewed in my learned brother's judgment in this case and also in his judgment in the case reported *Kurapathi Radhakrishna* v. *Satyanarayana*[3]. It is true that these decisions refer to the communication of the intention to divide on the part of one member to the other co-sharers. The present point now to be determined, whether the communication by a junior member of his intention to divide to the manager of the family alone is sufficient by itself to bring about a disruption of the joint family and to bring about a division of status so far as that junior member is concerned, did not arise in any way in these decisions. Nor is there any pronouncement negativing the sufficiency of such a notice. It is true that wherever there is a reference to the communication, their Lordships of the Judicial Committee speak of the communication to the co-sharers. But the question now is whether a communication to the manager is not really a communication to all the co-sharers in view of the representative character of the manager of a Mitakshara

1. (1912) 24 M.L.J. 345 : L.R. 40 I.A. 40 : I.L.R. 43 Cal. 1031 (P.C.) : I.L.R. 35 All. 80 (P.C.).
2. (1916) 31 M.L.J. 455 : L.R. 43 I.A. 151.
3. (1948) 2 M.L.J. 331.

joint family The basis of the right of junior member to bring about a division of status as between himself and the rest of the family, is as has been emphatically laid down by the Privy Council, that it is only his individual right dependent solely on his own volition and not restricted by the necessity for getting the concurrence of the other members of the family An examination of the Hindu law texts from out of which the doctrine is evolved by the Judicial Committee will be found in *Girja Bai* v *Sadashiv Dhundiraj*[1], although the earlier decision in *Suraj Narain* v *Iqbal Narain*[2] did not state the principle behind the statement of law enunciated therein Indeed even before the decision of the Judicial Committee in the later case in *Girja Bai* v *Sadashiv Dhundiraj*[1] the High Court of Madras had in their judgment in *Soundararajan* v *Arunachalam Chetty*[3] carefully reviewed the original texts bearing on the point "The necessity for a communication to the co-sharers is not to be found in the texts examined and referred to Placitum 5 of Chapter II of the Viramitrodaya (*see* Setlur's Hindu Law Books on Inheritance, p 316), explaining the meaning of the term "assembled together" समेत्य in Manu, Chapter IX, Sloka 104, would even seem to indicate that all that is required is that the intention to separate should be published and not necessarily communicated to the rest of the joint family, before it becomes effective It is not altogether without significance that even in *Suraj Narain* v *Iqbal Narain*[2] and in *Kawal Nain* v *Budh Singh*[4], the statement of law does not in terms refer to the necessity of a communication to the co-sharers The Full Bench decision of the High Court of Madras in *Soundararajan* v *Arunachalam Chetty*[3], understood the passage in *Suraj Narain* v *Iqbal Narain*[2], as requiring that the intention to separate should be expressed to the other co-sharers The necessity for a communication to the other members of the joint family has also been laid down by this Court in the decision in *Kamepalli Ayilamma* v *Mannem Venkataswami*[5] It is but reasonable to require that the intention to divide should not be secret and kept unpublished and the condition requiring its publication to the other members of the family is perhaps necessitated by the circumstances relating to the exercise of this right on the part of a junior member and its repercussions and legal effect with regard to the rest of the members of the family This Court has been consistently rejecting all arguments to establish a division of status by recitals in documents made by an individual member uncommunicated to the other members of the family

Whether or not a junior member of the joint family should be given the freedom to get himself divided by a clear and unambiguous declaration to that effect even if the same had not been communicated to the other members as for instance, by registering a document stating the avowed intention clearly and unambiguously or by other equally unquestionable ways of publication is probably a matter which can only be dealt with at the present stage of the case law as it has developed, by legislative enactment alone Even as early as 1916 that learned Judge, Sadasiva Aiyar, J , of our High Court as a member of the Full Bench has pointed out in his judgment in *Soundararajan* v *Arunachalam Chetty*[3] the necessity for the Legislature dealing with the matter to prevent the danger of perjured oral evidence and other inconveniences that might result from a recognition of the doctrine of unilateral declaration of a member to bring about a division of status

Proceeding then on the assumption that a communication is necessary to the other members of the joint family the question arises whether in the case of a junior member expressing his intention to become divided the communication of such an intention to the manager of the family is not sufficient compliance with the requirements of the law The reference in the judgments of the Privy Council to a communication to the other co-sharers does not necessarily require that the communication must be to each individual co-sharer separately There is no express statement

1 (1916) 31 M L J 455 L R 43 I A 151 I L R 43 Cal 1031 (P C)
2 (1912) 24 M L J 345 L R 40 I A 40 . I L R 35 All 80 (P C)
3 (1915) 29 M L J 816 I L R 39 Mad. 159
4 (1917) I L R 39 All 496
5 (1917) 33 M L J 746

by the Judicial Committee to that effect in any of its decisions Their Lordships were not dealing exhaustively with the various situations that might arise but were only emphasising the requirements that the intention to become separate on the part of a member should be published or brought home to the rest of the family as they were the members that would be affected by such an act They could not be deemed in this connection to have denied or negatived the ordinary representative character of the manager of a joint Hindu family to represent the family as a whole in matters pertaining to it Their Lordships' observations are general and do not expressly deal with cases where some of the co-sharers are either minors or of unsound mind or where they are themselves members of a smaller coparcenary within the main joint family as in cases where the main joint family contains branches with separate common ancestors of such branch or branches It is only the High Courts which have laid down that this communication should be made to persons who would be guardians of the minors if there were to be a partition, and also that no separate communication need be given to the coparceners of a branch whether they are majors or minors, if the communication has been made to the head of that particular branch.

If the underlying principle of the doctrine is the unquestionable right of the individual coparcener to get himself separated in status by the manifestation of his own intention, solely dependent on his own volition, and the inability of the other coparceners to resist the same, I do not see any reason why the Courts should add additional onerous conditions to the exercise of such a right which are not absolutely needed by paramount consideration of justice, equity and good conscience A rigid adherence to the *ipsissima verba* found in the pronouncements of the Judicial Committee in the cases where they were not dealing with or contempating the variety of circumstances relating to the composition of any particular joint family would in my judgment be really arresting the normal development of Hindu law by a legitimate application and extension of its basic principles to meet the varying circumstances of particular cases with special peculiarities Such has been the normal course of development of the Hindu law not only by the commentators and the Hindu legists but also by judicial precedents, particularly, the classical judgments of the Judicial Committee for over a century Freedom, theology and law alike should broaden from precedent to precedent.

The question then arises whether there is anything which precludes the recognition of the representative character of a manager of a joint Hindu family in relation to the particular matter now under consideration I do not see anything either in Hindu law or usage which would preclude the Court from recognising such representative capacity in the manager in the present case as well The separation of one member is not necessarily the separation of the remaining members of the family *inter se* Indeed in the case of a declaration and a communication by one member of his intention to divide from the family the other members of the family will continue to be as before, members of an undivided family and the manager of the joint family would continue to be the manager of the joint family excluding the member who wishes to separate and will continue to represent the joint family and the other members thereof even after the particular member has got himself divided from the rest On principle, therefore, it should be held that the communication to the manager is really a communication to all the co-sharers. If that is so, it will satisfy even the very language of the Judicial Committee It is said that the manager of the joint family has no right to represent it in transactions or suits, *inter se* between the members It may be that in the suit for partition by metes and bounds the presence of all the co-sharers is necessary, not only under the rules of procedure governing partition suits but even otherwise, because the necessity for a just and convenient division by metes and bounds and allotment of specific items should take in other considerations than merely an ascertainment of the shares Even in partition suits where there are sub-branches they are in a majority of cases represented by the heads thereof, the representative character of such persons so far as that branch is concerned being accepted. Long before

the present rules of procedure were evolved, the Sadar Court had upheld a decree in a suit for partition for $\frac{1}{6}$th share of the properties brought by a coparcener against the manager alone as the sole defendant even though there were three other brothers along with the defendant who would be entitled to 1/5th share each if they had asked for the partition of their shares A specific objection on the ground of non-joinder of the other brothers in the partition suit was rejected by the Zillah Judge and the Saddar Court on appeal The particulars of that litigation will be found referred to in the decision *Palaniammal* v *Muthuvenkatachala Maniagarar*[1] That decision may or may not be governing precedent now but it shows that the recognition of the representative character of the manager even in a suit for partition by one member against the rest of the family was not regarded as foreign to the spirit of Hindu law and usage The matter may be looked at from another point of view also It is not uncommon in Hindu Joint families that one junior member thereof renounces his share in favour of the rest of the family either for consideration or otherwise It is frequently the case that prodigal and spendthrift sons are cut off from the rest of the family by discharging their existing debts and giving some further amounts to such members The renunciation or release by any one junior member is generally evidenced only by a document in favour of the manager of the joint family who in such cases is deemed to represent the rest of the family. Eminent Judges of this Court, Sir V Bashyam Iyengar and K Srinivasa Aiyangar, and Kumaraswami Sastri, JJ , with their large experience and intimate knowledge of the details of the joint family system throughout the presidency (including not only what is now known as Tamil Nad but Andhradesa as well) have emphatically stated that generally such a renunciation by release by one member does not bring about a division of status as between those who continue in the family (See at page 778 in *Palaniamma* v *Muthuvenkatachala Maniagarar*[1] and also in *Rangaswami Naidu* v *Sundararajulu Naidu*[2]) I believe that in most of those cases documents are generally between the member cut off and the manager of the family representing all the other members That at any rate is my experience In *Wasantrao* v *Anandrao*[3], the document of release was in favour of the father alone and it was held that that release by one son really operated in favour of the entire joint family and this decision was affirmed by the Privy Council in *Anand Rao and others* v *Vasantrao Mahadevrao and others*[4]. In all those cases it has been taken for granted that the manager's representative capacity is not taken away by the fact that the other party to the transaction is himself a member of the family The transaction is really between one member of the family and the rest regarded as a unit which continues to be a joint family and is capable of acting through its head and manager Not infrequently also are arrangements made between one member of the family in his individual capacity and the manager representing the whole family with regard to the financial advances to be made by the family to the particular member and under special arrangemnets as to its re-payment or adjustment later on In such arrangements the joint family may speak " by the mouth of its managing member " See *Bhurumal* v *Jagannath*[5] Indeed to deny to the manager the representative character in transactions of this sort would be an unnecessary handicap to a junior member and may drive him to the necessity of borrowing from strangers which may not always be in his interest to do so I do not therefore, find anything which should compel me to confine the representative character of the manager to transactions with strangers alone

The learned editor of Mayne's Hindu Law (1 0th edition) has stated in article 451 at page 562 that

> " on principle it is difficult to see why the intention should be communicated to every member of the family It would seem to be sufficient if the intention is clearly intimated to the managing member No doubt the expression of intention must be published in some way so as to be legally effective "

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1 (1917) 33 M L J 759 at 772

2 (1916) 31 M L J 472

3 (1904) 6 Bom L R 925

4 (1907) 17 M L J 184 9 Bom L R 595 (P C)

5 (1943) 1 M L J. 70 L R 70 I A 57 I L R 1942 Kar 33 (P.C)

Although there are no direct decisions on the point, it seems to me that this position regarding the sufficiency of a notice communicated to the manager alone was taken for granted in the decision in *Kotayya* v *Krishna*[1] In that case, there was communication only to the manager of the joint family although there were other members to whom the intention to separate on behalf of the minor plaintiff was not communicated Their Lordships decided that the severance of status was from the date of such notice to the manager and not from the date of the institution of the suit and hold that the renewals of earlier promissory notes by the manager after the date of such a notice would not be binding on the separating member No doubt, the manager in that case was the father of the other coparcener to whom notice demanding a partition was given but that would not make a difference on this question It is not also without some significance that even in the decision of the Judicial Committee in *Girja Bai* v *Sadashiv Dhundiraj*[2], their Lordships say that the notice of 1st October, 1908, coupled with the suit for partition amounted to separation with all its legal consequences See *Girja Bai* v *Sadashiv Dhundiraj*[2]. The notice referred to was a notice to the manager of the joint family alone and there was no communication to another coparcener entitled to 1/3rd share In C C C Appeal No 10 of 1934 (unreported) a notice claiming a partition communicated to the manager alone was held to be insufficient not because it was not communicated to the other co-sharers but only because the coparcener who claimed the partition was at the time of his demand, disqualified and was not entitled to a share and there was no fresh notice by him after the disqualification was removed by Act XII of 1928 I do not, however, wish to stress this as it must be admitted the present point was not expressly considered and decided therein.

The doctrine of division of status takes in not only the express declaration or intention to divide but also such fixed and unequivocal intention evidenced by conduct also The underlying principle is the same in both the cases In cases where separation is established by conduct it is difficult to decide the precise point of time when the separation may be said to have taken place but it is noteworthy that the various acts of conduct may not always be communicated to all the members Separation is really a matter of proper inference to be drawn from all the circumstances taken together This would seem to suggest that the necessity for the communication even to the other members of the joint family is more in the nature of evidence to indicate the clear and unambiguous and fixed determination of the individual to separate himself in status and not part of any substantive right of the other members restrictive of the individual volition of the separating member However, that may be, it is sufficient in this case to state that the requirement of communication to the co-sharers (in cases of express declarations) even taking it in a very literal sense, is complied with by a communication to the manager who may very well be taken to be a representative of all the other co-sharers even for the purpose of receiving intimation of such intention on the part of the separating member I am, therefore, of opinion that the communication to the manager alone is sufficient to bring about a division of status

Lastly, it is argued that there may be the danger of collusion between one member of the family and the manager which can operate to prejudice the rights of the other members if the representative character of the manager should be recognised as aforesaid The same danger, if any, exists also in the case of transactions with strangers to the family and I do not see why the other members of the family should be in a better position than they Considerations of equity in proper cases may modify any hardship that may be caused to persons who have had no actual notice, as to which see the decision in *Kashi Ram Bhagshet* v *Bagha Bhagshet*[3]. As against this it may be pointed out that in a case where there are numerous coparceners in an ordinary Mitakshara joint family and much more so in the case of Marumakkathayam tarwads which usually consist of a very large number of members, insistence on communication of the intention to separate to everyone of the other

1 (1945) 1 M L J 74 I L R 1945 Mad 710 I L R 43 Cal 1031 (P C)
2 (1916) 31 M L J 455 L R 43 I A 151
3 (1945) 47 Bom L R 470.

co-sharers individually may operate to the prejudice of a member who wishes to separate and make bequests of his separated property to near relations or friends. In any case considerations of possible hardship should not be the determining factor in deciding these questions If, however, the law were clear that communication to every one of the co-sharers individually is necessary because of the pronouncements of the Judicial Committee, I agree that the inconvenience or hardship in the case of tarwads consisting of numerous members is irrelevant and is no ground for relaxing the rules, but in my judgment the Judicial Committee have not laid down such a rule I consider that the view adopted by me is really one which would facilitate the exercise of the right of partition conferred by the Legislature and not operate to retard it I, therefore, hold that the fourth defendant and his deceased mother must be deemed to have become divided in status even in 1941 and that the parties to the suit are each entitled to 1/21 share of the tarwads properties excepting the fourth defendant who should be given 2/21 shares thereof In other respects, I agree with the conclusion of my learned brother.

Opinion of Viswanatha Sastri, J. .—

The question of law on the answer to which the learned Judges differed has been formulated by Satyanarayana Rao, J , in these terms

> "Whether a member of a Mitakshara Hindu joint family or a member of a tarwad governed by the Marumakkattayam law can become divided in status by issuing notice of his intention to separate to the manager of his joint family or the karnavan of the tarwad without issuing notice to the other members "

Having regard to the form of the question, it was argued that it raised two distinct issues

> (*a*) Should notice be given to the other members of the family of the intention of an individual member to separate himself from the family in order to bring about a division in status between him and the other members?
>
> (*b*) If notice of such an intention has to be given to the other members, is a communication to each and every one of them necesssary or is notice to the head of the family sufficient to effect a severance ?

These questions have to be decided by the application of the rules of Hindu law derivable from the writings of the commentators and Nibhandakars and the decisions of the Judicial Committee I would have had little difficulty in answering the question propounded if I were to be guided solely by the ancient Hindu jurists without being embarrassed by judicial pronouncements which profess merely to interpret or declare the law as laid down by them I do not wish to cover a wider field than is absolutely necessary for the decision of this case especially as the matter now under consideration has received the particular attention of the remarkably able and acute lawyers who formulated the doctrine now in question

Under the Hindu law "partition" may mean and comprise both a division of right, *i e* , a severance in the joint status, and a division of property We are dealing in this case only with a division of right, or a severance of the joint status This may result from an agreement between the members of the joint family or from any other act or conduct which, in law, would create a severance An agreement is not the only mode by which a division in status can be brought about, the contrary view held by some of the early decisions being no longer law

> "A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation "—*Suraj Narain* v *Iqbal Narain*[1].

Is the giving of a notice to the manager or to all the other members of the family of this intention to separate an integral part of the rule according to the texts of Hindu law ? If not, is any and if so, what formality has to be observed by a member who desires to separate by a declaration of his intention ? The answer will be clear if we examine the jural basis of this doctrine as expounded by the early writers on Hindu law

I may preface my examination of the texts by observing that the ancient law givers, far from encouraging the continuance of the joint family recommended a

1 (1912) 24 M L J 345 L R 40 I A 40 . I L R. 35 All 80 (P.C).

artition mainly on religious grounds "विभागे तु धर्मवृद्धिः" says Gautama (28-4) "पृथग्दैवपित्र्यकर्मकरणात् धर्मवृद्धिम् अपेक्षमाणाः विभजेयु" "Let those who desire an increase of merit by the separate performance of worship for the gods and the manes, divide." *See also* Manu Chapter IX-111 The word "Dharma" in Sanskrit which I have translated as "merit" has reference to religious acts such as the performance of panchamahavajnas, the *secre* of the Romans If the family is joint, worship of the gods, Vaisvadeva, Shradhas and the feeding of guests are all single for the whole family and the spiritual benefits derived therefrom are shared by all the members, while if they separate, each performs these acts separately and acquires religious merit for himself in a much larger measure I am not sure whether Seshagiri Aiyar, J, had any textual authority in view when he observed in *Soundararajan* v *Arunachalam*[1], as follows

> "It is enough to say that the essential characteristics of Hindu law as understood by the writers of the Benares school are survivorship and representation. So far as a cursory examination of these treatises goes the idea of survivorship is in entire consonance with the genius of Hindu law as it is administered in South India"

Once and for all, Vijnâneswara emphatically asserted and established the sons' right to separate from the father even during his lifetime. Even in the days of Gautama 15 centuries before Vijnaneswara the right to partition received a fillip for the religious sentiments above described Partition is therefore not looked upon with disfavour by the early treatises on Hindu law

It is best to start the examination of the texts with Vijnaneswara, the most celebrated of the commentators, who belonged to the 11th century He takes the following sloka from Yajnavalkya Smrithi for comment

भूर्या पितामहोपात्ता निबन्धो द्रव्यमेव वा ।

तत्र स्यात्सदृशं स्वाम्यं पितुः पुत्रस्य चैव हि ॥

> "In land, corrody (annuity, etc) or wealth received from the grandfather, the ownership of the father and the son is only equal"

(Yajnavalkya, Chapter II, section 121.)

The relevant portion of the commentary of Vijnaneswara is as follows

यत्पितामहेन प्रतिग्रहविजयादिना लब्धं तत्र पितुः पुत्रस्य च स्वाम्यं लोकप्रसिद्धमिति कृत्वा विभागोऽस्ति । हि यस्मात् तत् सदृशं समानं तस्मान्न पितुरिच्छयैव विभागो नापि पितुर्भागद्वयम् ॥..

......तथा च सरजस्कायां मातरि सस्पृहे च पितरि विभागम् अनिच्छत्यपि पुत्रेच्छया पैतामहद्रव्यविभागो भवति ।

(Setlur's Mitakshara, pages 646-648)

> "In property obtained by a paternal grandfather through gifts, conquest, etc, the ownership of both, the father and the son is well-known to the world and therefore there is a partition (of this property) Because there is equal right, therefore the partition is not merely at the desire of the father nor does the father get a double share . . . And thus though the mother is having her menstrual courses (has not lost the capacity to bear children) and the father has attachment (to wealth) and does not desire a partition, yet by the will (or desire) of the son a partition of the grandfather's wealth does take place"

I have given a literal translation of the text even though it appears a little uncouth in its English garb. The astonishing and often perplexing brevity of these ancient writers renders necessary a word of explanation. In the passage which I have omitted with a view to economise space and which I have indicated by asteriks, a text of Manu to the effect that while the parents live, though they are old and infirm, the son has no control over the parental estate is referred to. Another

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1 (1915) 29 M L J 816 I.L.R. 39 Mad. 159 (186) (F.B.).

text of Narada allows the father a double share at a partition Yet another text of Gautama allows a partition only when the father desires partition and the mother is past the child-bearing age Vijnaneswara distinguishes these pronouncements and explains them away as applicable to a partition of the effects acquired by the father himself and not to a partition of the ancestral or paternal grandfather's property With regard to ancestral property he rules that there can be a partition at the will or desire of the son (putrachaya) because of the equal right (sadrisasamya) of the father and son You have here got the idea of individual volition (Ichcha) bringing about a severance in a joint family

Dealing with the other texts in their chronological order, the Saraswati Vilasa, said to have been compiled in the early years of the 16th century, has been repeatedly recognised by this Court and the Judicial Committee as of special authority in South India. It is a work written in prose and not in verse as supposed by Seshagiri Aiyar, J. The discussion of this topic starts with placitum 22 and continues till placitum 30

(22) विभागो नाम द्रव्यधर्मयोः अन्यतरस्य पृथक्करणमित्याह भारुचिः ॥

(23) विज्ञानयोगी तु विभागो नाम द्रव्यसमुदायविषयाणां अनेकस्वाम्यानां तदेकदेशेषु व्यवस्थापनमित्याह ॥

(24) तन्नस हते भारुचिः धर्मविभागे तदभावात् ॥

(25) धर्मविभागो नाम धर्ममात्रविभागः पृथग्वैश्वदेवपञ्चमहायज्ञानुष्ठानपैतृकादि-करणम् ॥

(26) तच्च केषांचित् अत्यन्तनिःस्वानां द्रव्याभावात् धर्मविभागः कर्तव्यः विभागे धर्मवृद्धिः स्यात् इति गौतमस्मृतेः धर्मवृद्धिकामानां धर्ममात्रविभागो वा कर्तव्यः ॥

(27) अत एव विष्णुः-धर्ममात्रं वा विभजेदिति । अत्यन्तनिःस्वानामिति शेषः ॥

(28) अनेन ज्ञायते परिभाषां विना संकल्पमात्रेणापि विभागसिद्धिः । यथा पुत्रिकाकरणं परिभाषां विना संकल्पमात्रात्सिध्यति इति ॥

(29) द्रव्यवतां तु द्रव्यविभागानन्तरमेव धर्मविभागः । विभक्ताः भ्रातरः कुर्युः नाविभक्ताः कथं च नेति निभक्तकर्तव्यतया धर्मान् वैश्वदेवादिकान् अधिकृत्योक्तत्वात् ॥

(30) अतश्च निःस्वानामितरानुमत्या तदान्तरेणापि पृथग्धर्मानुष्ठानमेव धर्मविभागः धनिकानां तु धनविभागः ॥

(22) Bharuchi says that "division" means the separation (keeping apart) of either wealth or religious duty. (23) Vijnanayogi, however, says that division (partition) is the adjustment of the ownership of several persons in the common wealth by assigning portions in several ownership. (24) Bharuchi does not accept this, as it is absent in a division of dharma (religious duty) (25) By division of "dharma" is meant a division of dharma alone, that is to say, separate performance of Vaisvadeva, the five great sacrifices and ancestral rites (26) Therefore in the case of the extremely indigent owing to the absence of wealth (to be divided) division of Dharma (religious duty) may be made On a division of Dharma (religious duty) alone can be made among those who desire an increase of (religious) merit in view of the saying of Gautama ' By partition (religious) merit increases " (27) Therefore Vishnu says " or let him divide religious duties alone," (the expression) " if absolutely indigent " being supplied (or understood) (28) From this it is known that without any speech (or explanation) even by means of a determination (or resolution) only, partition is effected, just as an appointed daughter is constituted by mere intention without

speech. (29) In the case of those who have wealth, partition of religious duty follows only upon the partition of wealth for, religious duties such as Vaisvadeva, etc, have to be performed according to the (following) text "divided brothers may perform but not the undivided ones under any circumstances" (30) Therefore in the case of the indigent, the separate performance of religious duties with or without the consent of others, constitutes a division of religious duties, but in the case of the rich (there takes place) a division of property

According to the Saraswati Vilasa, a division in status is brought about by "Sankalpa" alone without "Paribhasha". "Sankalpa" I have translated as "determination, resolution, intention" and "Paribhasha" as "speech, explanation." The reference to the "putrika" in placitum 28 throws a flood of light on the meaning of the author. The conception of "putrika" or "appointed daughter" is now obsolete It will be recalled by those familiar with the Smrithis that the marriage of a brotherless maiden was not recommended by the Smrithikars particularly Manu and Yajnavalkya, for fear that the father of the girl might, without even so much as an express stipulation at the time of the marriage, but merely by his own unilateral intention and mental resolution, treat the girl as his own son or annex the first born son of the girl to his own family, he himself being sonless Either the girl took the place of a son to her own father or her son became the son of his maternal grandfather and his own father lost the spiritual ministrations he and his ancestors would normally be entitled to Hence the chorus of disapprobation of a brotherless maiden, whose hand would, for that very reason, be competed for eagerly in modern days The point relevant to the present discussion is that the "putrika" may be constituted by a mere unilateral intention on the part of the father

अभिसंधिमात्रात्पुत्रिकेत्येकेषाम् । तत्संशयान्नोपयच्छेद् भ्रातृकाम् ॥

The expression "अभिसंधिमात्रात्" connotes the same idea as "वाग्व्यवहारेण न कृता." This silent speechless annexation of the putrika and the putrikaputra by the unilateral intention of the father is referred to by the author of Saraswati Vilasa as a parallel doctrine when he states that mere "Sankalpa" or "determination" or "intention" is enough to bring about a division in status.

The next treatise that has to be considered in order of date is the Viramitrodaya of Mitra Misra written somewhere in the first half of the 17th century It is one of the most exhaustive of the Nibhandas and closely follows the Mitakshara. Vijnaneswara dealt with a division at the desire of the son Mitra Misra extends the privilege to all coparceners including grandsons The relevant portions of the text are these

अत्र मनुवचने समेत्येत्यनेन पाक्षिकं साहित्यमनूद्यते बहुत्ववत् । अन्यथा एकेच्छया द्वयोश्च भ्रात्रोः विभागो न स्यात् समिति तु नियम्यते । तच्च विवक्षामः ।

In the Manu's text the term "assembled-together" merely recites (but does not insist on) the assemblage (of coparceners) which may take place like the plurality in the expression "brothers". Otherwise, partition could not take place at the desire of one coparcener or where there are two brothers, only. The term "equally" however is restrictive. We shall consider this subject later. (Chapter II, placitum 5):

अत्र च पुत्रेच्छया यो जीवद्विभागो यश्चाजीवद्विभागः स एकेच्छयापि भवत्यविशेषात् ॥ अत एव विभागं प्रक्रम्य यत्कात्यायनेनोक्तम्-अप्राप्तव्यवहाराणां धनं व्ययविवर्जितम् न्यसेयुर्बन्धुमित्रेषु प्रोषितानां तथैव च ॥ इति तदपि सम्मतम् । अन्यथा तदनुमतिमन्तरेण विभागाभावे तद्धनस्य बन्धुमित्रेषु न्यासविधानम् अनुपपन्नं स्यात् ॥

"Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will) of a single (coparcener) In support of this view is the text of Katyayana dealing with partition The wealth of those who have not attained (the age of) discretion should not be disbursed (spent) but deposited with relatives and friends Likewise the wealth of those who are abroad (in a distant place). Otherwise, if partition could not take place without their consent, the direction for deposit of their wealth with relatives and friends would be inappropriate" (Chapter II, placitum 23) In placitum 23 the author says that partition or division may take place at the will or desire even of a single coparcener (Ekechhaya) In the next placitum he extends to a grandson and great-grandson the right which he conceded to the son

Lastly we come to the Vyavahara Mayukha of Nilakantabhatta written in the beginning of the 17th century. With characteristic terseness and lucidity, he starts the law as follows

द्रव्यसामान्याभावेऽपि त्वत्तोऽहं विभक्तः इति व्यवस्थामात्रेणापि भवत्येव विभागः ।
बुद्धिविशेषमात्रमेव हि विभागः । तस्यैवाभिव्यञ्जिकेयं व्यवस्था ॥

"Even in the absence of any common (joint family) property severance does indeed result by the mere declaration 'I am separate from thee' because severance is a particular state (or condition) of the mind and the declaration is merely a manifestation of this mental state (or condition)" (Chapter IV, S iii-1) Emphasis is laid on the "Budhivisesha" (particular state or condition of the mind) as the decisive factor in producing a severance in status and the declaration is stated to be merely as "Abhivvanjika" or manifestation which might vary according to circumstances

Now an examination of the texts of Hindu law leads me to the conclusion that the severance of the joint status so far as the separating member is concerned is a matter of his individual decision, the desire on his part to sever himself from the joint family and enjoy his hitherto undivided share separately from the others. I may say that the texts do not countenance the idea that even if the intention to be divided is kept locked up as a secret in the bosom of the dividing member, he can claim that there has been a severance To have that effect, some outward manifestation, indication, or publication of his intention either by word of mouth or by conduct is requisite. If, as stated in the texts and accepted by decisions of authority, an intention to divide is inferable from conduct, there is no question of formal notice being given of the intention of the separating member to sever himself from the other members of the family It could not be said in such a case that the severance in status has taken place at a particular point of time or by a formal communication to the other members of the family In *Joy Narain Giri* v *Girischandra Myti*[1], the Privy Council regarded the conduct of one of the two members of a joint family

> "when he left the joint residence and withdrew himself from commensality as indicating a fixed determination henceforward to live separate from his cousin"

and treated

> "the fact of his borrowing money for his separate maintenance, as well as his making a will, as indicating, at all events, that he himself considered that a separation had taken place"

The conclusion was based on the inference of intention derivable from the acts and declarations of the member who, it was alleged, had separated himself, and not from the conduct or attitude of any other party In *Ram Pershad Singh* v *Lakhpati Koer*[2], the Judicial Committee stated:

> "But here again the conduct of the parties must be looked at in order to arrive at what constitutes the true test of partition of property according to Hindu law, namely, the intention of the members of the family to become separate owners"

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1 (1878) L R 5 I A. 228 I.L R. 4 Cal. 434 (P.C).

2. (1902) L.R 30 I.A 1 I.L.R. 30 Cal. 231 (P C).

In the case of a division in status brought about by conduct, all that can be said is that there is a publication or manifestation of an intention to divide and that is all that the texts of Hindu law required

It must however be confessed that the decided cases present greater difficulty than the texts As early as 1865, the Calcutta High Court in the case of *Bulakeelal* v *Inderputtee Koowar*[1] held as follows

"And any act or declaration showing an unequivocal intention on the part of a shareholder to hold or enjoy his own share separately and to renounce all rights upon the shares of his coparceners constitutes a complete severance or partition"

Again in the case of *Vatokoer* v *Rowshan Singh*[2], the same Court expressed itself in these terms on the question of separation

"We find that Sohun did publicly and unequivocally by petition presented in Court declare his intention to become from that date divided in estate Such an intention amounts to a valid separation though not immediately perfected by an actual partition on the estate by metes and bounds The acts and declarations of Sohun Singh showing an unmistakeable intention to hold and enjoy his own estate separately, and to renounce all rights upon the shares of his coparceners, constitute, in our judgment, a complete severance or partition"

This passage from the judgment of the Calcutta High Court has been accepted by the Judicial Committee in *Girja Bai* v *Sadashiv Dhundiraj*[3] as laying down the law correctly. There is no reference here or in the earlier case from the Weekly Reporter to the necessity of a communication of the intention of the separating coparcener to the other coparceners if a severance in status is to be brought about. As late as 1911, this Court laid down after considerable argument and deliberation, that the preliminary decree in a partition suit effected a severance in status, *Thandayuthapani Kannigal* v *Raghunath Kannigal*[4] Then came the decision of the Judicial Committee in *Surajnarain* v *Iqbal Narain*[5] with the following categorical statement of the legal position ·

"A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation, but to have that effect the intention must be unequivocal and clearly expressed Suraj Narain alleged that he separated a few months later, there is, however, no writing in support of his allegation, nothing to show that at that time he gave expression to an unambiguous intention on his part to cut himself off from the joint undivided family"

The necessity for a communication of the intention of a member to separate himself to the other members of the family is not adverted to by their Lordships, either because they did not consider it an essential component of the rule or because it was not necessary in the circumstances of the case to deal with that aspect of the question

Soon after the decision of the Privy Council, a Full Bench of this Court had to consider its scope and effect In *Soundararajan* v *Arunachalam Chettiar*[6], Sir John Wallis, C J, held that the texts to which I have referred in this judgment did not support the doctrine of partition by unilateral act Seshagiri Aiyar, J, went one step further and held that the weight of textual authority was against the contention that an unilateral declaration by one member of a joint family of his intention to become divided created a severance Sadasiva Aiyar, J, however held that the doctrine propounded by the Judicial Committee in *Surajnarain* v *Iqbal Narain*[5] was by no means a novel one, though the Madras High Court had all along dissented from the Calcutta High Court and consistently held that a mere declaration by one member was ineffective to bring about a severance in status All the three learned Judges, however, held that the decision of the Privy Council in *Surajnarain* v. *Iqbal Narain*[5] left them no option but to hold that a member of a joint Hindu family became separated from the other members by the fact of suing them for partition It may be observed that no question of notice to the other members of the intention of one member to separate was raised in the reference

1 (1865) 3 W R 41.
2. (1867) 8 W R 82
3 (1916) 31 M L J 455 · L R. 43 I.A 151 : I L R 43 Cal 1031 at 1051 (P C)
4 (1911) 21 M L J 240 I.L.R 35 Mad 239
5 (1912) 24 M L J 345 L R. 40 I A. 40 : I.L R 35 All 80 (P C)
6 (1915) 29 M L J 816 I L R 39 Mad. 159 (F B)

to the Full Bench. Sadasiva Aiyar, J., however stated that the phrase "clearly expressed" in the decision of the Privy Council meant "clearly expressed to the definite knowledge of the other coparceners" In answering the reference the learned Judge stated his conclusion in these terms.

"A member of a joint Hindu family becomes separated from the other members by the fact of suing them for partition and by the unequivocal declaration mentioned in the plaint in that suit when such unequivocal declaration has been definitely expressed to the other coparcener or coparceners through the Court or otherwise"

I have now to consider the authoritative pronouncement of the Judicial Committee on this topic in *Girja Bai* v *Sadashiv Dhundiraj*[1], which, the later decisions both of the Privy Council and of the High Courts in India, have purported to follow and apply. The question in that case was whether Harihar, the original plaintiff in the action, had become divided from his nephews Dhundiraj and Nilkant and their sons who were defendants 1 to 4 Dhundiraj the first defendant was the *de facto* manager of the joint family after the death of his father Atmaram in 1899. On 1st October, 1908, Harihar gave a registered notice to Dhundiraj that he wanted to have a partition of his one-third share of the joint family property On 18th October, 1908, Dhundiraj replied asking Harihar not to have the property partitioned but agreeing to have a division if Harihar insisted upon it On 21st October, 1908, Harihar brought a suit for partition against Dhundiraj and others The defendants filed a written statement admitting the claims and agreeing to have a division On 17th June, 1909, Harihar died before any decree could be passed in the suit and his widow Girja Bai applied as his heir-at-law to continue the suit The defendants opposed her application on the ground that Harihar's rights have devolved upon them by survivorship and his widow had no right to proceed with the suit. This contention was upheld by the Judicial Commissioners of Nagpur, but rejected by the Privy Council After an examination of the relevant texts of Hindu law, their Lordships refer to the well-marked distinction that exists in Hindu law between a severance in status so far as the separating member is concerned and a *de facto* division into specific shares of the property held until then jointly and laid down the law in these terms.

"One is a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status, whilst the other is the natural resultant from his decision, the division and separation of his share which may be arrived at either by private agreement among the parties, or on failure of that by the intervention of the Court Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable, neither the co-sharers can question it nor can the Court examine his conscience to find out whether his reasons for separation were well founded or sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others"

It is difficult to say that their Lordships of the Judicial Committee who purported to found themselves on the texts of Hindu law, laid it down as an integral part or essential condition of the rule permitting severance by unilateral declaration of intention to become divided, that there should have been a communication of that declaration to the other members of the family The expression "once" occurring in the passage above quoted is not to be understood as meaning "if and not otherwise" or "unless and until" or "then and not till then" It is not as if in this passage their Lordships were particularly considering the claim of the surviving coparceners by the right of survivorship and repelling it because they had been clearly intimated about the unequivocal declaration or intention by Harihar to divide himself Their Lordships were merely emphasising the principle that it is the inherent right of every coparcener to demand a partition and if he expresses his intention to do so, neither the other members nor the Court have any right to enquire into his reasons or motives but have merely to give effect to his right. That their Lordships did not intend to lay down that the issue of a notice to the other coparceners was an essential part of the doctrine of severance by unilateral declaration appears from what they stated at page 1050 of the report

1 (1916) 31 M L J 455 L.R. 43 I.A. 151 I L R 43 Cal. 1031 (P.C)

"The intention to separate may be evinced in different ways, either by explicit declaration or by conduct If it is an inference derivable from conduct, it will be for the Court to determine whether it was unequivocal and explicit"

The position is made clearer still by the concluding portion of the judgment at page 1051 of the report

"In the present case, Harihar, the husband of the appellant, unequivocally and unmistakably manifested his intention to separate himself from the defendants, and to hold, possess, and enjoy his unquestioned interest separately from them In their Lordships' judgment, this was sufficient, under the Hindu law, to constitute a separation and to divide him in estate from his coparceners"

The later decisions of the Privy Council do not call for any detailed examination since they purport merely to reiterate the statement of the law contained in the decision above cited In *Kaval Nain* v *Budh Singh*[1], Viscount Haldane referred to the judgment of the Judicial Committee in *Girja Bai* v *Sadashiv Dundiraj*[2], as laying down that the commencement of a suit for partition effected a separation from the joint family and that it was immaterial in such a case whether the co-sharers assented He added that

"a decree may be necessary for working out the result of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not"

The severance in status is here stated to be brought about by the assertion of the right to separate and there is no qualification that the other co-sharers should be notified regarding the assertion of that right In *Ramalinga Annavi* v. *Narayana Annavi*[3], Mr Amir Ali in delivering the judgment of the Board observed

"An unambiguous and definite intimation of intention on the part of one member of the family to separate himself and to enjoy his share in severalty has the effect of creating a division of the interest which, until then, he had held in jointness This intention was clearly intimated to the coparceners when the plaintiff Narayana served on them the notice on the 30th July, 1909 That notice effected a separation so far as his branch of the family was concerned"

Their Lordships apparently had in mind the facts of the particular case where a notice had been issued In *Syed Kasam* v *Jorawar Singh*[4], Viscount Cave in delivering the judgment of the Judicial Committee observed

"It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place, and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree"

There is no reference here to the necessity for a communication to the other members of the family In *Balkrishna* v *Ramkrishna*[5], it was held by the Judicial Committee that one of the four brothers by name Lal Man had become separated from his brothers by reason of his conduct and actings Sir George Lowndes stated the law in these terms .

"It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain* v *Iqbal Narain*[6] The question was further examined in *Girja Bai* v *Sadashiv Dhundiraj*[2] and the principle was re-affirmed and the last mentioned case was followed in *Kaval Nain* v. *Budh Singh*[1]"

The next decision of the Judicial Committee calling for notice is *Babu Ramasray Prasad* v *Radhika Devi*[7], where Sir John Wallis observed as follows —

"It is however well settled that a member of a joint family may effect a separation in status by giving a clear and unmistakeable intimation by his acts or declarations of a fixed intention to become separate even though he goes on living jointly with the other members of the family and there is no division of property *Balkrishna* v *Ramkrishna*[5]"

In all the three cases immediately above cited, a severance in status was inferred merely from the conduct of the parties which of course must have been known to

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1 (1917) 33 M L J 42 L.R. 44 I A 159: I L R 39 All 496 (P C)
2 (1916) 31 M L J 455 L R 43 I A 151 : I L R 43 Cal 1031 (P C)
3 (1921) 43 M L J. 428 L R 49 I A 168 : I L R 45 Mad 489 (P C)
4 (1922) 43 M L J 676 . L.R 49 I A 358 . I L R 50 Cal 84 (P C)
5 (1931) 61 M.L J 362 L.R 58 I A 220 : I L R 53 All 300 (P C)
6 (1912) 24 M L J. 345 L R 40 I A 40 : I L R 35 All 80 (P C).
7 (1935) 43 L W 172 (P C).

the members of the family In the case of *Ramnarain Sahu* v *Mst Makhna*[1], their Lordships of the Judicial Committee held that if a coparcener, or if he is under a disability, any person entitled to act for him, demands a separation of his share in a pending suit for partition, there is a severance in status even though no relief is granted by the decree Sir George Rankin in delivering the judgment of the Judicial Committee referred to the previous decisions of the Board in these terms

' The right of a member of a Hindu family who is *sui juris* to separate himself in estate and interest by declaring his intention was thus stated by Sir George Lowndes in *Balkrishna* v *Ramkrishna*[2] (Then follows the passage already extracted above from the judgment in 53 All 300)

From the foregoing discussion it will be observed that there is no decision of the Privy Council which has gone to the length of holding that where there has been " a definite and unambiguous indication " or " a clear and unequivocal declaration " by one member of his intention to separate, nevertheless, there is no severance in status unless and until notice of such intention or declaration has been communicated to the other members of the family Nor does the Judicial Committee invariably insist upon a communication or notice to the other members of the family of the intention of one member to divide himself from the others It must however be conceded that when they do refer to a notice or communication or intimation of the intention to divide, they refer to an intimation to the other members of the family.

In the case of a severance in status brought about by conduct—and it has been repeatedly recognised by the Privy Council that it can be so brought about—there is no question of a notice or communication of the intention to divide The texts quoted by me regard the unilateral decision or the individual volition and desire of a member of the joint family as the crucial severing factor, the indication, manifestation, or publication of such intention being merely evidentiary In other words, notice or communication of an individual's intention to divide, to the other members of the family, is neither a condition nor a pre-requisite of the severance in status, but is only of evidentiary value and importance Partition does not create title in the coparcener or give him a right to his share It only enables him to obtain what is his own already Notice of an intention to become divided is not the root of title and is not like a notice to quit which is a condition precedent to the accrual of the right or an integral part of the cause of action itself The other members of the family have no voice in the matter They cannot veto the declaration of the member They cannot resist his determination If you impose a condition that it is only if all the other members of the family are duly notified of the intention of an individual member to divide, there could be a severance in status so far as he is concerned, you are imposing a clog or fetter on the right of the individual member You are abrogating *pro tanto* the " unilaterality " of the doctrine of unilateral declarations At the same time it can easily be realised that it is of vital interest to the other members of the family to be sure of their position *vis-a-vis* the dividing or outgoing member Therefore it is that the declaration of intention to separate must be clear and unequivocal, expressed in such a form that it would not be open to the separating coparcener afterwards to say that he still continues to be a member of the joint family It is for this reason that an outward manifestation or clear indication of an intention to divide is also required. Suppose a man registers a document declaring that he is a divided member or publishes a notice to that effect in the newspaper Is it to be said that he has not become divided in status simply because his co-parceners have not been individually notified of his intention ? The only reasonable rule that can be deduced from the texts and the several decisions of the Judicial Committee is that the declaration of an intention to divide on the part of a member of the family should be clear and unequivocal and should be indicated, manifested or published in such a manner as is appropriate in the circumstances of the case One method, but not the

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1. (1939) 2 M L J 569 . I L R 1939 All. 680 (P C)
2. (1931) 61 M L J. 362 L R 58 I A 220 : I L R 53 All 300 (P C.)

only method, of such manifestation or publication is by delivering a notice containing a declaration of intention to become divided to the other members of the family.

It may be pointed out that even after the decision of the Privy Council in *Suraj Narain* v. *Iqbal Narain*[1], the majority of the Full Bench in *Soundararajan* v *Arunachalam*[2], accepted the doctrine of severance by unilateral declaration with considerable reluctance and hesitation, opposed as it was to the opinion of that eminent jurist, Sir V. Bhashyam Aiyangar, and the view taken in several previous decisions of this court. This unreceptivity to what was considered to be a somewhat revolutionary doctrine, is descernible in the hesitancy and extreme caution with which it was continued to be applied in this court in spite of the lead given by the Judicial Committee In *Kamepalli Ayilamma* v *Mannem Venkatasami*[3] it was laid down by Sir John Wallis and Kumaraswami Sastri, J , that if a coparcener does not communicate, during his lifetime, his intention to become divided to the other coparcener or coparceners, the mere declaration of his intention, though expressed or manifested, does not affect a severance in status In that case the only other coparcener happened to be a minor and their Lordships held that notice of the intention of the major coparcener to become divided should have been given to the mother of the minor, his natural guardian, so as to reach the latter during the lifetime of the major coparcener In their Lordships' view the receipt of the communication of an intention to divide by the other members of the family was essential to create a severance in status In the case of minor coparceners who had no natural guardians, their Lordships held that "there must be such an intimation as the case admits of" Is the coparcener desiring separation from such a minor to have a guardian *ad litem* or *ad hoc* constituted for the minor ? What is to happen if nobody was willing to accept responsibility for the minor and receive the notice ? The Court cannot appoint a guardian of the interest of a minor coparcener in a joint Hindu family under the Guardians and Wards Act Is the major coparcener to forego the right to become divided in status until the minor becomes a major or is he to be forced to file a suit for partition ? Why should he suffer because there is no lawful guardian to receive notice on behalf of a minor coparcener ? These difficulties were, however, not considered by the learned Judges. Another case to which reference has been made in the course of the argument is *Rangasayi* v *Nagaratnamma*[4] That was a suit for partition instituted on behalf of a minor This case has no direct bearing on the point now under consideration. The Court merely purported to reiterate the rule laid down by the decision of the Judicial Committee already cited All the Judges, however, agreed that if an adult coparcener filed a suit for partition, the severance takes place from the date of the plaint and not from the date when summons is served on the defendants, and the same result would follow if a suit for partition filed on behalf of a minor happens to be decreed by the court This can only be on the principle that the date of communication to the defendants by service of summons in the suit is not the starting point of the severance in status

I now turn to two decisions of this court which have considerably qualified the rule as to the necessity for communication of an intention to divide The first is *Rama Iyer* v. *Minakshi Ammal*[5] where, a father after instituting a suit for partition against his son, but before the son was served with summons, settled his share of the property on his daughters and died before the suit came on for trial The son attacked the settlement on the ground that until summons was served and the contents of the plaint were communicated to him, there was no division in status between the father and the son and the settlement having been executed by an undivided member of the joint family was invalid. Madhavan, Nair, J., upheld the validity of the settlement with the following observation

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1 (1912) 24 M L J 345 L R 40 I A 40 I L R 35 All 80 (P C)

2 (1915) 29 M L J 816 I L R 39 Mad 159 (F B).

3 (1917) 33 M L J 746

4 (1933) 65 M L J 630. I L R 57 Mad. 95 (F B).

5 (1930) 33 L W 384

"If the severance of the joint status can be brought about by individual volition, and the assent of the cosharers is not necessary for it, then, I fail to see how it can be said there could be no severance so far as the plaintiff in a suit is concerned, unless the intention is actually communicated to the other coparceners This position is clearly not opposed to the ruling of the Privy Council which states that the unequivocal intention of the separating coparcener to be effective must be "clearly expressed" to the other coparceners Notice to the other cosharers of the plaintiff's intention to separate would be necessary to make the severance operative against them so that they may know he is claiming his share of the joint family property from the date of the plaint and that the severance is final, but it cannot, I think, be a condition precedent to bring about a severance of the joint family status so far as the plaintiff is concerned To make this severance effective as against the remaining coparceners notice would no doubt be necessary"

I very much regret my inability to follow the reasoning. If the filing of the plaint effects a severance so far as the plaintiff is concerned, then, the defendants must necessarily become severed from him If service of summons and the plaint on the defendants is necessary to make the severance effective as against the defendants, then till the service of summons, there can be no severance even as regards the plaintiff There cannot be two dates for the severance, one on the date of the institution of the suit so far as the plaintiff is concerned and the other on the date of the service of the summons as regards the defendants, when the parties between whom severance is effected are the same, namely, the plaintiff on the one hand and the defendants on the other.

The next decision that calls for detailed notice is *Narayanarao* v *Purushothamarao*[1], decided by Varadachariar and King, JJ In that case a father gave a registered notice of his intention to divide himself from his son, but the notice did not reach the son till four days after the death of the father After issuing the notice the father executed a will making dispositions of his share of the property and died The son contested the validity of the will on the ground that the father was undivided with him at the time of his death and the law of survivorship prevailed against the will The Court, however, upheld the will, their Lordships taking the view that a severance of status took place from the date when the communication of the intention to separate was *sent* by the father and not from the date when it was *received* by the son The Court held that the date of receipt of the communication by the coparcerner was, in the circumstances, immaterial. Varadachariar, J, who delivered the judgment of the Bench observed as follows:

"It is true that the authorities lay down generally that the communication of the intention to become divided to other coparceners is necessary, but none of them lays down that the severance in status does not take place till after such communication has been received by the other coparceners We see no treason to interpret the reference to 'communication' in the various cases as implying that the severance does not arise until notice has been actually received by the addressee or addressees"

Later in the course of the judgment His Lordship referred with approval to the decision of Madhavan Nair, J, in *Rama Iyer* v *Meenakshi Ammal*[2] and held that the issue of the notice, in so far as the testator was concerned, was sufficient to prevent the operation of the principle of survivorship It is necessary to pause and consider the effect of this pronouncement Suppose on 1st April, 1948, A, a member of a joint Hindu family made a clear and formal declaration in writing that he was divided in status from the other members of the family and also published its contents in a newspaper. Suppose he died without giving notice to the other members of the family of his intention to divide and the other members of the family became aware of his declaration a year after his death, say, on 1st January, 1949. Is it to be said that the unilateral declaration was effective so far as *A* was concerned as and from the 1st January, 1948, and so far as the other members were concerned only from 1st January, 1949? Or is it to be said that as soon as the other members came to know of the declaration of intention on 1st January, 1949, it related back to 1st January, 1948, so far as they too were concerned A joint family may, and a tarwad does often consist of numerous individuals There are tarwads containing more than 100 members, many of whom are pursuing different walks of life in foreign countries There may be infants in the tarwad and children in the womb.

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1. (1938) 1 M L J 45 I L R (1938) Mad 315.
2. (1930) 33 L W 384

Is it to be said that service of notice of an intention to divide on the part of one member to every one of the other members is essential, if a severance in status is to be brought about? Supposing the notice is served on the karnavan today and on the junior members on various subsequent days running over a couple of months does the severance take place on the date of the issue of the notice or on the date when service can be said to have been effected on all the members? Or does the severance take place on each of the dates when notice is served on each of the members so far as the particular recipient is concerned? If, as held by Varadachariar, J., the severance in status takes place as soon as the dividing member has published his intention to divide even though the other members of the family have not been notified about it, does it not really mean that communication to the other members of the family is not indispensable to create a severance? Supposing the addresses of some members of the family are not known and a member is about to die and is desirous of getting himself divided and making a provision for his wife and daughters, is he to serve those members by some method analogous to substituted service? Is he prevented from executing a will till all the members are served either in person or by the method of substituted service? If subsequent notice to the other members acts retroactively and creates a division in status from the date of the declaration itself, are you not effectively doing away with the necessity of communication as a condition of severance? In the present case, all the members of the tarwad today know that the deceased member, shortly before her death, published her intention to become divided, by issuing a notice to the karnavan demanding a partition and the notice itself is exhibited in the suit. If their present knowledge is to be related back to the date of the suit of the notice, why should not the deceased member be considered to have died divided in status though a considerable interval has elapsed between the date of the issue of the notice and the date when it was filed as an exhibit in the case and came to the knowledge of the other members?

The only logical rule furnished by the texts of Hindu law as interpreted by the decisions of the Privy Council, appears to me to be that an unilateral declaration of an intention to become divided on the part of a member of a joint Hindu family effects a severance in status. The declaration must be clear, unequivocal and unambiguous. There must be some manifestation, indication, intimation or expression of that intention to become divided, so as to serve as authentic evidence in case of doubt or dispute. What form that manifestation, expression or intimation of intention should take would depend upon the circumstances of each case, there being no fixed rule or rigid formula. The despatch to or receipt by the other members of the family of a communication or notice announcing the intention to divide on the part of one member of the family, is not essential nor its absence fatal, to a severance in status.

Mr. K. P. Ramakrishna Aiyar, the learned advocate for the respondents, drew my attention to the serious consequences of the view I am taking, particularly, the danger of tainted evidence about such declarations and manifestations of intention to become divided. Even if a communication were regarded as essential to create a severance, the law does not require that the declaration or the communication should be in writing. Oral declaration of an intention to divide and oral communication of such intention are quite sufficient in law. The Court would no doubt require clear and convincing evidence of such a declaration of intention before it acts upon it. As regards the danger of perjured evidence and the heavy burden that will be thrown upon courts, I have only to state that courts are here to shoulder that burden as part of their duty. The machine is not to be put above the work it has to do. Oral wills (permitted in the mofussil till 1925) oral authorities to adopt oral partitions, oral surrenders or releases, oral declarations of intention to divide and oral communications of such intention have had to be adjudicated upon by courts and my conclusion in this case is not likely to add appreciably to the burden of the courts or the volume of tainted evidence. As pointed out by Sadasiva Aiyar, J., in *Soundararajan* v. *Arunachalam*[1], and my learned

1. (1915) 29 M.L.J. 816 : I.L.R. 39 Mad. 159 (F.B.).

brother, Panchapagesa Sastri, J, in this case, it is always open to the Legislature to enact that a declaration of intention to become divided by a member of a joint Hindu family should be in writing and registered

Assuming that communication of an intention to become divided on the part of a member of a joint Hindu family or a tarwad to the other members is an essential condition of the doctrine of severance in status by an unilateral declaration, the further question that arises is, whether a communication of such intention to the manager of a joint Hindu family or in the case of a tarwad, to the karnavan of the tarwad, is sufficient or whether a communication to all the members of the family is necessary in order to effect a severance in status There is no direct authority on the point one way or the other The decisions that refer to communication or intimation of an intention to divide on the part of a member of a joint Hindu family assume in a general way that the communcation is to be made or the intimation is to be given to the "co-sharers" *i e*, coparceners But these observations are of a general character and must not be understood as decisive of the point now raised, one way or the other The manager of a joint Hindu family has the power or the right to represent the family in all transactions relating to it so far as the outside world is concerned He is entitled to act on behalf of the family without taking the consent of the other members A manager can sue and be sued without joining the other members of the family; in respect of family transaction the manager represents the entire family in such suits The result of the litigation would be binding on the members of the family, in the absence of fraud or collusion The position of the karnavan of a Malabar tarwad is similar and was thus described by Holloway, J "A Malabar family speaks through its head, the karnavan" The question, however, is whether this power or right of representation enables the manager of a joint Hindu family or the karnavan of a Malabar tarwad to receive on his own behalf and on behalf of all the members of the family a notice given by a outgoing member of his intention to become divided from the rest of the family. It is open to one member of a joint Hindu family to separate himself from the rest leaving the latter to continue as before as members of the joint family If one coparcener dies or drops out, the corporate character of the family is not lost thereby. The true position is stated by the Judicial Committee in *Palaniammal* v *Muthu Venkatachala*[1], in these words,

> "It is now beyond doubt that a member of a jont family can separate himself from the other members of the joint family and is, on separation, entitled to have his share in the property of the joint family ascertained and partitioned off from him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family, what remained after such a partition, of the family property That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on"

If the remaining members continue as a joint family, the manager of the family would represent them in all transactions with the outside world, including the outgoing member. It is not as if the manager or any of the remaining members of the family have any voice, veto or option in the matter All of them have to submit, willy nilly, to the demand of a coparcener for the separation of his share, for, it is a matter of his own individual volition The notice or communication of an intention to become divided is only of evidentiary value, assuming of course that it is an indispensable piece of evidence If it were the law that the separation of one member *ipso jure* causes a separation of all the member of the family, on the analogy of the death or retirement of a partner in a partnership, one can understand the necessity for a notice individually to all the remaining coparceners When that is not the case, I fail to see why a notice issued to the manager of the family who would continue to represent the remaining members of the joint family is not a sufficient notice to the remaining members themselves. *Quoad* the joint family, the position of an outgoing member is like that of a stranger and I do not see any reason why the manager of the family, acting on behalf of the

1 (1924) 48 M L J 83 L R 52 I A 83 I L R. 48 Mad 254 (P C.).

remaining members and representing them, should be disabled from receiving a notice of separation given by the outgoing member There might be transactions between an individual member of a joint family and the joint family itself represented by the manager A member of a joint Hindu family can do business with, lend to or borrow from the joint family represented by its manager In *Bhuru Mal* v *Jagannath*[1] a case which was apparently not brought to the notice of my learned brethren, the Judicial Committee have gone to the length of holding that it is open to a coparcener in his own individual capacity to enter into a contract of partnership with the joint family of which he is a member, the joint family being represented by the manager Such a transaction can be effected by the members of the family through the medium of the manager, the joint Hindu family being regarded as entity capable of being represented by its manager If so much is granted, I fail to see why an intimation or communication of the intention of one member to divide, given to the person who would continue to be the manager of the joint family after the severance of the outgoing member, is not sufficient notice to the remaining members who form the joint family.

The analogy of a suit for partition is not conclusive on this matter In order to prevent a multiplicity of suits and give a finality to litigation, the procedural law insists upon every member of the family entitled to a share in the family properties being made a party to a suit for partition and also upon the inclusion of every item of family property A suit for a division in status alone without a *de facto* division of the properties is inconceivable. If there is to be a division by metes and bounds, then the wishes of all the sharers have to be consulted as regards the best method of allotment of property consistent with the interests of all the sharers. A division in status depends upon the volition of the separating member, while a division by metes and bounds requires the agreement of all the parties or the decree of a court

I am glad to be fortified in my conclusion by the opinion of so eminent a lawyer as the editor of the latest edition of Mayne's Hindu Law extracted in judgment of Satyanarayana Rao. J. My learned brother, Panchapagesa Sastri, J , has drawn attention to the fact that both in *Girja Bai* v *Sadashiv Dhundiraj*[2] and *Kotayya* v. *Krishnan*[3] notice of the intention of an outgoing member to separate himself from the family was given only to the managing member I may also add that in the former case the manager was only a *de facto* manager As however, the present point was not raised or considered in those cases, I do not rely on them as binding precedents.

Out of the respect I entertain for the opinion of my learned brother Satyanarayana Rao, J., I have set out at some, but I hope not unnecessary length, the considerations which have led me to form an opinion contrary to his own For the reasons indicated in my judgment, I would answer the question referred to me in the affirmative

(The appeal was finally allowed)

K.S *Question answered Appeal allowed*

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1. (1943) 1 M L J 70 . I L R. (1942) Kar (P C) 33
2. (1916) 31 M.L J. 455 . L.R. 43 I A. 151 43 Cal 1031 (P C).
3. (1945) 1 M L J 74 I L R 1945 Mad. 710

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE MACK.

Puthiya Velappil Ayissamma *Petitioner* *

v

Chowakkaram Puthiya Purayil Bavachi Keyi . . *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *sections* 12 (1) (b) *and* 7 (5)—*Vexatious and false petition to evict—Dismissal—Compensatory costs—If can be recovered by separate suit*

The word "landlord" in section 7 (5) of Madras Act XV of 1946, obviously means landlord or any one claiming to be a landlord making an application Similarly the words "a tenant" can only mean "a tenant or any one alleged to be a tenant"

Section 7 (5) of Act XV of 1946 reproduced the principle of section 35-A of the Code of Civ Procedure in rent control proceedings If a petition was false and vexatious, compensatory costs can be granted But there is no legal principle on which such relief can be given to the party who was dragged unnecessarily into the proceedings by way of a separate suit for damages

Petition under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, (Principal), Tellicherry, dated 17th November, 1947, in S C S No 91 of 1947

M. C Sridharan for Petitioner

C K. Viswanatha Aiyar for Respondent.

The Court delivered the following

JUDGMENT —This revision petition arises out of a rather unusual suit filed by the petitioner, the widow of one Moidu Haji, who died on 1st January, 1946, to recover from the two defendants a sum of Rs 172-15-0, expenses incurred by her in defending a petition, R.C P No 304 of 1946 before the House Rent Controller, instituted by the defendants The defendants are Moidu Haji's grandmother and her son They sought to evict the widow in those proceedings from a block of three shops The learned Rent Controller Mr. K K Mathews dismissed their petition finding it to be both frivolous and vexatious, but he expressed himself unable to grant any compensation to the petitioner and other respondents impleaded before him as, by denying the title of the petitioner before him as landlord, they had removed themselves from the purview of section 7 (5) of the Madras Act XV of 1946 Instead of filing any appeal against the refusal to grant any compensation under this section, a remedy open to the petitioner under section 12 (1) (*b*) of the Act, the petitioner filed a regular suit to recover as damages the actual expenditure she incurred in her defence before the Rent Controller. In her plaint she alleged that she paid Rs 160 to her advocate for eight appearances before the Rent Controller The learned District Munsif, quite rightly, held that the suit to recover these costs was not maintainable and he dismissed it without any order as to costs

Section 35 (*a*) of the Civil Procedure Code makes provision for compensatory costs in respect of false or vexatious claims or defences in suits or other proceedings not being an appeal Section 7 (5) of Act XV of 1946 reproduces the principle of this section in Rent Control proceedings but limits compensation to Rs. 50. I should like here to correct an obvious error in the view of the learned Rent Controller who seemed to think that this compensation under section 7 (5) could only be awarded in an application made by a landlord for the eviction of a tenant and presumably that if the appellant's position as landlord was in dispute or not established, the award of such compensation was not permissible. The phrase "application made by a landlord" in section 7 (5) obviously means an application made by a landlord or any one claiming to be a landlord. Similarly, the words "a tenant" can only mean 'a tenant, or any one alleged to be a tenant" If the view taken by the learned Rent Controller is to be accepted, a large category of cases all the more frivolous and vexatious because they are instituted under the Rent Control Act by persons who have no title as landlord against persons impleaded

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* C R P. No 766 of 1948 14th April, 1949.

as tenants who set up paramount title will be quite excluded from the scope of compensation This is a clear case in which the Rent Controller would have been fully justified on a finding that the petition was both false and vexatious in granting the petitioner the full amount of Rs 50 as compensation

I do not desire to make any further comment on the merits as between the parties in view of no less than three suits as is not disputed, pending as between the heirs of Moidu Haji The learned advocate for the petitioner asks that at any rate a compensation of Rs 50 may now be awarded to the petitioner to defray part of her legal expenses in the Rent Control proceedings There is no legal principle on which this relief can be given to the petitioner by way of a separate suit The view taken by the learned District Munsif is correct; the law does not unfortunately provide for damages incurred by defendants impleaded in civil proceedings found to be false or vexatious by way of separate suits One can only sympathise with the petitioner whose petition is dismissed in the circumstances but without any order as to costs.

K S *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE PANCHAPAKESA AYYAR

Kotamsath Appanna . *Petitioner*

v

Koppoju Appalaraju *Respondent*

Indian Penal Code (XLV of 1860), section 406—Jewel taken from goldsmith as sample for approval—Retention towards debt due by goldsmith—Offence made out

Where a person takes from a goldsmith a gold jewel for showing it to his wife and placing an order for a similar jewel if she approved of it but fails to return it and retains it with himself towards some debts due to him by the goldsmith, he will be guilty of an offence under section 406 of the Indian Penal Code He has utilised the jewel for a purpose not intended and against the express agreement. The mere fact that the jewel is intact is irrelevant

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the order of the Sub-Divisional Magistrate, Vizagapatam in C A. No 24 of 1948 (C C No 417 of 1947, Stationery Sub-Magistrate, Srungavarapukota)

Y Suryanarayana for the petitioner.

E. Venkatesam for respondent

The Public Prosecutor (*V L Ethiraj*) for the Crown

The Court pronounced the following

ORDER —I have perused the entire records and heard the learned Counsel for the petitioner and the learned Public Prosecutor *contra.* Two Courts found the petitioner guilty under section 406, Indian Penal Code in respect of a gold jewel taken by him from P.W 1, a goldsmith, on 18th April, 1948, for showing it to his wife and placing an order for a similar jewel if she approved of it, and failing to return it and retaining it with him towards some debts due to him by P W. 1, and refusing to return it He has been fined Rs 150, and the entire fine is directed to be paid to P W. 1 as compensation for the loss of the jewel.

The learned counsel for the petitioner urged that the lower courts should have believed the evidence of the D Ws and held the jewel to be his and made from gold supplied by him I cannot agree. The lower courts were right in disbelieving these D Ws

The next contention urged was that the petitioner has simply retained the jewel as security for his debt and will not be liable under section 406, Indian Penal

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* Crl R. C No 139 of 1949 15th July, 1949
(Crl R. P. No 134 of 1949)

Code in view of the rulings in In re *Adinarayana Iyer*[1], and *Rex* v. *Krishnan*[2], especially as he has produced the jewel in this court, and it is intact, though he is not willing to return it The facts here are different from the facts in In re *Adinarayana Iyer*[1] There, a man willingly left a box in the accused's house and was not allowed to take it away before he paid his dues. That is analogous to a hotel-keeper's or lodging-house keeper's lien over the luggage of customers and lodgers Here the petitioner promised to return the jewel and broke his promise and retained it and claimed it to be his own The ruling in *Rex* v *Krishna*[2] clearly says that wherever a thing is utilised for a purpose not intended against an express agreement or implied understanding there will be an offence under section 406, Indian Penal Code The mere fact that the jewel is intact with the petitioner is irrelevant He has caused wrongful loss to P W 1 by dishonestly retaining it and claiming it to be his and by misappropriating it So he was rightly convicted Even now he is not willing to return the jewel to P W 1 in which case I might have let him off with a small fine In the circumstances I confirm the sentence and order under section 545, Criminal Procedure Code also and dismiss the petition.

V S *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE PANCHAPAKESA AYYAR

A. Govindaswamy and others *Petitioners* *

Madras City Police Act (III of 1888), section 75—Applicability—If confined to riotous behaviour as a result of being drunk

It is not correct to say that section 75 of the Madras City Police Act would apply only to persons guilty of riotous and disorderly or indecent behaviour as a result of being drunk The section punishes both drunkards, incapable of taking care of themselves, and people guilty of riotous or disorderly or indecent behaviour in any public place

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Fifth Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras in N.C. No. 60277 of 1949

N. S. Mani for *Messrs Row and Reddy* for Petitioners.

The Crown Prosecutor (*S Govind Swaminathan*) for the Crown.

The Court pronounced the following

ORDER —The petitioners have been sentenced under section 75 of the City Police Act to undergo three weeks rigorous imprisonment each for behaving in a riotous disorderly or indecent manner and have also been directed to execute bonds themselves for Rs 50 each with one surety for Rs 50 each for six months after release under section 106, Criminal Procedure Code. Mr. Mani for the petitioners, urged that section 75 would apply only to persons guilty of riotous, disorderly or indecent behaviour as a result of being drunk, and not as here without being drunk and in a perfectly sober mood. I cannot agree Section 75 punishes both drunkards incapable of taking care of themselves and people guilty of riotous, disorderly or indecent behaviour in any public place etc like these petitioners The petitioners abused in filthy and indecent language the loyal workers and behaved in a riotous, disorderly and indecent fashion in a public place and were rightly convicted under section 75 But considering all the circumstances I modify the sentences to the periods of imprisonment already undergone and a fine of Rs 15 each or in default further rigorous imprisonment for a week each. Time for payment till 3 p.m. on 14th August, 1949

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1 (1907) 17 M L J 413

2 A I R 1940 Mad. 329

* Crl R C No 885 of 1949. (Crl R. P No. 821 of 1949). 29th July, 1949.

There was no justification in the circumstances of this case to take bonds under section 106, Criminal Procedure Code from any of the petitioners none of whom had any antecedents of crimes involving a breach of the peace and all of whom had acted in sudden heat of passion on finding their fellow-workers refusing to join the strike and persisting in going on working The bonds are cancelled

V.S *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE MACK

Malladi Seetharama Sastri *Petitioner*

v

The Hyderabad State represented by the General Manager, Nizam State Railway, Secunderabad (Deccan) *Respondent*

Limitation Act (IX of 1908), *Article* 31—*Suit to recover value of machinery consigned to railway company for carriage but not delivered to consignee—Limitation—Starting point*

A merchant consigned on 21st August, 1944, to the railway company some machinery for carriage from Bezwada to Lahore He received from the consignee a letter dated 7th November, 1944, to the effect that the goods had not reached him The consignor sent a notice on 8th February, 1945, to the railway company complaining of the non-delivery of the goods and asking for payment of their value. To this letter he was not vouchsafed any reply He filed his suit on 31st October, 1945, for recovery of the value of the machinery On a question whether the suit was in time

Held, in view of the fact that in 1944 railways were afflicted by war conditions and congestion in transit, two months and sixteen days could not be considered to be an unreasonable period within which a railway company ought to have delivered the goods In any event the suit was filed within one year of the receipt of information of non-delivery and hence there was no substance in the technical plea taken by the railway that the suit was barred

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge, Vijayawada, dated 3rd April, 1947 in S C S No 247 of 1945

V Subramaniam for Petitioner

V K Ramanathan instructed by *Messrs. King and Partridge* for Respondent

The Court delivered the following

JUDGMENT —The petitioner is the plaintiff, a merchant of Bezwada, who sued the Nizam State Railway of Hyderabad for the recovery of Rs 305 being the value of some machinery he consigned on 21st August, 1944, from Bezwada to the Circar Engineering Company, Lahore It is common ground that the goods had to be carried over three railways. Plaintiff received from the consignee a letter Exhibit P-1 dated 7th November, 1944, to the effect that the goods had not reached him. He sent a notice to the railway company on 8th February 1945, complaining that the goods had not been delivered and asking for payment of their value To this letter he was not vouchsafed any reply He then, after going through the necessary formalities, filed this suit on 31st October, 1945 The learned Subordinate Judge dismissed it as time barred under Article 31 of the Limitation Act which prescribes as the period of limitation for a suit against a carrier for compensation, non-delivery or delay in delivering goods one year from the date "when the goods ought to be delivered" The learned Subordinate Judge attached importance to the evidence of a parcels clerk of the Bezwada railway station who deposed that it would normally take one week by passenger train and 15 days by goods train for a consignment to reach Lahore On this basis the Subordinate Judge held that the suit was filed out of time The view taken by him is obvioulsy incorrect and cannot be suported

Two limitation Articles which can govern this case are Article 30 which prescribes for suits against a carrier for compensation for losing or injuring goods

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C R. P No. 1193 of 1947 6th July, 1949.

one year from the date when the loss or injury occurred In *Madras and Southern Mahratta Railway Co* v *Bhimappa*[1], a Bench of this Court observed as regards Article 30 that the burden of proving when the goods were lost is on the railway company and that in that case they had not proved when they were lost and there was nothing in the evidence to show that they were lost more than one year before the institution of the suit Those observations are relevant and pertinent to the facts of the present suit As regards Article 31, the difficulty it raises is that it fixes no specific time for the delivery of the goods, the ordinary rule being that goods have to be delivered by a carrier within a reasonable time What is a reasonable time has to depend on the facts of each case In *Jugal Kishore* v *Great Indian Peninsular Railway*[2], the plaintiff consigned goods on the 28th August, 1918, and filed his suit for damages on the 31st March, 1920. For more than a year plaintiff had been put off by various statements on the part of the railway companies to the effect that the matter was being enquired into It was held that the suit was in time and not barred, whether Article 30, or Article 31 was considered applicable to the facts That suit was filed about a year and eight months after the consignment, whereas the present suit was filed less than one year and three months after the consignment The learned Subordinate Judge relied on *Palanichami Nadar* v *Governor-General of India in Council*[3] for the position that time would begin to run under Article 31 from the date of a definite refusal or declaration or inability by the railway company to deliver the lost goods. But that construction of Article 31 has been obviously misapplied by the learned Subordinate Judge to the facts of this suit In the cases in which that construction was given, it merely enlarged the period within which a suit should be brought from the date on which, after a protracted correspondence with the railway company, they expressed inability to give delivery of the goods for some reason or other In the present case, the railway company did not even accord the plaintiff the courtesy of a reply to his original letter of complaint In fact the decision in *Palanichami Nadar* v *Governor-General of India in Council*[3] gives very strong support following as it does, *Jugal Kishore* v. *Great Indian Peninsular Railway*[2] and *Madras and Southern Mahratta Railway* v *Bhimappa*[1], to the present case of the plaintiff It has also to be remembered that in 1944 railways were afflicted by war conditions and congestion in transit, and two months and 16 days could not be, in any event, considered to be an unreasonable period within which a railway company ought to have delivered the goods When the plaintiff received the letter Exhibit P-1 from his consignee in Lahore that the goods had not yet reached there, he can scarcely be blamed for giving a little further time before making his complaint to the railway company In any event the suit was filed within a year of Exhibit P-1 There is no substance in this technical plea of limitation taken on behalf of the railway Nor can I see any substance in another technical plea to the effect that the railway company has not been correctly impleaded in the suit The defendant was originally impleaded as the General Manager of the Nizam State Railway and this, on objection being taken by the defendant, was amended to Hyderabad State represented by the General Manager of the Nizam State Railway Even this amended description of the defendant is now objected to by the learned advocate for the respondent railway on grounds which I am unable to appreciate It is not disputed, as the learned Subordinate Judge has also found, that the value of the consignment of machinery is Rs 300

The petition is allowed with costs and the suit decreed as prayed for against the defendant railway also with full costs

V S *Petition allowed.*

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1. (1912) 23 M L J 511
2. (1922) I L R 45 All 43.
3. (1945) 2 M L J 448

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

C.V. Rajagopalachari ... *Appellant.**

Indian Press Emergency Powers Act (XXIII of 1931), *sections* 18 *and* 4 (1) (d)—*Prosecution under section* 18—*Facts to be proved—Intention or motive in publishing the offending matter—Relevancy—Scope of section* 4 (1) (d).

In prosecutions under section 18 of the Indian Press (Emergency Powers) Act, the prosecution need only prove that a document other than a newspaper has been intentionally made and published and that it contains either published news or comments on published news or any matter described in sub-section 1 of section 4 of the Act without obtaining the necessary permission of the Magistrate under section 15 of the Act. Sub-section 1 (*d*) of section 4 does not mention anything about the intention or motive in publishing such words but simply says that the document in question should contain words, signs, etc., which tend directly or indirectly to bring into hatred or contempt the Government established by law. In other words, it is the effect of the contents of the documents, the *objective aspect* that is covered by section 4 (1) (*d*) and not the intention or motive or the *subjective aspect*, or the *mens rea* in uttering or publishing those words which would be material for a prosecution for sedition under section 124-A, Indian Penal Code.

A pamphlet of four pages without any cover whether a "book" or not will fall within the definition of a "news sheet" and where taken as a whole and without tearing any statements made therein out of their context, tends directly or indirectly to bring the Government into hatred or contempt, whatever be the intention or the motive of the author in publishing it, it will fall within the scope of section 4 (1) (*d*).

Appeal against the order of the Chief Presidency Magistrate, Egmore, Madras, in C.C. No. 3244 of 1948, dated 27th December, 1948.

The appellant in person.

The Crown Prosecutor (*S. Govind Swaminathan*) for the Crown.

The Court delivered the following

JUDGMENT :—This is an appeal by one Mr. C. V. Rajagopalachari who has been convicted by the Chief Presidency Magistrate under section 18 of the Indian Press (Emergency Powers) Act 1931, for having published an unauthorised "news-sheet" entitled "'Save the country from the totalitarianism", which is a pamphlet or tract of four pages without any cover. Copies of this pamphlet or news-sheet, he sent to the Prime Minister of India, the President, Indian National Congress, and also, according to him, to every Minister of the Congress Government in Madras and every prominent congressman, besides public men and institutions of standing ; and also sent a copy to the "*Baltimore Sun*," in the United States of America. He enclosed copies of a prior pamhlet "Creed and Camouflage in Congress politics" when sending this second pamphlet. He has been sentenced to pay a fine of Rs. 250 and, in default, to rigorous imprisonment for six weeks. After an elaborate discussion, the Chief Presidency Magistrate rejected the appellant's contention that this pamphlet was not a "news-sheet". He found that the document in question was not a newspaper and did not contain public news or comments on public news but contained matters covered by section 4 (1) (*d*) of the Indian Press (Emergency Powers) Act, that is, matters which tend directly or indirectly to bring into hatred or contempt His Majesty or the Government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India, or to excite disaffection towards His Majesty or the said Government, and would, therefore, constitute a "news-sheet". It is admitted by Mr. Rajagopalachari that he did not take any permission of the Magistrate to publish this pamphlet under secton 15 of the Act. Therefore, the only question that remains to be considered is whether this document will be an unauthorised "news-sheet" punishable under section 18. There is no doubt whatever that he made and published this pamphlet. But he contends that he is always publishing pamphlets, and that these will be "books" and not "news-sheets".

The main point which falls to be determined when considering this question is whether the matters contained in this document will fall within the purview

* Crl. Appeal No. 748 of 1948. 13th July, 1949.

of section 4 (1) (*d*) in which case, the conviction will be correct, as this pamphlet is "a document other than a newspaper" within the meaning of section 4 (1), whatever the case be with regard to the sentence Mr Rajagopalachari contended that his intention and motive in publishing this document was not to bring into hatred or contempt the Government, or the Congress, or the administration, or any class or section of His Majesty's subjects, or to excite disaffection towards the Congress or the Government or anybody else, but only to make Congressmen think deeply over the principles and policies of Mahatma Gandhi and see that the Congress organization is brought back to a state of strength and sacrifice as in its heydays His contention is that, to achieve this object, he had to speak out whatever he felt, without fear or favour, and that the fact that he sent copies of the pamphlet to the Congress President and Pandit Jawaharlal Nehru, who wrote a letter thanking him for it, and to other prominent Congressmen, shows that his motive in writing and distributing it was the same motive as had actuated Mahatma Gandhi and is actuating some other Congress leaders in Madras Province and elsewhere to express strong and fearless criticism of the Congress and the Government He contended that he was a staunch and veteran congressman and the Secretary of the Civil Liberties Union and a back-bencher democrat He argued that an *intention* to bring the Government into hatred or contempt was essential, as in the case of sedition, and relied on the ruling in *Public Prosecutor* v *Subba Mudaliar*[1], and *Niharendu Dutt Majumdar* v. *King Emperor*[2], for this contention, and vehemently urged that the proper thing to do, if the prosecution was confident of its case that the contents of this pamphlet came under section 4 (1) (*d*), was to prosecute him for *sedition*, under section 124-A, Indian Penal Code, and prove it to be the hilt, in which event he would have produced books, documents and witnesses galore and proved the case to be misconceived and unsustainable The learned Crown Prosecutor contends, on the other hand, that there is no sedition charge in this case and that, therefore, there is no need to go into the question of the sustainability of a sedition charge based on the contents of this pamphlet, and that the main question here, since the intention to write and publish the pamphlet is proved, is whether the matters in this document tend directly or indirectly to bring the Government etc into hatred or contempt, whatever the intention in writing and publishing those matters I agree

Here, we are not concerned either with the Congress or its alleged pristine purity or present alleged degeneracy, or with any attempts of the appellant or others at purifying it ; we are only concerned with the fact whether this pamphlet contains matters falling under section 4 (1) (*d*), and whether it will constitute an unauthorised "news-sheet"

After deep consideration, I agree with the learned Crown Prosecutor's view that the intention or motive in publishing the matters in such pamphlets is immaterial in the case of such prosecutions under section 18, provided the matter is published intentionally and tends directly or indirectly to bring into hatred or contempt the Government of the day Sedition is a major offence, and has to be proved strictly, and there are well known decisions like *Niharendu Dutt Majumdar* v. *King Emperor*[2], governing the question as to what constitutes "sedition", and I may freely admit that, if this were a prosecution for sedition, the evidence on record may be inadequate to convict the appellant But the matter before me now is different In my opinion, in prosecutions under section 18 of the Indian Press (Emergency Powers) Act, the prosecution need only prove that a document other than a newspaper has been intentionally made and published and that it contains either published news or comments on published news or any matter described in sub-section (1) of section 4 of the Act without obtaining the necessary permission of the Magistrate under section 15 Sub-section (1) (*d*) of section 4 does not mention anything about the intention or motive in publishing such words etc., but simply says that the document in question should contain words, signs or visi-

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1. 1937 M.W.N 175 2. 1942 F.L.J 47 I.L.R. 1942 Kar. (F.C.) 56.

ble representations which tend directly or indirectly to bring into hatred or contempt the Government established by law etc

In other words, it is the *effect* of the contents of the document, *the objective aspect*, that is covered by section 4 (1) (*d*) and not the intention or motive or *the subjective aspect*, or the *mens rea* in uttering or publishing those words, which would be material for a prosecution for sedition under section 124-A, Indian Penal Code It is significant that section 4 (1) (*d*) omits all the provisons found in section 124-A

The next question is whether this pamphlet contains words which tend directly or indirectly to bring into hatred or contempt the Government After deep consideration, I am of opinion that it does, whatever be the motive or the intention of appellant The following passages from the document in question will make this clear One passage runs —

"Congress Governments have failed to control the prices of commodities They have not put down rich monopolists, but have given them full scope for looting the people, At the dictation of the rich hoarders, decontrol of prices of food grains and cloth have been effected The result is the phenomenal rise in the cost of living and the suffering of the poor and the middle classes"

It is obvious that this passage tends directly or indirectly to bring the Government into hatred or contempt. People already ground down by soaring prices, and 90 per cent of them unable to understand the cause of the high prices or the economic laws or the laws of trade, will conclude from this passage that the high prices are due to the fault of the Congress Government and that the Congress Government have given full scope to rich monopolists for looting the people, and that they have decontrolled the prices of food grains, cloth etc , at the dictation of rich hoarders

Again, there is another passage, viz ,

"Congress Government have passed emergency laws to detain without trial people who agitate to better the lot of the poor If anybody protests against the repressive acts of the Government, he is dubbed as Communist or 'fellow-traveller'."

In these times, when undoubtedly there are some people who agitate not to better the lot of the poor but to better their own lot, this passage will tend directly or indirectly to bring the Government into hatred or contempt. Yet another passage runs

"The Congressmen came to power by sacrificing the principles for which many suffered in the past Now they are hand in glove with the reactionaries And they are bent upon keeping the power in their hands at any cost To achieve this object, they will solicit anybody's co-operation and even put God to auction In order to hide these facts from the public knowledge they make the communists the scapegoats"

This passage too will undoubtely tend directly or indirectly to bring the Government into hatred or contempt There is the communist movement , it is an arguable question whether communists are to be detained or not without trial To say that these are detained and made scapegoats of by the Government in order to hide their lust for retaining power cannot be said to be reasonable criticism or to be even objectively correct

Another passage runs

"Whatever error our National leaders may commit, they are immune from criticism If any dare point out such errors, he is condemned as an unpatriotic rebel and *consigned to jail*"

The last words show that the passage relates to Congressmen in Governement, as, otherwise, they cannot consign people to jail This passage too, in my opinion, falls within the scope of section 4 (1) (*d*)

Still another passage runs

"Now they are trying to be in power by securing the support of a section of the people by calling them true patriots and giving them lands and jobs and detaining others who refuse to accept the leaders' policy as correct This policy, if continued, will drive the country to anarchy and chaos and will end in civil war"

This passage too will come within section 4 (1) (*d*), as it too brings the Government into contempt or hatred and will cause grave disaffection among the citizens and

may promote the very civil war which the pamphleteer says he wants to prevent.

Another passage runs

"Leaders get angry if any one asks whether they can make India strong and prosperous by constantly quarrelling with Pakistan and by cajoling the Maharajahs by making them *Rajapramukhs* and by paying huge sums as compensation to parasitic zamindars and inamdars, and playing with communal prejudices The leaders and their faithful followers refuse to face these facts because they are suffering from communist and communalist phobia Their anti-communism is only helping the reactionary rich to exploit the helpless poor which is thwarting the path of peaceful progress"

This passage too, in my opinion will fall within the scope of section 4 (1) (*d*) Even objectively, one cannot agree that the quarrels with Pakistan are all of the Indian Government's making, or are engineered by the Indian Governement, or that the Maharajahs are cajoled by the Government by being made *Rajapramukhs* (after foregoing their sovereignty !) or that zamindars and inamdars are given compensation to serve as parasites and hangers-on and admirers of the Government (when the lands have been taken away from them and only such compensation as is considered reasonable by the Legislature elected by the people is awarded to them).

Therefore, the pamphlet, taken as a whole and without tearing any statements made therein out of their context, tends directly or indirectly to bring the Government (and not merely the Congress) into hatred or contempt, whatever be the intention or the motive of the appellant in publishing such opinions Whether it is a "book" or not, it will, therefore, fall within the definition of a "news-sheet". No doubt, the appellant has been a congressman for 25 years, from 1st January, 1921 to 1st January, 1946, and has been also the Secretary of the Civil Liberties Union, and he seems to be fanatically convinced of the truth of his own observations in this document and might, as he contends, have merely followed the footsteps of the greater men inside and outside the Congress in publishing such seething and sweeping criticisms But a Court of Law is confined strictly to the law governing the facts, and the effect or tendency of the facts contained in the offending pamphlet or document. Politicians exceeding the limits laid down by the law take the risk of being convicted for offences under the law, as they have been all through the ages Nor can they ask courts dealing with a particular pamphlet under section 18 to read all their prior pamphlets to see the purity of their motives and their burning desire to reform the Government of the land.

In the end, I confirm the conviction of the appellant In the peculiar circumstances of the case, and seeing that the definition of "news-sheet" has not been made clear by any rulings of this court, and that, according to the learned Crown Prosecutor, even big books will come under the definition "news-sheet", and that the accused urges that he never dreamt that his pamphlet would be considered to be a news-sheet and not a book, and that he wrote and sent it to prominent people and papers and institutions as several people, congressmen and others, have written pamphlets and books containing criticisms similar to the document now before me and have not been prosecuted, I reduce the sentence to a fine of Rs 50 or, in default, one week's simple imprisonment

V S. —— *Conviction confirmed, but fine reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE MACK.

Mangalapurapu Dakshayani, by next friend Koniki Nagabhushanam .. *Petitioner*

v

Mangalapurapu Brahmayya and others .. *Respondents*

Guardians and Wards Act (VIII of 1890)—Order for custody—Examination of minor—Necessity—Minor wife ordered to be restored to her husband's custody—Failure to examine her in person—Legality of order.

It is a salutary practice for a Judge sitting on the Guardians and Wards side to examine all minors and interrogate them before directing their return or being handed over to any custody, even that

* C. R. P. No 124 of 1948 6th July, 1949

of the legal guardian There are circumstances which may justify a refusal to hand over a minor even to the custody of a *prima facie* legal guardian, the interests of the minor being the paramount consideration

An application in such proceedings by a minor to be declared a major cannot be determined without the minor being produced in Court

Where the Judge under the Guardians and Wards Act makes an order granting custody to the husband of his minor wife without examining the minor or considering her objections, the order has to be set aside and the matter remanded for fresh disposal after Court's examination of the minor

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, Guntur, dated 2nd December, 1947 in I.A No. 855 of 1947 in O P No. 118 of 1947.

V. Suryanarayana for Petitioner.

G Suryanarayana for Respondents.

The Court delivered the following

JUDGMENT —This petition has been filed on behalf of a minor wife by next friend to rivise the order of the learned District Judge of Guntur declining to set aside a custody order he passed in O.P No 118 of 1947, on 30th September, 1947, on the ground that he had not consulted the wishes of the minor who was a grown-up girl before he passed his order.

The custody order is as follows .

" The petitioner as the husband of the minor wife is in law entitled to her custody especially when it is found from his evidence which has not been challenged that his marriage with the minor was consummated three years ago The respondents have no objection to restore custody They have endorsed on the petition to that effect I therefore order the custody of the minor to the petitioner. The parties shall bear their own costs."

The respondents to the original petition were the girl's sister and her husband. Along with this revision petition an applicatioon for stay of the custody order was admitted and stay was made absolute pending the disposal of this petition on the ground that the learned District Judge had not examined the minor and considered her objections to be restored to her husband's custody. It is brought to my notice by the learned advocate who has filed this petition that an application has been filed in this court on behalf of the minor to be declared as major. I called for this petition which has not yet been numbered. On the merits the custody order passed by the learned District Judge cannot be sustained. It is a salutary practice for a Judge sitting on the Guardians and Wards side to examine all minors and interrogate them before directing their return or being handed over to any custody, even that of the legal guardian There are circumstances which may justify a refusal to hand over a minor even to the custody of a *prima facie* legal guardian, the interests of the minor being the paramount consideration The application by the minor to be declared a major cannot be properly determined without the girl being produced in court

I set aside the custody order passed by the learned District Judge and remand O P No 118 of 1947 for fresh disposal after a court examination of the minor If she is now found to be a major and *sui juris*, the court will of course have no jurisdiction to pass any custody order The application by the girl to be declared a major will be transferred to the District Judge for disposal. No order as to costs in this petition

V. S.

Case remanded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE GOVINDARAJACHARI

Girjaram Singh *Appellant* *

v.

Moopu Samban and others *Respondents*

Madras Agriculturists' Relief Act (IV of 1938)—Appropriation of payment—Rules as to—Payment in excess of interest due on date of payment—How to be appropriated

To constitute appropriation within the meaning of the Madras Agriculturists' Relief Act there must be an overt Act from which appropriation can be reasonably deduced or inferred The mere payment of money towards a debt and the passing of a receipt acknowledging such a payment will take the matter no further

A calculation of the amount of principal and interest due on the date on which an arrangement is made for the payment of the debt and a statement in the deed of arrangement that a portion out of the amount to be raised in the manner indicated therein should be credited towards the debt is not sufficient to constitute appropriation

Where sales are executed in discharge of mortgages, the notional payment made under those documents can only be regarded as being or amounting to open payments

In cases of payment in excess of interest due on the date of such payment, there is an appropriation only as regards that excess and no appropriation at all of the balance which would be an open payment liable to be appropriated according to law

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A S No 136 of 1943, preferred against the decree of the Court of the District Munsif, Villupuram, in O S No 275 of 1939

R Gopalaswami Aiyangar and *N T Raghunathan* for Appellant

T. L Venkatarama Aiyar for Respondents

The Court delivered the following

JUDGMENT —This is a creditor's appeal and the main point that arises is under Madras Act IV of 1938

Most of the material facts are not in dispute In 1930 the first defendant executed in favour of the plaintiff (appellant) three deeds of mortgage, Exhibits A, B and C for Rs 1,500, Rs 1,500 and Rs 900 respectively Admittedly, no payments were made towards any of the mortgages till August, 1935, when an arrangement was arrived at between the plaintiff and several persons who had purchased portions of the hypotheca from the first defendant This arrangement was embodied in Exhibit E, dated 19th August, 1935 After reciting the mortgages it is stated in Exhibit E that the balance in respect of those debts on 19th August, 1935, stood at the figure of Rs. 6,130 It is then provided that

"a sum of Rs 5,344 should be credited therefor in the mortgage deeds and towards that the properties mentioned hereunder in accordance with the particulars mentioned in paragraph 2 , should be sold"

It was expected that seven sale deeds would be altogether executed for the purpose of raising the amount of Rs 5,344 mentioned in Exhibit E but only five out of these were executed and the other two transactions were not put through

In the suit out of which this second appeal arises the appellant claimed Rs 2,828-12-0 as the amount due under the three mortgages, Exhibits A, B and C The suit was decreed substantially as prayed by the learned District Munsif but on appeal the learned Subordinate Judge held that Exhibits B and C were completely discharged and that there remains still due under Exhibit A a sum of Rs 483, as on 1st October, 1937

Two questions arise in this second appeal (1) whether Exhibit C was completely discharged by the execution of the sale deed, Exhibit F-2 ; and (2) whether the amounts mentioned as consideration for the other four sale deeds, namely,

* S A. No 1591 of 1945. 16th July, 1948

Exhibits F, F-1, F-3 and F-4 were open payments towards Exhibits A and B or whether there was an appropriation in respect of those amounts.

The first question can be shortly dealt with It is common ground that on the 29th August, 1935, when Exhibit F-2 was executed the amount due under Exhibit C exceeded Rs 1,300 Exhibit F-2 purports to be for a sum of Rs 1,000 only In the document as originally written it was stated that the consideration was to go towards the discharge of the mortgage evidenced by Exhibit C This was, however, corrected into a statement that the amount was to go in discharge of the mortgage It was suggested that the amount of the purchase money was really Rs. 1,300 and odd but that for the purpose of reducing the stamp duty payable on the document the parties stated the reduced figure of Rs 1,000 In dealing with this part of the case the learned Subordinate Judge bases his final conclusion that Exhibit C was fully discharged on several alternative bases and this has come in for some criticism by Mr Gopalaswami Aiyangar, the learned advocate for the appellant It is however quite clear from the judgment of the learned Subordinate Judge that he found in effect that the agreement between the parties was that the plaintiff should take items 4 and 7 which were conveyed under Exhibit F-2 in full satisfaction of the mortgage, Exhibit C, and that the correction in Exhibit F-2 was necessary for giving effect to and did give effect to the initial agreement between the parties. This finding of fact, for which there is considerable support in the evidence, seems to me to conclude the case against the appellant in this respect It has been argued that this finding overlooks the fact that Exhibit C is still with the plaintiff This is claimed as a circumstance to show that Exhibit C could not be taken to have been completely discharged but as Mr Venkatarama Aiyar, the learned advocate for the respondent, has rightly pointed out, this circumstance was never adverted to in either of the Courts below and can perhaps be met by the statement of the 16th defendant in the course of his evidence that Exhibit C was not available at the time when the sale deeds were executed. It must therefore be taken that Exhibit C was fully discharged by the execution of Exhibit F-2

It now remains to deal with the contention relating to the manner in which the amounts representing the consideration for Exhibits F, F-1, F-3 and F-4 should be dealt with Exhibit F states that Rs 442 out of its consideration should be credited towards the mortgage deed, Exhibit A and Rs 1,123 should be similarly credited towards the mortgage, Exhibit B The provision in Exhibit F-1 is that Rs 575 out of the consideration should be endorsed as paid on the mortgage deed, Exhibit A. It is provided in Exhibits F-3 and F-4 that the amounts of Rs 345 and Rs 200 forming the consideration respectively for those two sales were to be regarded as paid towards Exhibit B I have not set out the exact wording in the several documents but this is the effect and purport of the relevant clauses in the sale deeds

It has been strenuously argued by Mr Gopalaswami Aiyangar, that there was on the 29th August, 1935, when all these sale deeds were executed, *an* appropriation within the meaning of Madras Act IV of 1938, and that the payments made under those documents or what is equivalent to payment, namely, the conveyance of properties cannot be regarded as being or amounting to open payments within the meaning of the law relating to the scaling down of debts due by agriculturists There is of course no dispute that the concerned defendants are all agriculturists entitled to the benefits of Madras Act IV of 1938

I find it difficult to infer an appropriation of these several amounts towards the mortgages It is unnecessary to define what constitutes an appropriation for the purposes of the Madras Agriculturists' Relief Act Cases which have arisen under that Act have however laid down what would and what would not amount to appropriation It is obvious that mere payment of money towards a debt is not appropriation The passing of a receipt acknowledging such a payment takes the matter no further.

In *Narayana Holla* v *Balarama Hande*[1], it was held that the execution of a release deed which contained reference to " the balance after deducting the previous payments " did not amount to an appropriation It is of course not necessary that there should be an adjustment of the amount paid towards the principal or towards the interest or in stated proportions or amounts towards principal and interest If there is an appropriation the burden of showing that the appropriation was made in a manner most favourable to himself lies on the debtor In a number of cases it has been held that the recording of part satisfaction towards a decree debt and the taking out of execution for the balance would amount to an appropriation See *Ramaswami Aiyar* v *Ramayya Sastrigal*[2] and *Srinivasacharrar* v *Bysani Krishnayya*[3] The recording of part satisfaction to the extent of the amount realised by the sale of the hypotheca under a mortgage decree accompanied by an application for the passing of a personal decree for the balance was similarly held in *Venkateswara Aiyar* v *Ramaswami Aiyar*[4] to amount to appropriation

From this short review of the effct of the cases which have arisen under the Act it is apparent that there must be an overt act from which appropriation can be reasonably deduced or inferred

It is apparent from the language of Exhibit E already set out as also from the language of Exhibits F, F-1, F-3 and F-4 that all that was said was that the amount that was to be, or that was raised, by the sales was to be credited towards, and go in discharge of the amounts due under Exhibits A and B The relevant portions of these documents go no further It is true that Exhibit E states that the amount of principal and interest due under Exhibits A, B and C amounted on that date to Rs 6,130 and that the several sale deeds that were contemplated would be for the aggregate amount of Rs 5,344 A calculation of the amount of principal and the interest due on that date and a statement that a portion out of that amount to be raised in the manner indicated should be credited towards the debt is, in my opinion, not sufficient to constitute appropriation Mr Gopalaswami Aiyangar relied on the further facts that the plaintiff executed a release deed, Exhibit I and took possession of the properties covered by the several sale deeds As regards the release deed it has now been held—and that finding cannot be challenged in second appeal—that the parties intended that it should come into effect only if all the documents as per Exhibit E were executed and that since they were admittedly not executed, Exhibit I cannot be given effect to But apart from this, the language of Exhibit I is insufficient to constitute any appropriation In its material portion all that is stated is that the mortgagee gives up his mortgage right under Exhibits A and B over the properties described in the schedule attached to Exhibit I in consideration of a certain sale deed executed by the releasee, the 16th defendant, in favour of the mortgagee The mere fact that the sales were given effect to and that the vendee took possession of the properties conveyed to him has no bearing on the question of the appropriation of the several sale amounts towards the mortgages The facts relied on by Mr Gopalaswami Aiyangar would only go to show that the several sales were acted upon, but that leaves altogether untouched the question as to whether there was such adjustment or payment of the amounts realised by the several sales as would amount in law to appropriation In my opinon, none of these facts taken individually or cumulatively would amount to appropriation

Considerable reliance has been placed by Mr Gopalaswami Aiyangar on the decision in *Duraiswami Mudaliar* v *Muhammad Amiruddin*[5], wherein it was held thot a receipt acknowledging payment of

" Rs 5,400 only being the part payment in respect of the decree debt in C S No 500 of 1930 "

would amount to an appropriation The case was perhaps somewhat peculiar on its facts and it is unnecessary to decide whether the decision was or was not correctly given in the circumstances of that case , but if it is to be regarded as lay-

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1 (1943) 2 M L J 436.
2 (1941) 1 M L J 295
3. (1941) 1 M L J 833
4 (1941) 1 M L J 9
5 (1948) 1 M L J 441

ing down that every time a receipt is passed acknowledging part payment of a debt there is an appropriation, I must, with great respect, point out that this is opposed to a long line of decisions given by Wadsworth and Patanjali Sastri, JJ, in dealing with cases arising under Madras Act IV of 1938. *Narayana Holla* v *Balarama Hande*[1], is referred to by the learned Judges in *Duraiswami Mudaliar* v *Muhammad Amiruddin*[2], as being opposed to the view that they were themselves inclined to take They however put it aside on the ground that the learned Judges in *Narayana Holla* v *Balarama Hande*[1], 'were dealing with a preliminary mortgage decree I am unable to see how that circumstance makes any difference for the purpose of deciding the question of appropriation It would appear that the counsel in *Duraiswami Mudaliar* v. *Muhammad Amiruddin*[2] admitted that *Narayana Holla* v. *Balarama Hande*[1] was the only case he could rely on This admission can be said to be hardly accurate because there have been a very large number of decisions, reported and unreported, holding that the mere statement that a certain amount was received in part satisfaction of a debt is no appropriation It is otherwise impossible to sustain the correctness of the innumerable judgments which have been given on the footing that a payment which is endorsed as towards a debt or towards the principal and interest due on a debt is an open payment Mr Gopalaswami Aiyangar characterised the transaction here as bilateral and said that that would alter the case but all that has happened here is that the creditor has accepted certain properties as amounting to payment of certain named amounts I do not see how this differs in principle from a payment in cash made by a debtor and accepted by the creditor in partial satisfaction of his debt In fact, every time that payment is made and accepted and an endorsement of that payment is made on the document of debt, the transaction can be described as bilateral because it cannot possibly happen without the consent of the creditor I do not, therefore, regard this case as differing in any respect from the cases of payments towards a debt

The result is that there was no appropriation either on the date of Exhibit E or on 29th August, 1935, when the several sale deeds were executed It is not suggested that there was any subsequent appropriation before the 1st of October, 1937

Mr Gopalaswami Aiyangar then raised an alternative argument based on the decision in *Raghava* v *Devarajulu*[3] In that case it was held by King, J, agreeing with Patanjali Sastri, J, and differing from Wadsworth, J, that where a payment made is in excess of the interest due on that date, to the extent of the excess there is an appropriation towards the principal of the debt It was pointed out that the amounts credited towards Exhibit A under Exhibits F and F-1 came to Rs. 1,017 while the interest due on Exhibit A on that date, namely 29th August, 1935, was only Rs 942 In regard to Exhibit B it was similarly pointed out that under Exhibits F, F-3, and F-4 the total amount paid towards Exhibit B on 29th August, 1935, was Rs 1,668 while the interest then due was only Rs 952-8-0. Since the payments exceeded the interest due in each case there was, it was said, an appropriation of the payments themselves

This point was not raised in either of the Courts below ; but as it is a question of law and as the material facts are not in dispute I permitted it to be raised.

The argument however must fail on its merits and in my opinion it misconceives the effect of the decision in *Raghava* v *Devarajulu*[3]. All that was held in that case was that there is an appropriation in regard to the excess of the payment over the interest then due That decision says nothing as to the appropriation of that portion of the payment which is equal to the interest due at the time In fact, it was held in subsequent decisions which have not however been reported that that part of the payment is an open payment which is liable to be subsequently appropriated in a manner favourable either to the creditor or the debtor ; and that in the absence of such appropriation it would continue to be an open payment down to the 1st

1. (1943) 2 M L J 436
2. (1948) 1 M L J 441.
3 (1942) 2 M L J 724: I L R 1943 Mad. 563

October, 1937. Patanjali Sastri, J, whose view was accepted by King, J, in *Raghava v Devarajulu*[1], himself decided several cases on that footing and it is enough to refer to one which I am myself able to re-call, namely, the decision given by him in S A No 678 of 1942 It was argued that it is difficult to conceive of a payment which is partly appropriated and partly not, and again that if the excess of the payment over the interest due goes towards the principal it would only be logical to hold that to the extent of the interest due, there is an adjustment of such portion of the payment as may be necessary, against such interest The correct description of the payment to the extent that it is in excess of the interest has also been debated; is it an actual appropriation or necessary appropriation or presumed appropriation? King, J, uses the expression "actual appropriation" In their decision in *Rama Sah v Lal Chand*[2], which is the main basis and support of the judgment in *Raghava v Devarajulu*[1], their Lordships of the Judicial Committee seem to regard it as a presumed appropriation and in one place they use the expression that the appropriation must of necessity have been intended

It would however be mere hypercriticism to object to any particular description of the appropriation, now that it is established that there is, in such circumstances, an appropriation The more material question is as to the extent of such appropriation, and here it seems to me that though, on a first impression it may not look quite logical, the decisions are to the effect and rightly too that there is an appropriation only as regards the excess of the payment over the interest and no appropriation at all as to the balance I do not think it is permissible to go behind the position thus established

If the excess is to be appropriated towards the principal and if by another process the payment to the extent of the amount of interest is to be regarded as open payment to be finally adjusted towards the principal on the 1st October, 1937, it may seem as if the process of splitting the payment is a futile process because ultimately the entire amount is adjusted towards the principal This, however, is not the correct position in law. To the extent of the excess of the payment over the interest if it is held in law that there is an appropriation towards the principal it is open to neither party thereafter to change the destination of that excess; *eo instanti* it reduces the amount of the principal As regards the rest of the payment however it is an open payment which is liable to be appropriated, at the instance of the debtor or the creditor according to the well-known rules of law relating to appropriation either towards the principal or towards the interest or partly towards the principal and partly towards the interest; and it is only if there is no such appropriation between the date of payment and 1st October, 1937, that that portion of the amount finally gets adjusted towards the principal. It may be that cases of subsequent appropriation are not frequent; but that, however, does not alter the true legal position.

Mr Venkatarama Aiyar, the learned advocate for the respondent, also pointed out that it would be somewhat difficult to apply the rule in *Raghava v Devarajulu*[1] to Exhibit A because the amount adjusted towards Exhibit A under Exhibit F was Rs. 442 and the amount adjusted under Exhibit F-1 was Rs 575, neither of these amounts taken separately being in excess of the interest due on Exhibit A on that day The answer on the other side is that they were part of a single transaction and must be taken as if there was only one sale deed comprising both items of property for an aggregate consideration of Rs 1,017 Whether this is so, or not, it is unnecessary to consider in view of what has already been stated regarding the true scope and effect of *Raghava v Devarajulu*[1].

The learned Subordinate Judge was, therefore, correct in holding that the payments under Exhibits A and B were open payments with the result that Exhibit B must be taken to have been completely discharged by the application of Madras Act IV of 1938, while there will be due on Exhibit A on 1st October,

1 (1942) 2 M L J 724 I L R 1943 Mad 563.

2 (1940) 1 M L J 895 L R 67 I.A 160: I L R 21 Lah 470 (P.C)

1937, only a sum of Rs 483 towards the principal for which appropriate provision has been made in the decree of the lower appellate Court

The second appeal fails and is dismissed with costs No leave

V S *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR JUSTICE VISWANATHA SASTRI

M R S Mani *Petitioner**
(*Cr. M P No* 190 *of* 1949).

v

The District Magistrate, Mathurai and the Superintendent, Central Jail, Vellore *Respondents*

Criminal Procedure Code (V of 1898), *section* 491—Habeas corpus—*Application for—Detention of person under Madras Maintenance of Public Order Act,* 1947—*Grounds of detention—Disclosure to person detained—* Bona fide *exercise of power—What constitutes—Interference by Court—When justified—Membership of political party not declared illegal—Effect—Acts done in immediate past to be taken into account—Non-compliance with formalities prescribed in Ss* 2 (2) *&* 3—*Effect*

Under section 2 of the Madras Maintenance of Public Order Act of 1947, the satisfaction of the detaining authority is a subjective state of mind and not an objective fact It is not open to the Court to go into the question whether the detaining authority could or could not be so satisfied on the grounds subsequently disclosed to the detenu, nor is it open to the Court to compel the Government or the detaining authority to disclose the facts or the material or the grounds on the basis of which the order was made There is no doubt a duty cast upon the Executive Government under section 3 of the Act to disclose the grounds , but so far as satisfaction is concerned it is the satisfaction of the Provincial Government or the empowered authority as the case may be, and not that of the Court If some of the grounds are good and some are vague and indefinite and uncertain, the grounds which are uncertain and vague may be ignored and the order of detention may be justified on the grounds which are definite and certain If the grounds are vague and uncertain it would be open to the Government to supplement them by giving particulars to enable the persons concerned to make a proper representation If the grounds furnished are no grounds at all in the sense that they convey no information to the person detained or even if they are grounds outside the purview of the Act the continuance of the detention cannot be justified

Even if a party is declared illegal the mere association of a person with that party would not justify the inference that the person was acting in a manner prejudicial to public safety

Narayanaswami Naidu v *Inspector of Police, Mayavaram* (1949) 1 M L J 1 (F B), applied

Dale's Case, (1881) 6 Q B D 376 and *Green's case* (1942) 1 K B 87 and (1942) A C 284, considered

Per *Viswanatha Sastri, J*—If the detaining authority has acted in good faith and has come to a decision on relevant materials placed before it that detention is necessary, the Court cannot enquire into the sufficiency of the materials or reasonableness of its satisfaction

If there is sufficient material before the Court for holding that the recital in the order is inaccurate and that the order is merely a routine order mechanically passed or the mere outcome of police recommendation and not of a decision of the detaining authority the Court would interfere under section 491, Criminal Procedure Code

Antecedent conduct may furnish reasonable ground for coming to a conclusion that the person is likely to act in a manner prejudicial to public safety or maintenance of public order But in this connection acts done in the approximate and immediate past and not in the remote past should alone be relied on to obtain the satisfaction that is required under section 2 (1) of the Act.

Substantial compliance with the formalities prescribed by section 2 (2) and section 3 (1) is quite essential to sustain the legality of the continuance of the detention They are not merely directory provisions whose non-observance would constitute a mere irregularity in procedure If the non-compliance with the provisions of section 2 (2) and section 3 is substantial and serious, it would render the continuance of the detention illegal even though it might have been legal *ab initio*.

M. R Venkataraman v *Commissioner of Police, Madras,* (1949) 1 M L J 90, Considered

Where the delay in communicating the grounds under section 3 (1) or in submitting the case to the Advisory Council under section 3 (2) or in passing final orders under section 3 (5) is

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*Cr. M. P. Nos 190 to 192 of 1949. 21st March, 1949.

unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground

If in the opinion of the Court the grounds furnished are so vague, indefinite and insufficient that the detenus could not fairly be expected to make an effective representation against the legality or propriety of the order then, it must be held that their detention is illegal or improper If activities which are normally unobjectionable are considered to be objectionable and therefore relied on as a ground for detention then the circumstances in which or the reasons why those activities are looked upon as objectionable must be indicated to the detenu The grounds and particulars together form a sort of substitute for a charge

Petitions under section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue directions in the nature of *Habeas Corpus* for the production before the High Court, Madras, of the person of M R S Mani and others, detenus, to be dealt with according to law and to direct that they be set at liberty

N S Mani for *Messrs Row and Reddy* for Petitioners

N T Raghunathan for the Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown

The Court delivered the following

JUDGMENTS *Viswanatha Sastri, J*—We have, during the last few days, been hearing many applications filed under section 491 of the Code of Criminal Procedure by persons detained in jail under Madras Act I of 1947 The grounds raised by the applicants in these applications are more or less the same and are of general importance We heard arguments on the common questions arising for decision in these applications before considering them individually on their merits We are indebted to the learned counsel for their assistance

In these applications we have been repeatedly and forcibly reminded by counsel for the detenus that it is our duty to exercise our powers under section 491, Code of Criminal Procedure, freely and liberally in order to protect the personal liberty of citizens against unjustifiable interference by executive authority Language much more trenchant and even provocative, is employed in the affidavits filed by the detenus themselves in support of their applications Madras Act I of 1947 professes to be an emergency measure and not a permanent part of the statute book In the troublous times through which this country has recently been passing, interference with the personal liberty of citizens has been extended and legalised by the Legislature to an extent which would not have been considered as legitimate in normal times These temporary encroachments on individual freedom have been made in the larger interests of the State, dictated as they are by the paramount needs of peace, order and good Government It is the considered opinion of the Legislature as expressed in the preamble to Act I of 1947 that there is an urgent necessity for imposing, in the interests of public peace and tranquillity, and for ensuring the continuance of services vital to the life of the community, restraints on individual liberty The Act has imposed the duty, and given the power of taking preventive action againt persons acting or about to act in any manner prejudicial to public safety or the maintenance of public order, to the Provincial Government or its duly constituted delegate Section 16 (1) of the Act prevents an order made in the exercise of a power conferred by or under the Act from being called in question in any Court Preventive detention in connection with the maintenance of public order is within the legislative competence of the Provincial Legislature under the Government of India Act, 1935 (Schedule VII, List No. 2 Entry No 1) and it has not been contended before us that Act I of 1947 as a whole or section 16 (1) in particular, is *ultra vires* the Provincial Legislature

In England the House of Lords on two memorable occasions, in times of national crises, upheld the legality of the imprisonment of British subjects without trial and opportunity of defence in Court, if the Home Secretary thought it reasonable to imprison them in the interests of public safety and for the due prosecution of the

war It was held that the executive was not even compellable to give its reasons for detention The writ of *Habeas Corpus*, the most important writ known to English Constitutional Law and one of the privileges of Englishmen zealously guarded and maintained by the English Courts, was held to have been displaced in effect, though not in form, by the emergency powers of preventive detention vested in the executive by the Legislature The restraint was held not to be illegal because it was justified by the terms of the statutory regulation and the writ of *Habeas Corpus* was, therefore, refused I am referring to the well-known "Regulation 14 (B)" and "Regulation 18 (B)" cases, *Rex* v *Halliday*[1], *Liversidge's case*[2] and *Greene's case*[3] which have largely influenced the interpretation of Madras Act I of 1947 notwithstanding the difference between the English Regulation and the Indian enactment Neither the fact that drastic powers have been given to the executive authority nor the fact that they are liable to abuse, should stand in the way of our interpreting and giving effect to the terms of Act I of 1947 according to their plain and natural meaning At the same time, as the Act empowers the executive to deprive a subject of his liberty without a trial and conviction,—indeed for no offence of his—the process being somewhat euphemistically called "preventive justice" or "preventive detention", this Court ought to insist that the executive exercises its powers strictly in accordance with the terms of the statute and within its four corners and observes every formality prescribed by the Act. I respectfully agree with the following observations of Subba Rao, J, in *A. K. Gopalan* v *District Magistrate, Malabar*[4], which arose under this Act.

> "It is the sacred duty of this Court to see that no citizen of this Province whether he is rich or poor, whether he belongs to this or that political persuasion is illegally detained for one minute .. No provision of the statute restricting the liberty of the citizen can be overlooked and no breach of any provision thereof can be condoned on the ground of administrative convenience"

In spite of the enactment of section 16 of Madras Act I of 1947 restricting the jurisdiction of Courts, it is now well settled that an order of detention made under Act I of 1947 is open to challenge in an application under section 491 of the Code of Criminal Procedure on the ground that it was not made in conformity with the powers conferred by that Act. *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[5], *Sibnath Banerji's case*[6] on appeal from the Federal Court[7] *Basantha Chandra Ghose* v *Emperor*[8] Personal liberty is one of the most cherished rights of a citizen of this or any other civilized country of which he cannot be deprived except by and in strict conformity with the law On what grounds then can the legality of an order of detention made under section 2 (1) (*a*) of Madras Act I of 1947 be questioned by the person aggrieved?

An analysis of the provisions of the Act governing the preventive detention of persons reveals the following seven steps or stages in the proceedings connected with such a detention (1) Satisfaction of the Provincial Government or its delegate empowered under section 15, that a person is acting or about to act or likely to act in any manner prejudicial to public safety or the maintenance of public order [section 2 (1)] (2) Order directing the detention of such a person [section 2 (1) (*a*)] (3) Report to be made forthwith to the Provincial Government together with the grounds of detention and other particulars if the order for detention is made by a delegate of the Government [section 2 (2)] (4) Communication to the detenu of the grounds of the order for detention with particulars sufficient to enable him to make a representation against the order (5) Reference by the Provincial Government to the Advisory Council of the case of the detenu together with the grounds for the detention and the representation of the detenu, if any [section 3 (2)]. (6) Submission of its report by the Advisory Council to the Provincial Government [section 3 (4)] (7) Order of the Provincial Government confirming or cancelling or modifying the order made under section 2 (1) [section 3 (5)]

1. (1917) A C 260
2. (1942) A C 206
3. (1942) A C 284
4. (1949) 1 M L J 78 at 79
5. (1949) 1 M L J 1 (F B)
6. (1945) 2 M L J 325 L R 72 I A 241 : 1945 F L J 222 (P C)
7. (1943) 2 M L J 468 6 F L J 151
8. (1945) 1 M L J 365 I L R. 24 Pat. 187. 1945 F L J 40 (F C).

unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground

If in the opinion of the Court the grounds furnished are so vague, indefinite and insufficient that the detenus could not fairly be expected to make an effective representation against the legality or propriety of the order then, it must be held that their detention is illegal or improper. If activities which are normally unobjectionable are considered to be objectionable and therefore relied on as a ground for detention then the circumstances in which or the reasons why those activities are looked upon as objectionable must be indicated to the detenu The grounds and particulars together form a sort of substitute for a charge.

Petitions under section 491 of the Code of Criminal Procedure, 1898, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue directions in the nature of *Habeas Corpus* for the production before the High Court, Madras, of the person of M. R. S. Mani and others, detenus, to be dealt with according to law and to direct that they be set at liberty

N. S. Mani for *Messrs. Row and Reddy* for Petitioners.

N. T. Raghunathan for the Public Prosecutor (*V. L. Ethiraj*) on befalf of the Crown.

The Court delivered the following

JUDGMENTS : *Satyanarayana Rao J.—Crl. M. P. No.* 190 *of* 1949. This and the connected petitions under section 491 of the Criminal Procedure Code were heard together as they raise common questions of law under the Madras Maintenance of Public Order Act, I of 1947.

The facts and the contentions peculiar to the other petitions will be dealt with separately. Under section 2 (1) (*a*) of the Act the District Magistrate, Madura, passed an order of detention, dated 1st April, 1948, and the applicant was arrested on the same day. He was kept in police custody at Madura till the 3rd April, when he was removed to the Central Jail, Vellore. The grounds of detention were communicated to the applicant on 24th April, 1948, and he submitted his explanation on the 10th May, 1948. The Government referred the matter to the Advisory Council on 14th February, 1949 and the matter is still pending with it. This application was filed on 18th January, 1949, and till now no final order was passed by the Government under section 3 (5) of the Act

Mr. N. S. Mani, the learned counsel for the applicant, raised two contentions : firstly that the order of detention was void *ab initio* and not *bona fide* as the grounds now communicated to the detenu would not justify the order , secondly it was argued that as Government had failed to comply with the mandatory provisions required to be carried out after the order of detention under section 2 (1) was passed the continuance of the detention of the applicant is, in any event, illegal.

The first of these contentions may be disposed of shortly. The order of detention passed by the District Magistrate who was empowered under section 15 of the Act to take action under the Act states that he was satisfied that the applicant was acting in a manner prejudicial to the public safety and that with a view to prevent him from so doing, it is necessary to detain him. The satsifaction of the detaining authority is a condition precedent for the order of detention. An order which is legal on the face of it is presumed to have been legally made and the jurisdiction of this Court to go into the validity of such an order was considered by the Full Bench in *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[1]. The Full Bench judgment was based upon an elaborate consideration of the decisions of the Courts in England and in India bearing upon the question, particularly the decisions of the House of Lords in *Liversidge* v. *Sir John Anderson*[2] and *Greene* v. *Secretary of State for Home Affairs*[3]. The learned Chief Justice after examining the authorities formulated under four heads the limitations within which this Court could interfere in the exercise of its jurisdiction under section 491 of the Code of Criminal Procedure with orders made under section 2 of the Act. They are .—

1. (1949) 1 M L J. 1 (F B.).
2. (1942) A.C. 206.
3. (1942) A.C 284.

"(1) when the order is not duly authenticated, as for example, when it is passed by an officer or authority not empowered under section 15 of the Act,

(2) when the person detained in pursuance of the order is not the person intended to be detained, that is to say, when there is a mistake of identity,

(3) when there is lack of *bona fides*, and

(4) when it is established that the essential requirements of section 2, namely, the satisfaction of the Provincial Government or an officer or authority empowered under section 15 with respect to the particular person that he is acting or about to act in any manner prejudical to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under section 2 (1) of the Act, is not present If it is established that neither the Provincial Government nor the officer or other authority empowered under section 15 has exercised its or his mind on the material placed before it or him, then an order of detention though purporting to be passed under section 2 (1) must be deemed to be not an order under section 2"

The other learned Judges also agreed with this view. Under section 2 of the Act, the satisfaction of the detaining authority is a subjective state of mind and not an objective fact It is not open to the Court to go into the question whether the detaining authority could or could not be so satisfied on the grounds subsequently disclosed to the detenu, nor is it open to the Court to compel the Government or the detaining authority to disclose the facts or the material or the grounds on the basis of which the order was made. There is, however, a duty cast upon the Executive Government under section 3 of the Act to disclose the grounds. But so far as the satisfaction is concerned, it is the satisfaction of the Provincial Government or of the empowered authority, as the case may be, and not that of the Court. In the words of the learned Chief Justice in the Full Bench.—

"If these grounds do not exist, it is well established on the highest authority that this Court cannot investigate the sufficiency of the material or the reasonableness of the grounds upon which the Government or the empowered officer or authroity had been satisfied It is not competent for this Court to call upon the Government or the detaining authority to disclose the information and material on which it or he was stisfied as to the necessity for the detention of the person concerned The satisfaction required by the section is the satisfaction of the Government or the empowered authority and not the satisfaction of this Court There is no question of fact which can be submitted to this Court in this matter This position was fairly conceded by learned counsel appearing on behalf of the petitioners"

Govindarajachari, J., the other learned Judge, expressed the same view at page 36 as follows.—

"Negatively it can be said that the sufficiency of the available material or information to justify the order of detention and the question whether the officer concerned could be said to have reasonable grounds for the issue of the order in question are not matters which are within the cognisance of the Court The satisfaction is the satisfaction of the officer He is the sole judge and once the conclusion is reached that he was satisfied the detenu cannot invite the Court to go behind it and dissect the reasons which weighed with the officer and find out for itself whether the order should have been issued While the satisfaction of a properly constituted authority is a condition precedent to the issue of an order of detention, whether circumstances called for the issue of such an order is a matter entirely for its consideration and nobody else's"

Govinda Menon, J, also was of the same opinion. The learned Judge states at page 49:—

"It is not open to the Court to find out whether the grounds on which the Provincial Government is satisfied are sufficient Different standards of satisfaction are likely to exist in the case of different individuals even if the society were ideal In the society as it is constituted to-day, we cannot expect the same standard in every individual, so that if the executive authority states *bona fide* that it is satsified, this Court cannot say that it is not a proper or valid satisfaction"

The same view was also taken by the other High Courts construing similar provision in the Public Safety Acts in the respective Provinces.

It was argued that if the grounds disclosed are such as would not justify in the opinion of the Court, the conclusion that the detenu was acting or was about to act in a manner prejudicial to public safety or the maintenance of public order, then, the inference should be drawn that the order was not *bona fide* and that this Court would have the jurisdiction to interfere in such a case under category (3) referred to by the learned Chief Justice in the judgment of the Full Bench. Even if the grounds do not warrant the making of an order under section 2 of the Act, and the decision of the authority concerned that it was so satisfied is erroneous, it cannot be inferred that either the Provincial Government or the detaining authority

were actuated by malice in making the order and that therefore it is *mala fide*. A judgment, however erroneous it may be, cannot be held to be a *mala fide* judgment. The discretion under the section of passing an order of detention if the condition is satisfied is vested in the authority concerned and it cannot be questioned.

It was contended on behalf of the applicant that the Full Bench while laying down that the satisfaction cannot be questioned and canvassed in a proceeding under section 491, Criminal Procedure Code, placed no limit on the grounds open for consideration by the detaining authority and that to take an extreme case, if a man was detained under section 2 (1) of the Act on the ground that his nose was long, it would not be open to this Court to consider the legality of the order of detention. This contention, no doubt, has considerable force, but, in my opinion, there is a limit and a clear line of demarcation regarding the grounds which are open for consideration by the detaining authority and the Full Bench was not called upon to consider and lay down the limits of that demarcation. It must be remembered that the power of the Provincial Legislature to enact a law of the kind now under consideration is derived under item 1, list II (Provincial Legislative List) of the Government of India Act, 1935, which is as follows :—

"Public order (but not excluding the use of His Majesty's naval, military or air forces in aid of the civil power), the administration of justice, constitution and organisation of all Courts, except the Federal Court, and fees taken therein, *preventive detention for reasons connected with the maintenance of public order*, persons subject to such detention" (The italics are mine)

The power to legislate is for preventive detention for reasons connected with the maintenance of public order and the preamble of the Act (Madras Act I of 1947) states :—

"Whereas for the maintenance of public safety and to prevent and put down disorders involving menace to the peace and tranquillity of the Province, it is necessary to provide for preventive detention, imposition of collective fines, etc, etc, it is hereby enacted as follows."

The power conferred on the Legislature and the preamble to the Act make it clear that the object of the Legislature is preventive detention and the basis on which the order for detention is made is that a particular person is acting or about to act and after the amendment of 1948, or is likely to act, in a manner prejudicial to the public safety or the maintenance of public order and that therefore with a view to prevent him from so acting, it is necessary to make an order of detention. The acts which justify an order of detention under the Act are acts which are prejudicial to the public safety or the maintenance of public order. The person sought to be detained must be one who is either acting in such a manner or is about to act in such a manner or is likely to act in such a manner. The limitations, therefore, on the grounds that are open to the detaining authority for consideration and are permissible are the acts which are prejudicial to public safety and the maintenance of public order. The grounds, therefore, must be grounds which lead to the inference that the person concerned is acting or is about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order. If the grounds, therefore, are not within the ambit of the Act, the order cannot be justified. The Full Bench[1] had not to consider and was not called upon to consider to what extent the acts of a person are permissible and can be taken into consideration under section 2 of the Act by the authority concerned. The illustration that is given in the course of the argument by the learned Advocate of a person having a long nose and detained on that account under section 2 (1) of the Act would be an instance of a ground which is entirely outside the purview of the Act and an order of detention based upon material which is not within the ambit of the Act would be wholly illegal Of course, as pointed out by the Full Bench of the Bombay High Court in In re *Rajdhar*[2], if the grounds disclosed contain grounds, some within the ambit of the Act, and some outside it, the order of detention would be vitiated, wholly as in that event, it would be impossible to say which of the grounds and to what extent the detaining authority was influenced by acts outside the Act in making the order of detention. If, however, some of the grounds are

1. (1949) 1 M.L.J. 1 (F.B.). 2. A.I.R. 1948 Bom. 334 (F.B.).

good and some are vague and indefinite and uncertain, the grounds which are uncertain and vague may be ignored and may be treated as non-existing, and the order of detention can be justified on the grounds which are definite and certain. This is also the view expressed by Chagla, O C J, in the Full Bench of the Bombay High Court. In my opinion, that decision affords a clear line of a demarcation between grounds which are permissible under the Act and the grounds which are not permissible under it in making an order of detention under section 2 of the Act. In dealing with the several petitions now before us, we have to bear these principles in mind in arriving at a correct decision.

It was also argued on behalf of the applicant that it will be open to us to go behind the Full Bench judgment and reconsider the position whether there is justification for the view expressed by the Full Bench that the satisfaction of the detaining authority cannot be canvassed in a proceeding under section 491, Criminal Procedure Code. No reasons are given in support of this extreme contention except inviting us to reconsider the authorities relied on in the judgment of the Full Bench[1] and I see no reason to accede to this request. The decision of the Full Bench is clear and was based, if I may say so with respect, upon a careful consideration of all the authorities bearing on the question and it will be, in my opinion, an unnecessary waste of time to reconsider it

The effect of non-compliance of the Executive Government with the various steps laid down under the Act, after the order of detention under section 2 was passed till the stage of a final order under section 3 (5) on the legality of the continuance of the detention is a more difficult question. The Full Bench was concerned only with the original order of detention under section 2. This was made clear in the judgment of Govindarajachari, J, at page 31 of the Madras Law Journal report. The learned Judge observed.

"The challenge in every one of the cases involved in the batch of applications before us is a challenge against the order of detention itself and not that even if the order was valid at its inception the continuance of the detention has become illegal or improper in view of what happened subsequently or by reason of what the Government subsequently did or failed to do. I say this merely to guard myself against being understood as having decided anything more than what is strictly required by the applications under consideration"

The Full Bench judgment, therefore, does not hold us in deciding this difficult question.

The object of the Act, as stated already, is preventive detention and not punishment The preliminary step under the Act is an order of detention under section 2 (1) which is conditional on the satisfaction of the detaining authority. The final step contemplated by the Act is the passing of the order by the Provincial Government under section 3 (5) of the Act While the order under section 2 may be passed either by the Provincial Government or by an officer or authority to whom the power was delegated under section 15 of the Act, the subsequent steps should be taken and the final order itself should be passed by the Provincial Government. The officer or authority empowered under section 15 after making an order of detention under section 2 (1) has forthwith to report the fact to the Provincial Government together with the grounds on which the order was made, along with such other particulars as will have a bearing on the order [section 2 (2)]. After this, the officer, or authority empowered under secion 15 has no statutory function to discharge The next step after the order of detention was made, is provided by section 3 (1) Under it, the Provincial Government has to communicate to the person affected by the order

"so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes a representation against the order".

1. (1949) 1 M.L.J. 1 (F.B.).

There is no time-limit fixed under the Act for the Provincial Government to communicate this information. After the receipt of the grounds, the person detained has got the right to make a representation to the Government and that very section enjoins upon the Provincial Government to inform the person of his right to make such a representation and also to afford him an opportunity of doing so. After the representation is received, the next step is, the Provincial Government has to place the matter before the Advisory Council constituted under the Act. The Advisory Council, thereafter, after considering the material placed before it and after calling for such further information from the Provincial Government or from the person concerned has to submit a report to the Provincial Government, and after the receipt of that report, the final step is, the Provincial Government has to pass an order under section 3 (5) either confirming or modifying or cancelling the order made under sub-section (1) of section 2. Under section 4, the order of detention continues in force for a period of six months from the date on which the final order under section 3 (5) was passed by the Provincial Government. But, of course, it is open to the Provincial Government to release the detenu even before the expiry of the period of six months. For taking the various steps above described, no time-limit is fixed under the Act. It must be remembered that the Act, interfered with the liberty of the subject without any trial and without any other remedy by way of appeal or otherwise to any other authority except the restricted and limited right of making a representation to the Government and through it to the Advisory Council whose opinion, however, is not binding on the Government. This restricted right of representation, therefore, should not be still further curtailed by non-observance of any of the steps laid down by the Act. We have instances in which a final order under section 3 (5) was not passed by the Provincial Government, even though the detention has continued in force for more than several months, in some cases nearly a year. The result of this is if ultimately the Government were to decide after considering the representations made by the detenu that the person should be set at liberty, such person would have unjustly been deprived of his liberty for no fault of his Even if the Government were to decide that the original order of detention should be confirmed under section 3 (5), the result even in such a case would be that while the Government would be entitled to keep him in custody for a period of six months only from the date of the final order, by reason of the delay on the part of the Provincial Government in taking the steps contemplated by the Act, his detention would be unnecessarily, and perhaps unjustly, prolonged which is contrary to the spirit of the Act.

It is therefore necessary to consider to what extent the provisions of the Ac enjoining the Provincial Government to take certain steps are mandatory and whether if those provisions were not observed properly by the Provincial Government, the continuance of the detention would become illegal or improper within the meaning of section 491 of the Code of Criminal Procedure. There is no time-limit fixed by the Act for either communicating the particulars and grounds under section 3 (1) or for referring the matter to the Advisory Council after the representation of the detenu is received, or even to pass a final order under section 3 (5) after the report of the Advisory Council is received. The absence of the time-limit is probably responsible for the inordinate delay we have noticed in some of these petitions on the part of the Government in taking the steps. It is an accepted rule of construction of a statute, that where no time-limit is fixed for the doing of an Act enjoined by it, the act should be performed within a reasonable time and it is unnecessary to consider the authorities in support of this rule of construction and it would be sufficient to refer to the Full Bench decision of the Patna High Court in *Murat Patwa* v. *Province of Behar*[1]. In the petitions before us, there is no complaint of unreasonable delay in furnishing the grounds under section 3 (1). We may however observe that the question was considered by Subba Rao and Mack, JJ., in *Venkataraman* v. *Commissioner of Police, Madras*[2], in which the question that arose

1. A.I R. 1948 Pat. 135 (F.B). 2. (1949) 1 M.L J. 90.

for consideration was the effect of the delay caused by the detaining authority in communicating to the Provincial Government the grounds of detention under section 2 (2) of the Act The learned Judges held that the subsequent non-compliance with the provisions of the Act after an order of detention under section 2 (1) was made, would not affect the legality of the original order of detention and would not make it *ab initio* void. They were also of opinion that the delay in communicating the grounds under section 2 (2) would not even affect the further detention. In dealing with the contention that by reason of the non-observance of the subsequent provisions of section 2 (2), the continuance of detention became illegal, Subba Rao, J., observed at page 92

"This argument ignores the distinction between the order of detention and the procedure prescribed for enabling the aggrieved party to seek redress The petitioner, as we found, was legally detained under section 2 (1) of Madras Act I of 1947 Under section 4 of the Act this order of detention shall be in force for six months from the date on which it is confirmed or modified under sub-section (5) of section 3 If the authority concerned did not carry out his statutory duties, the petitioner could have taken the appropriate remedy to compel him to perform his duty He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned But in our view the non-compliance with the provision of sub-section (2) to section 2 could not make the detention illegal In any view as the order was communicated to the Government and the grounds for detention were duly served on the petitioner it would be impossible to hold that the detention of the petitioner at present is invalid"

The question of the effect of the delay in communicating the grounds to the Provincial Government under section 2 (2) by the detaining authority does not directly arise for consideration before us We are, however, unable to see what remedy a person would have to compel the detaining authority to perform the statutory duty of communicating the grounds under section 2 (2). If the authority concerned is outside the original jurisdicition of the High Court, even a *Mandamus* would not lie. It is difficult to see what other remedies a person in such a situation would have if there was a clear breach of a statutory duty by the authority concerned. The man was deprived of his liberty, was in jail and there is no means of enforcing the statutory obligation to communicate the grounds under section 2 (2) to the Provincial Government. The question came up for consideration before a Full Bench of the Patna High Court in which the delay complained of was the delay in communicating the grounds under section 4 of the Bihar Maintenance of Public Order Act corresponding to section 3 of the Madras Act If the grounds of detention were not communicated to the detenu within a reasonable time and there is no acceptable explanation for the delay, the further detention becomes illegal. If the complaint before us in the petitions now under consideration was one of delay in communicating the grounds under section 2 (2) or in communicating the grounds under section 3 (1), in the light of the decision of the Full Bench of the Patna High Court, the decision in *Venkataraman* v. *Commissioner of Police, Madras*[1], in my view, would require reconsideration and would have necessitated a reference to a Full Bench for an authoritative decision on the point. But as the objection before us is of a different nature, it is unnecessary to follow such a course.

The main ground of complaint before us in the several petitions is that the Provincial Government failed to carry out the duty of communicating to the detenu the grounds on which the order has been made, and such other particulars as are, in their opinion, sufficient to enable the detenu to make an effective representation to the Government. The contention is that the grounds are vague, indefinite and uncertain and that no particulars were given in any of the cases As the detenu was not placed by the Executive Government in a position of making an effective representation to Government, he was deprived of the usefulness of the only remedy that is open to him under the Act to prove to the satisfaction of the Government and the Advisory Council that he was not guilty of any of the activities attributed to him. The relevant provision of section 3 (1) is :

"Where an order in respect of any person is made by the Provincial Government under sub-section (1) of section 2 or where any such order is made by any officer or authority subordinate to

1. (1949) 1 M.L.J. 90.

them, after receipt of the report specified in sub-section (2) of that section, the Provincial Governmen shall communicate to the pesson affected by the order, so far as such communication can be made without disclosing the facts which they consider it would be gainst the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes, a representation against the order "

This provision is mandatory and imposes on the Provincial Government a duty of communicating to the detenu the grounds on which the order was made. So far as the grounds are concerned, there is no power under the Act to withhold any of the grounds, as the grounds to be communicated are the grounds on which the order has been made which implies that all the grounds should be communicated to the detenu So far as the facts are concerned, it is no doubt left to the Provincial Government to consider whether all the facts should be disclosed to the detenu or only some of them They are not bound to disclose all the facts if they consider that such a disclosure would be against public interest. The Act makes a distinction between facts, grounds and particulars While all the grounds have to be communicated and such facts as would not endanger public interest alone could be disclosed, so far as the particulars are concerned, the Government are to communicate to the detenu so much of the particulars as would be sufficient in their opinion to enable the detenu to make a representation against the order. The Provincial Government, therefore, has to decide whether the particulars given and disclosed would be sufficient to enable the detenu to make a representation against the order. If the grounds are vague and uncertain, it would be open to the Government to supplement them by giving particulars to enable the person concerned to make a proper representation If the grounds communicated are vague and uncertain, and no particulars are given, does the non-observance of the rule make the further detention illegal or improper ?

Under the Act the liberty of the subject is curtailed without trial by Courts established by law and the only safeguard provided by the Act for the detenu is the right to make a representation to the Advisory Council through the Provincial Government. This right is a substitute for a trial under ordinary law In order to enable the detenu to present his case properly he should know the grounds and the particulars of the grounds on the basis of which an order for detention is made under section 2 (1) The duty of providing this information was laid by the Act on the Provincial Government. The power conferred upon the Provincial Government of curtailing the liberty of the subject by the Act should, in my opinion, be exercised subject to the conditions and limitations imposed by the Act. It is the function of the Court to see whether the conditions laid down by the statute are properly carried out or not. If they are not duly observed and fulfilled, the very foundation of the power to continue to detain the person comes to an end and the further detention becomes illegal. If the grounds furnished are no grounds at all in the sense that they convey no information to the person detained, or even if they are grounds outside the purview of the Act, the continuance of the detention cannot be justified It may not be necessary that the Provincial Government should furnish legal evidence or proof of the accusations against the detenu, as in cases where he is charged with a crime, but the information furnished must be such which enables the detenu to present his case effectively.

In *Dale's case*[1] dealing with an application for a writ of *habeas corpus*, the rule requiring the observance of the steps laid down by law and its effect upon the detained person is stated thus by Brett, L J , (page 461) :

"It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity, the Court will not allow the imprisonment to continue "

And again, at page 463 :

"I desire to state that, although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the Courts at Westminster will not allow any individual in this kingdom to

1. (1881) 6 Q.B.D. 376.

procure the imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of her Majesty's subjects "

Cotton, L J., in the same case concurred with Brett, L.J., and stated the rule in his own words as follows (at 469) :

" I quite agree with Brett, L J, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form Here, however, the departure from the correct procedure is not, in my opinion a mere matter of form, but is a matter of substance "

The other High Courts, which considered a similar question under the Public Safety Act, have unanimously held that where the particulars given are indefinite and vague and uncertain there is no compliance with the provisions of the Act and the continuance of the detention is illegal Vide *Nak Muhammad* v. *Province of Behar*[1]. In re *Krishnaji Gopal Brohme*[2] and *Durgadas* v. *Rex*[3]. I respectfully agree with the reasons given in those judgments for holding that where there is no substantial compliance with the provisions of section 3 of the Act, the continuance of the detention becomes illegal. It is unnecessary to examine these decisions at length.

The Court of Appeal in *Greene's case*[4] considered the effect of an error in the grounds communicated to the detenu on the continuance of the detention The detenu there was informed of the grounds on which the order of detention was made and was also furnished with the particulars to enable him to present his case to the Advisory Council The grounds communicated stated that he was concerned in one kind of acts endangering public safety, while the order of detention was made in fact, on a totally different ground. The detenu, however, was served with a true copy of the actual order and the particulars clearly stated the correct ground of detention. He did not, however, draw the attention of the Advisory Council to the material discrepancy between the two. Goddard, L J, with whom the other Lord Justices agreed, held

"That a mistake in the document served on the detenu after he was in custody would not invalidate the original order of detention nor does it render its continuance invalid There was nothing to show that the detenu was in any way prejudiced by mistake "

This aspect of the case was referred to and dealt with by the House of Lords on appeal. The House of Lords[5], agreed with the Court of Appeal, that as no prejudice was caused to the appellant by the error in the document sent to him by the Advisory Committee, the detention, or its continuance was not illegal Lord Macmillan at page 298 observed :

" The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention. Consequently the mistake affords no ground for invalidating the detention order and does not help the appellant in his present application "

The test applied by the House of Lords was whether by reason of the mistake, there was no prejudice to the detenu and if there was no prejudice no question of its effect on the detention arose for consideration, particularly as in that case the mistake was one which could be remedied.

In cases where on the basis of vague, indefinite and uncertain grounds a representation was made by the detenu to the best of his ability and after the matter was considered by the Advisory Council, the Provincial Government passed a final order of detention, there was no further means of remedying the defect and it cannot be said that, when a Provincial Government failed to discharge its duty, by the fact that the detenu did not complain at the time of making the representation of want of particulars he is precluded from agitating the question now. The grounds,

1. A.I.R. 1949 Pat. 1 (F B)
2. A.I.R. 1948 Bom. 380.
3. A.I.R. 1949 All. 148 (F.B.).
4. (1942) 1 K B. 87.
5. 1942 A C. 284.

therefore, in each of the petitions before us have to be examined in the light of these principles.

In some of the petitions we have noticed that there is considerable delay on the part of the Provincial Government in referring the matter to the Advisory Council even after the representation by the detenu was received In other cases, there was also delay in passing final orders after the report of the Advisory Council was received. The Government, it must be mentioned, has to deal with a number of applications of this nature and actually time would be taken in examining the representations made in the light of the information available and in referring the matter to the Advisory Council It may be that the Provincial Government requires in certain cases further information from the District Magistrates and that might occasion some delay. Making due allowance for all these considerations, a delay of several months, if not properly explained, cannot be altogether ignored. The question of the effect of the delay in referring to the Advisory Council was considered by me and Rajagopalan, J., in Crl M P. No 200 of 1949, and we stated in the judgment in that case :

"We should however be inclined to say that any period in excess of the statutory limit of six months made applicable to an order under section 3 (5) would by itself be proof *prima facie* of unreasonableness But whether delay in any given case is unreasonable or not has to be judged with reference to the circumstances of that case, taking also into account that the period was far in excess of six months"

Horwill and Govinda Menon, JJ, observed in Crl M. P No. 2128 of 1948 that

"Any further delay beyond a fortnight after the date of the order passed by the learned Judges would be sufficient to show that further detention would be illegal The delay, therefore in the two stages, namely in referring the matter to the Advisory Council and in passing a final order under section 3 (5) after the report from the Advisory Council was received, if unreasonable and is not properly explained would have the effect of making the continuance of the detention illegal"

In the present application, excluding the activities in 1946 and before August, 1947, when the applicant was released from detention, the only ground communicated to him would not, in my opinion, convey any information, nor does it refer to any activities on his part showing that he is acting in a manner prejudicial to the public safety and its maintenance. The Communist party was not declared illegal, in which case, it will be open to the Government to take action under section 17 of the Criminal Law Amendment Act, if the person continued thereafter to associate himself with that party Even if a party is declared illegal, the mere association with that party would not justify the inference that the person was acting in a manner prejudicial to public safety. In the Allahabad and Patna cases already referred to, which deals with cases of members of Rashtriya Swayam Sewak Sangh, it was pointed out that their mere association as such with the party after it was declared illegal is not an activity which endangers public safety We are not concerned with the objects of a particular political party, nor are we prepared to accept the argument advanced on behalf of the applicants that the proceedings under the Act are actuated by political animosity and that therefore they are *mala fide*. We are concerned only with the question whether the grounds communicated are definite and are such as would enable the applicant to present his case properly to the Provincial Government. To take a sample of the grounds communicated to the present applicant, one of the grounds stated that the applicant ridiculed the proposals of the Government to award compensation to the zamindars and inamdars ; that he was also actively engaged in the Municipal election propaganda to get Communist candidates elected. These grounds besides being vague, are, in our opinion, entirely outside the purview of the Act. A political party is entitled to take part in municipal or other elections and for that reason alone it cannot be said that the activity of a person concerned is such as to endanger public safety, nor his criticism of the proposals of the Government to award compensation to the zamindars and inamdars under legislation now pending sanction before the Governor-General for the abolition of the zamindaris. No dates are given as to when

and where the person concerned ridiculed the policy of the Government. And the only other ground that is added is that he spread alarmist ideas about the number of workers that would be retrenched if the recommendations of the Committee were given effect to Nobody knows and there is nothing to indicate what this Committee is and what the reference to the alarmist ideas about the number of workers to be retrenched is The grounds are not outside the purview of the Act but are indefinite and vague. With these grounds, if they can be called grounds, it is impossible for any person to make any representation to the Government to show his innocence and to establish that he is not guilty of any of the conduct attributed to him We are therefore satisfied that as the statutory requirements have not been satisfied and as even no particulars were given, the continuance of the detention of the applicant is not justified. We direct, therefore, that the applicant should be set at liberty forthwith

Crl M. P. No 191 *of* 1949—The applicant in this case was arrested under section 151, Criminal Procedure Code, on the 27th March, 1948. The order of detention under section 2 (1) of the Act was passed on 9th April, 1948, by the District Magistrate, Tanjore. The District Magistrate states in the order that the applicant is acting, or about to act in a manner prejudicial to public safety, and maintenance of public order. He was removed to Central Jail, Vellore, on 12th April, 1948. The grounds of detention were furnished to him on 21st April, 1948. On 11th May, 1948, the applicant sent a representation to the Provincial Government. The matter was referred to the Advisory Council on 22nd June, 1948 On 22nd December, 1948, the Advisory Council recommended that the applicant should be released The Provincial Government, however, did not accept this recommendation but confirmed the original order of detention under section 3 (5) of the Act.

In this case also the grounds alone were communicated and no particulars were given. The only substantial ground is that he avdocated acts of violence and was engaged in intimidating local and imported workers. The ground does not say when and where he advocated acts of violence and the reference to intimidation of local and imported workers is wholly unintelligible and is indefinite in that it does not even give the approximate time and date Some of the grounds are outside the purview of the Act There is no compliance with the provisions of section 3 (1) of the Act and we, therefore, direct that the petitioner should be set at liberty forthwith.

Crl. M P. No 192 *of* 1949—The applicant in this case was arrested under section 151, Criminal Procedure Code, on 2nd May, 1948, and an order of detention was passed on 15th May, 1948, and thereafter he was removed to the Vellore Jail. The grounds were communicated on 6th June, 1948. He submitted his representation on 29th June, 1948, and the matter was referred to the Advisory Council on 14th July, 1948 The Advisory Council recommended by its report, dated 20th January, 1949, that he should be released, but the Provincial Government passed a final order on 15th February, 1949, confirming the original order of detention.

On an examination of the grounds, we are satisfied that the grounds contain sufficient particulars and are not vague and indefinite. The original order of detention was objected to on the ground that the authority of the District Magistrate passing an order under section 2 (1) was not disclosed in the order of detention. It is not necessary to state the authority and if the petitioner had raised the objection and seriously contended that the District Magistrate was not empowered under section 18 of the Act, the order would have been easily produced. We therefore think that there is no substance in this contention.

It was also argued that the order of detention was passed after he was arrested under section 151, Criminal Procedure Code, and this indicated that the order was not *bona fide*. Section 151, Criminal Procedure Code, authorises a police

officer to arrest a person designing to commit a cognisable offence, and, therefore, if there was material justifying the action under section 2 (1) of the Act, there is no reason to hold that the order of detention is illegal We think, therefore, that there is no case for interference made out in this application. The application is therefore dismissed.

Viswanatha Sastri, J—We have, during the last few days, been hearing many applications filed under section 491 of the Code of Criminal Procedure by persons detained in jail under Madras Act I of 1947. The grounds raised by the applicants in these applications are more or less the same and are of general importance. We heard arguments on the common questions arising for decision in these applications before considering them individually on their merits. We are indebted to the learned counsel for their assistance.

In these applications we have been repeatedly and forcibly reminded by counsel for the detenus that it is our duty to exercise our powers under section 491, Code of Criminal Procedure, freely and liberally in order to protect the personal liberty of citizens against unjustifiable interference by executive authority. Language much more trenchant and even provocative, is employed in the affidavits filed by the detenus themselves in support of their applications Madras Act I of 1947 professes to be an emergency measure and not a permanent part of the statute book. In the troublous times through which this country has recently been passing, interference with the personal liberty of citizens has been extended and legalised by the Legislature to an extent which would not have been considered as legitimate in normal times. These temporary encroachments on individual freedom have been made in the larger interests of the State, dictated as they are by the paramount needs of peace, order and good Government. It is the considered opinion of the Legislature as expressed in the preamble to Act I of 1947 that there is an urgent necessity for imposing, in the interests of public peace and tranquillity, and for ensuring the continuance of services vital to the life of the community, restraints on individual liberty The Act has imposed the duty, and given the power of taking preventive action against persons acting or about to act in any manner prejudicial to public safety or the maintenance of public order, to the Provincial Government or its duly constituted delegate Section 16 (1) of the Act prevents an order made in the exercise of a power conferred by or under the Act from being called in question in any Court. Preventive detention in connection with the maintenence of public order is within the legislative competence of the Provincial Legislature under the Government of India Act, 1935 (Schedule VII, List No 2, Entry No. 1) and it has not been contended before us that Act I of 1947 as a whole or section 16 (1) in particular, is *ultra vires* the Provincial Legislature.

In England the House of Lords on two memorable occasions, in times of national crises, upheld the legality of the imprisonment of British subjects without trial and opportunity of defence in Court, if the Home Secretary thought it reasonable to imprison them in the interests of public safety and for the due prosecution of the war. It was held that the executive was not even compellable to give its reasons for detention The writ of *Habeas Corpus*, the most important writ known to English Constitutional Law and one of the privileges of Englishmen zealously guarded and maintained by the English Courts, was held to have been displaced in effect, though not in form, by the emergency powers of preventive detention vested in the executive by the Legislature The restraint was held not to be illegal because it was justified by the terms of the statutory regulation and the writ of *Habeas Corpus* was, therefore, refused. I am referring to the well-known "Regulation 14 (B)" and "Regulation 18 (B)" cases, *Rex* v. *Halliday*[1], *Liversidge's case*[2] and *Greens's case*[3] which have largely influenced the interpretation of Madras Act I

1. (1917) A C 260.
2. (1942) A.C 206.
3. (1942) A C 284.

of 1947 notwithstanding the difference between the English Regulation and the Indian enactment Neither the fact that drastic powers have been given to the executive authority not the fact that they are liable to abuse, should stand in the way of our interpreting and giving effect to the terms of Act I of 1947 according to their plain and natural meaning At the same time, as the Act empowers the executive to deprive a subject of his liberty without a trial and conviction,—indeed for no offence of his—the process being somewhat euphemistically called "preventive justice" or "preventive detention", this Court ought to insist that the executive exercises its powers strictly in accordance with the terms of the statute and within its four corners and observes every formality prescribed by the Act. I respectfully agree with the following observations of Subba Rao, J., in *A. K. Gopalan* v. *District Magistrate, Malabar*[1], which arose under this Act

"It is the sacred duty of this Court to see that no citizen of this Province whether he is rich or poor, whether he belongs to this or that political persuasion is illegally detained for one minute . No provision of the statute restricting the liberty of the citizen can be overlooked and no breach of any provision thereof can be condoned on the ground of administrative convenience"

In spite of the enactment of section 16 of Madras Act I of 1947 restricting the jurisdiction of Courts, it is now well settled that an order of detention made under Act I of 1947 is open to challenge in an application under section 491 of the Code of Criminal Procedure on the ground that it was not made in conformity with the powers conferred by that Act. *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[2], *Sibnath Banerji's case*[3] on appeal from the Federal Court[4] *Basantha Chandra Ghose* v. *Emperor*[5] Personal liberty is not of the most cherished rights of a citizen of this or any other civilized country of which he cannot be deprived except by and in strict conformity with the law On what grounds then can the legality of an order of detention made under section 2 (1) (*a*) of Madras Act I of 1947 be questioned by the person aggrieved ?

An analysis of the provisions of the Act governing the preventive detention of persons reveals the following seven steps or stages in the proceedings connected with such a detention (1) Satisfaction of the Provincial Government or its delegate empowered unser section 15, that a person is acting or about to act or likely to act in any manner prejudicial to public safety or the maintenance of public order [section 2 (1)]. (2) Order directing the detention of such a person [section (2 (1) (*a*)]. (3) Report to be made forthwith to the Provincial Government together with the grounds of detention and other particulars if the order for detention is made by a delegate of the Government [section 2 (2)] (4) Communication to the detenu of the grounds of the order for detention with particulars sufficient to enable him to make a representation against the order (5) Reference by the Provincial Government to the Advisory Council of the case of the detenu together with the grounds for the detention and the representation of the detenu, if any [section 3 (2)]. (6) Submission of its report by the Advisory Council to the Provincial Government [section 3 (4)] (7) Order of the Provincial Government confirming or cancelling or modifying the order made under section 2 (1) [section 3 (5)]

The first and second steps above enumerated are connected with the initial detention Before at all exercising the power of detention and passing an initial order therefor, the Provincial Government or its duly empowered delegate, must be satisfied that a person is acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order. This is a fundamental requisite essential to give jurisdiction to the detaining authority to act. It is the satisfaction of the detaining authority that matters. It is a personal or "subjective" and not an impersonal or "objective" standard of satisfaction.

1. (1949) 1 M.L J 78 at 79
2. (1949) 1 M L J 1 (F.B.).
3. (1945) 2 M L J 325 : L.R 72 I A, 241 . 1945 F L.J. 222 (P.C.),
4. (1943) 2 M.L J 468 6 F.L J 151.
5 (1945) 1 M L J 365 . I.L R 24 Pat. 187 ; 1945 F.L J. 40 (F.C).

The Court cannot examine the conscience of the detaining authority to find out whether its reasons for satisfaction were sufficient No outside decision is involved in this matter of satisfaction which rests solely with the detaining authority. The detaining authority can act an hearsay evidence and is not bound to derive its satisfaction from legal evidence The information on which it acts is likely to be of a confidential character which need not be communicated to the detenu or disclosed in Court. If the detaining authority has acted in good faith and has come to a decision on relevant materials placed before it that detention is necessary, the Court cannot enquire into the sufficiency of the materials or reasonableness of its satisfaction in regard to the matters of which it is required to be satisfied.

It is open, however, to the applicant, if he can, to establish that the detaining authority has not exercised its mind on the materials placed before it and has not satisfied itself about the necessity for the detention and therefore the order for detention, though purporting to be passed under section 2 (1) (*a*) must be deemed not to be an order under the section If there is sufficient material before the Court for holding that the recital in the order is inaccurate and that the order is merely a routine order mechanically passed or the mere outcome of police recommendation and not of a decision on the part of the detaining authority under section 2 (1) then this Court would interfere under section 491 of the Code of Criminal Procedure. *Sibnath Banerji's case*[1] on appeal from the decision in the Federal Court[2] and *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[3]. Section 3 (1) requires the Provincial Government to communicate to the detenu the grounds on which an order for his detention has been made against him together with such particulars as it considers necessary to enable him to make a representation against the order for detention. If the grounds and particulars furnished disclose that the detaining authority had not exercised its mind at all or had applied its mind to and acted upon considerations, wholly irrelevant to and outside the ambit and scope of section 2 of Act I of 1947, then, I should think it is open to this Court to hold that the detaining authority had not the requisite satisfaction regarding the necessity for detention and that the detention is bad for that reason. It has been held in England that where the return to an *habeas corpus* consists of a narrative of acts, it will be bad if the facts stated do not show a legal cause for the detention. (*R* v *Jackson*[4].)

It is not possible for this Court to go into the correctness of the facts alleged by the detaining authority but it is equally clear that accepting the facts at their face value, the Court can say that the satisfaction of the detaining authority is not a real satisfaction or a satisfaction in accordance with law In *Liversidge's case*[5], Lord Wright said " Satisfied, must mean reasonably satisfied. It cannot import an arbitrary or irrational state of being satisfied " Suppose a person convicted of cheating, forgery, or murder, served his sentence ten years ago and is detained under section 2 (1) (*a*) of Act I of 1947 on the ground of his previous conviction and his consequent undesirable antecedents This Court is entitled to say that the detention is bad either because the detaining authority had not exercised its mind at all on the relevant considerations or because that the satisfaction of the detaining authority which is required by section 2 (1) did not exist. Similarly if a person is detained merely on the ground of his religious, political or economic beliefs and opinions or because he is addicted to some personal vice, without anything relating to the maintenance of public safety or order appearing from the grounds, then also the detention would be held to be bad for the same reasons. Even if a person had been convicted of an offence involving a breach of the public peace, still, if the event happened in the remote past and the satisfaction of the

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1 (1945) 2 M L J 325 · L.R 72 I A 241 · 1945 F L J 222 (P.C.).
2. (1943) 2 M L.J 468 : 6 F.L J 151 : 1944 F.C.R. 41.
3 (1949) 1 M.L J 1 (F B).
4 (1891) 1 Q B 671.
5. (1942) A C. 206 at 271.

detaining authority does not relate to conduct persisted in after the coming into force of Act I of 1947, the detention would be bad. I do not mean to suggest that antecedent conduct would not furnish reasonable grounds for finding out the present attitude of a person and for coming to a conclusion that he is acting or likely to act in a manner prejudicial to the public safety or maintenance of public order. All that I mean is that acts done in the approximate and immediate past and not in the remote past, should alone be relied upon to obtain the satisfaction that is required under section 2 (1).

If the grounds and particulars furnished under section 3 (1) are within the ambit and scope of and relevant to section 2 (1), then this Court is not entitled to say that the materials were too slender or too untrustworthy to furnish satisfaction to the detaining authority Sufficiency of the relevant material or the reasonableness of the inference to be drawn from such relevant material is not for this Court to enquire into Supposing a man attempts forcibly to enter upon another's property and threatens to assault persons who prevent his unlawful entry, and an order for detention is passed against him under section 2 (1) on the ground that he is likely to act in a manner prejudicial to the maintenance of public order in the locality, this Court cannot question the propriety of the order, merely because, in its opinion, the incident which led to the satisfaction of the detaining authority is an isolated, trivial or easily avertible threat to public peace or the maintenance of public order. The material is relevant and admissible and the quantum of the evidence as well as the propriety of the inference drawn therefrom are not matters left for the consideration of the Court but of the Executive which has latitude of choice.

Take a case where the grounds and particulars furnished under section 3 (1) are such that some of them are within the scope and ambit of section 2 and some are wholly outside it and the satisfaction of the detaining authority is derived from both of them It is impossible to say whether relevant and admissible or wholly irrelevant and inadmissible considerations gave the requisite satisfaction to the detaining authority. In such a case detention would be bad. Sir Maurice Gwyer, C J, in delivering the judgment of the Federal Court in *Keshaw Talpade's case*[1] (overruled on another point by the Judicial Committee) dealt with such a situation in this way.

"If a detaining authority gives four reasons for detaining a man without distinguishing between them, and if two or three of the reasons are held to be bad, it (the Court) can never be certain to what extent the bad reasons operated on the mind of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them"

Chagla, C.J, in In re *Raj Dhar Kalu Patil*[2], dealt with the matter in this way:

"If a reason is given for the detention of a person which is not within the scope and ambit of the Act conferring the power upon the Government to detain, then the whole order is vitiated notwithstanding the fact that the other reasons given are good, because something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purpose of the Act . But some of the grounds given are not outside the scope and ambit of the Act but are merely vague and indefinite, it cannot be said that some extraneous consideration has weighed with the detaining authority in making the order it has made Therefore, we must draw a sharp distinction between a ground which is outside the purview of the statute and a ground which is bad because it lacks precision and accuracy In the latter case the ground has to be completely ignored as if no ground was furnished at all"

With these opinions I respectfully agree. I have referred to this aspect of the case at some length because in some of the cases that have come before us, grounds not within the scope and ambit of section 2 (1) of Act I of 1947 but dealing only with the political affiliations and economic creeds of a detenu and his activities

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1. (1943) 2 M.L J. 90: 6 F.L.J. 28: I.L.R. 1944 Bom. 183 (F.C.).

2. (1948) 50 Bom.L.R. 183 (F.B.).

in those fields are stated as grounds for detention. Membership of a party or association which has not been declared an illegal body is prominently mentioned in the grounds communicated to the detenus in some of these cases, without any allegation of any acts or facts suggesting that the detenus in question, apart from the party in general, were themselves acting or about to act in a manner prejudicial to public safety or maintenance of public order. In such cases the satisfaction of the detaining authority is not a satisfaction about matters relevant to or falling within section 2 so far as the particular individuals are concerned and that is not a satisfaction which is immune from scrutiny in this Court when the legality of the detention is impugned.

I do not consider that the decision of the Full Bench in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaran*[1], precludes us from holding that the detention is illegal because the detaining authority on its own showing, had obtained its satisfaction on a consideration of material irrelevant to and inadmissible under section 2 (1) of the Act and outside its scope and ambit. It is no doubt true that on an application under section 491 of the Code of Criminal Procedure, the Court cannot enquire into the sufficiency of the materials or the reasonableness of the inference drawn by the detaining authority. The detenu cannot litigate facts and must accept the facts disclosed by the executive authority. But if the reasons which influenced the detaining authority in making the order of detention are disclosed and put on the record by the Government, this Court can scrutinise them to find out the condition of the mind of the detaining authority when it made the order. In view, however, of the presumption of regularity and validity attaching to an official order, regular on the face of it, in view of the rule that is only the satisfaction or state of mind of the detaining authority without reference to any external standard that matters and in view of the power vested in the Provincial Government under section 3 (1) of refusing to disclose facts which it considers would be against the public interest to disclose, it will be difficult for the person challenging an order of detention on the ground above stated to substantiate his plea.

An order of detention may be bad on the face of it if it does not disclose the satisfaction of the detaining authority that the person ordered to be detained has acted or is about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order (See *A K. Gopalan's case*[2]) In some of the cases which have come before our notice, we find the language of section 2 (1) copied mechanically in the orders of detention without specifying whether the detaining authority is satisfied that the person sought to be detained is actually acting in a manner prejudicial to public safety or the maintenance of public order or is about to act or likely to act in such a manner The cyclostyle forms which incorporate all these three reasons found in the section are not even corrected before the orders are issued so as to indicate which of the three grounds apply to the particular case. One would expect that if more than one of the three enumerated grounds are relied upon in any particular case, the word "or" would be scored out and the word "and" substituted, but even this has not been done. This mechanical reproduction of the language of section 2 (1) in the cyclostyle orders of detention gives the impression that the empowered authority does not exercise its mind upon the materials placed before it in each individual case, but issues, the orders of detention as a matter of course or as a matter of routine without itself being sure about the reason for the detention. In a recent case decided by us Crl M P. No 2633 of 1948, we held on an examination of the terms of the order and the attendant circumstances, that the detaining authority might have satisfied itself that the case came within one or other of the two categories specified in the order without pledging itself exactly to any one of them

We also relied on the observations of Spens, C. J., in *Sibnath Banerji's case*[3] in the Federal Court affirmed on appeal by the Judicial Committee in *Sibnath*

1. (1949) 1 M L J 1 (F.B).
2. (1949) 1 M.L J 78.
3 (1943) 2 M L J 468: 6 F.L.J 151: 1944 F.C.R. 41.

Banerji's case[1] and upheld the validity of the order for detention It must, however, be confessed that orders framed in the terms above indicated leave a suspicion as to whether the mind of the detaining authority followed the act of signing the detention order If, however, the grounds and particulars served on the detenu under section 3 (1) specify the actual grounds on which he has been detained, there is no prejudice to him and the order of detention cannot be questioned on the ground above referred to, see *Greene's case*[2].

There are also other matters into which the Court can and will enquire under section 491 of the Code of Criminal Procedure if occasion arises, *e g.*, the *bona fides* of the detaining authority, the authenticity and genuineness of the order of detention itself, the existence of a delegated authority in case the order of detention is passed by a delegate, and the identity of the applicant with the person referred to in the order. So much is clear from the unanimous opinion of the Full Bench in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[3]

It is agreed on all hands that lack of *bona fides* or absence of good faith on the part of the detaining authority vitiates an order of detention The power of preventive detention must be exercised honestly and for the purposes for which it is intended by law and entrusted to the detaining authority. The order should not be a fraudulent or colourable exercise or abuse of the powers conferred by the Statute. See *Rex* v *Halliday*[4], *Liversidge's case*[5], *Greene's case*[2] and *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[6] It is far easier to formulate this doctrine in the abstract than to apply it to the facts and circumstances of particular cases. If, for instance, it can be demonstrated in a particular case that the order of detention was actuated by personal malice or hostility or political animosity or that its object or design was merely to prevent a person or body of persons from the pursuit of a lawful activity for fear that it might be prejudicial to the pecuniary or political interests of other persons or groups, the order would be illegal as being a *mala fide* exercise of the power of preventive detention. If an order for detention is made, not in the interests of public safety or the maintenance of public order, but for the purpose of securing the detention in prison of a person who cannot be successfully prosecuted for an offence of which he is merely suspected, then it would be a *mala fide* exercise of the power. If a person who has been serving a sentence of imprisonment in jail for a pretty long period, say two years, is served on the day of his release with an order of detention under section 2 (1) (*a*) the order for detention is in effect an illegal extension of the term of his sentence of imprisonment and would be a *mala fide* exercise of the power. In such a case it should not be said that he was acting or was likely to act in a manner prejudicial to public safety at the moment of his release Similarly, if a person gets an order for his release on bail from a competent Court and just when he is actually released, an order of detention is made so as to nullify the order granting bail and for the purpose of confining him in jail during his trial for offences with which he is charged, it would be a *mala fide* exercise of the power conferred by Act I of 1947. If the primary purpose and avowed intention of the order of detention is only to circumvent the orders of bail issued by Criminal Courts, then it would be a *mala fide* exercise of the power under section 2 (1). See In re *Srinivasan*[7].

In this connection I must notice a point that is raised in some of the applications questioning the validity of an order for the detention of a person already arrested under section 151 of the Code of Criminal Procedure for a cognizable

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1 (1945) 2 M.L.J. 325 : L.R. 72 I.A. 241 : 1945 F.L.J. 222 (P.C.).
2. (1942) A.C 284.
3. (1949) 1 M.L.J. 1 (F.B.).
4. (1917) A.C. 260.
5. (1942) A.C 206.
6. (1942) 1 M.L.J 1 (F.B).
7. Cr. M P. No. 43 of 1949 : (1949) 1 M.L.J. 581.

offence and remanded to custody It is argued that the action of the detaining authority in resorting to Act I of 1947 and passing an order under section 2 (1) (*a*) when it has evidently realised that there is no case against the applicant under the penal law of the land, is by itself proof of *mala fides* We have already repelled this contention in our judgment in Criminal M P No 2633 of 1948 and held that merely because the order for detention is made where the person concerned has already been arrested under section 151, Criminal Procedure Code, the order cannot be said to be *mala fide* We must not however be understood as laying down that in no case could an order of detention passed against a person already in custody be said to be *mala fide* We have an instance of a man who was detained in jail for over three months under section 117 of the Code of Criminal Procedure for refusing to execute an interim security bond Instead of pursuing the proceedings initiated against him under section 107 of the Code of Criminal Procedure and giving him an opportunity to substantiate his defence under section 118 of the Code, the Police dropped those proceedings and moved the District Magistrate for an order under section 2 (1) (*a*) of Act I of 1947. The order of detention was passed on the ground that because the applicant (who stoutly protested his innocence all long) refused to execute an interim bond for keeping the peace he was likely to act in a manner prejudicial to public safety.' His refusal to execute an interim bond did not mean or even imply that he was acting or was about to act or is likely to act in a manner prejudicial to public safety or the maintenance o public order and an order for his detention passed under section 2 (1) (*a*) of Act I of 1947 based on a refusal of the applicant to execute an interim security bond would be a *mala fide* exercise of the power.

Where there is a limited statutory power of interference with the liberty of a person, the power must be exercised *bona fide* for the end specified in the statute. Otherwise, it will constitute a fraudulent exercise of the power and an order based on such a fraudulent exercise of power would be bad. " Fraud " in this connection does not involve or imply moral turpitude but is used to denote the exercise of a statutory power for purposes foreign to or outside the intendment of the statute however laudable otherwise the intention of the person exercising the power may be. The fraud or *mala fides* consists in exercising the power for purposes foreign to those prescribed by the Statute The further question that arises is, whether, assuming the initial detention to be legal, non-compliance with the other requirements of sections 2 and 3 of Act I of 1947 renders the continuance of the detention illegal.

The powers conferred upon the Provincial Legislature under the Government of India Act, 1935 (Schedule VII, List 2, Entry No 1) as well as the preamble to Act I of 1947 and sections 2 and 3 of the Act, make it clear that it is only preventive detention for a specified period and not an arbitrary detention or imprisonment for an indefinite time at the pleasure of the executive that has been authorised by Act I of 1947. In an ordinary criminal trial, the accused is given detailed information and particulars about the alleged offence, the prosecution adduces evidence, the accused is given a right to rebut it, and conviction and sentence follow if the offence is found to be proved. Section 2 of Act I of 1947 abrogates trial by a Court and empowers the Provincial Government or its delegate, straightaway to imprison a man if it is satisfied that he is acting or is about to act or likely to act in a manner prejudicial to public safety or maintenance of public order It will be observed that no time-limit is prescribed for the communication of the grounds and particulars under section 2 (2), for the communication of the grounds and particulars to the detenu under section 3 (1), for the despatch of the representation of the detenu to the Advisory Council along with other materials under section 3 (2), for the submission of the report of the Advisory Council under section 3 (4) or for the passing of the final orders of the Government under section 3 (5). It is a distressing feature of some of the cases that have come under our notice and a circumstance that had caused us considerable uneasiness, that the applicants have been in jail for periods ranging from four months to one year pursuant to an initia

order of detention without final orders having been passed by the Provincial Government In other words, the applicants have had to endure imprisonment for a much longer period than the period of six months they would have to undergo, even if the initial order for detention had been confirmed by the Provincial Government under section 3 (5)

Another ground of complaint has been that the grounds communicated to the applicants are vague and general and lacking in precision One of the paragraphs common to all the grounds is that the Communist party to which the applicants belonged was indulging in violence and subversive activities and that most of the members of the party had gone underground and were committing various crimes like arson, looting, murder, etc. The grounds have been expressed in such a form as to be universally applicable to all people who profess to belong to the party without reference to the acts and conduct of the particular individual detained. I shall revert to this aspect of the matter later in the course of this judgment.

The question that arises for consideration is whether it is open to this Court to order the release of a detenue under section 491, Criminal Procedure Code, for the reason that there has been a non-compliance with the provisions of section 2 (2) or section 3 (1), (2) and (5) of the Act either by reason of an inordinate and unreasonable delay in taking the requisite steps or otherwise. It is argued that non-compliance with the formalities directed to be carried out by sections 2 and 3 of the Act after the exercise of the statutory power of detention under section 2 (1) (*a*), will not have the effect of invalidating the exercise of the power and the order of detention. In other words, it is said that the subsequent formalities prescribed in the various provisions following section 2 (1) (*a*) of Act I of 1947 are not essential to the validity of the order of detention and their non-observance would not in any way render the detention illegal. Support for this contention is to be found in the observations of Subba Rao, J., who delivered the judgment of the Court in *M.R. Venkataraman* v. *Commissioner of Police, Madras*[1]. In that case an order for detention of the applicant was made under section 2 (1) (*a*) by the Commissioner of Police on 1st April, 1948 and communicated to the Government under section 2 (2) on 9th June, 1948 The applicant was arrested only on 17th August, 1948, as he could not be found till then and was subsequently served with the grounds for his detention The applicant relied on the inordinate delay in communicating the order of the Commissioner of Police to the Government under section 2 (2) as invalidating his detention. The Court held that inasmuch as the initial order and the grounds thereof had been communicated to the Government and the applicant had been given a copy of the grounds and the necessary particulars and had also submitted his explanation at the time when the application under section 491 came on for hearing before the Court, the inordinate delay of more than two months in the communication of the order by the Commissioner of Police to the Government was a mere irregularity which did not render his detention illegal. A detenu who had made himself scarce for more than two months after the order for his detention was made and who could not therefore be arrested, could not reasonably be heard to complain of the *interim* delay in the communication of the order. The judgment however contained the following observations of a general nature :—

"If the order was valid at its inception we cannot see how it would become invalid by the subsequent non-compliance with the other provisions of the Act Assuming that in view of this enormous delay, it must be held that the provisions of the section have not been strictly complied with, would it have the effect of invalidating an order that had been validly passed? We think not Once an order has been passed in strict compliance with the provisions of section 2 (1) it was validly passed Sections 2 (2) and 3 (1) were designed to provide a machinery for the person against whom an order has been passed to seek redress as early as possible If a statutory authority did not comply with the provisions of section 2 or 3 there may be other remedies open to the aggrieved party, but in our view, the non-compliance with the provisions prescribing a procedure to get redress by the aggrieved party against whom an order has been passed under section 2 (1) cannot in law invalidate an order validly passed under section 2 (1) . The argument of Mr Pillai (counsel for the detenu) was that assuming the order passed under section 2 (1) was valid at its inception and continued to be so, the further detention after the violation of the provisions of section 2 (2)

1. (1949) 1 M.L.J. 90.

was illegal. This argument ignores the distinction between an order of detention and the procedure prescribed for enabling an aggrieved party to seek redress . If the authority concerned did not carry out his statutory duty, the petitioner could have taken the appropriate remedy to compel him to perform his duty. He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned But in our view, the non-compliance with the provisions of sub-section (2) to section 2, could not make the detention illegal "

In another case, In re *Venkatachala Thevar*[1], a copy of the grounds of detention under section 3 (1) was served after a delay of 22 days after the detention and after the filing, but before the hearing of an application under section 491 of the Code of Criminal Procedure, in this Court This Court characterised the delay as unconscionable but held that the irregularity had been cured by the time the application was heard The relevant portion of the judgment is as follows :

" However, even if in the absence of an order furnishing the reasons under section 3 (1) within a reasonable time, we might have held that the detenu had been unlawfully detained, we would not order his release after the reasons had been furnished and the detention became lawful "

This decision seems to assume that the continuance of the detention might become unlawful if there is unreasonable delay in serving the grounds under section 3 (1).

Though the learned Judges who decided *Venkataraman's case*[2] do not cite any authority, they were perhaps relying upon the observations of Goddard, L J., in the Court of Appeal and of Lord Macmillan in the House of Lords in *Greene's case*[3] couched in similar language I shall examine *Greene's case*[3] presently but before doing so, I may point out some of the consequences of the view taken by the learned Judge Section 2 of Act I of 1947 does not require that the order of detention should be served on the person ordered to be detained before he is arrested and indeed it does not even require a written order, though in practice such an order is made. According to the Full Bench decision in *Narayanaswami Naidu's case*[4], an order of detention based on the personal satisfaction of the detaining authority that the person detained is acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order is all that is required to make the contention legal *ab initio* The only grounds on which the legality of the initial detention can be challenged are (1) that the order was not duly authenticated, (2) that there has been a mistaken identity, (3) that there has been an absence of good faith, and (4) that there was not on the facts stated or disclosed by the Government, any such satisfaction in the mind of the detaining authority as is required by section 2 (1) The learned Judges in *Venkataraman's case*[2] held that the detention legal *ab initio* does not become illegal even though the formalities prescribed by section 3 are not complied with and therefore the remedy under section 491, Criminal Procedure Code, does not lie, whatever other remedies may be open to the prisoner in respect of such non-compliance. Goddard, L J., in the Court of Appeal in *Greene's case*[5] made similar observations citing the remedy by way of *mandamus*. But the writ of *mandamus* does not lie in India against the Provincial Government or mufussil authorities Nor is the remedy by way of damages for false imprisonment available, assuming that money can compensate a man adequately for the unjust deprivation of his freedom The remedy by *Habeas Corpus* and the claim for damages for false imprisonment are both founded on the illegality of the restraint or imprisonment and if according to the learned Judges in *Venkataraman's case*[2], a detention *ab initio* legal does not become illegal by reason of non-compliance with the terms of section 3, I am unable to visualise any remedy except by way of appealing to the sense of justice and fair play of the Government. But the absence of an effective remedy, though a relevant consideration, is not a conclusive argument if the interpretation of the Act is clear or if the decision in *Greene's case*[3] has authoritatively laid down the law in the sense in which it has been declared by the learned Judges.

To turn to the facts of *Greene's case*[5] Mr. Greene was arrested under an order of the Home Secretary under Regulation 18-B of the Defence

1. (1948) 2 M L J 67
2. (1949) 1 M L J 90
3. (1942) A.C. 284 · (1942) 1 K B. 87 (C A.)
4. (1949) 1 M L J 1 (F B)
5. (1942) 1 K B 87, 118 . (1941) 3 All E.R. 104, 122 : (1942) A.C. 284.

Regulations. The Order served upon him stated that he was a person of " hostile associations " within the meaning of clause (1-A) of the Regulation and that by reason thereof, it was necessary to exercise control over him By clause (3) of the Regulation the detenu was given a right of appeal to an Advisory Committee constituted under the Regulation on the lines of the Advisory Council under Madras Act I of 1947 Clause (5) of the Regulation cast on the Chairman of the Committee the duty of informing the objector, of the grounds on which the order had been made against him, with such particulars as were, in the opinion of the Chairman, relevant and sufficient The notice from the Chairman instead of specifying " hostile associations " under clause (1-A) as the ground of detention, referred to " acts prejudicial to public safety, defence of the realm, etc ," coming under clause (5) of the Regulation as the ground of detention The particulars furnished to the detenu, however, related mostly to " hostile associations ". The detenu appeared before the Advisory Committee and put forward his case without complaining about the discrepancy in the notice issued by the Chairman of the Advisory Committee. The Advisory Committee and the Home Secretary confirmed the initial order of detention An application for a writ of *Habeas Corpus* was made. The argument on behalf of the detenu, relevant to the present purpose, was that the discrepancy between the order for his detention and the subsequent notice issued by the Chairman of the Advisory Committee made the detention illegal *ab initio* or alternatively, from the date of notice This contention was repelled both in the Court of Appeal and in the House of Lords on the ground that the defect complained was a defect in procedure and a mere irregularity which did not prejudice the applicant The following observations of the Court of Appeal and the House of Lords taken together and in their context, show, in my opinion, that their Lordships contemplated not only the possibility of the detention being illegal *ab initio* but its continuance becoming illegal, for proper and sufficient reasons.

Scott, L J " As a matter of law, I cannot see anything in the Regulation which would justify the conclusion that such a mistake by the Advisory Committee either invalidates an originally good order or confers a right to release " (Page 106)

Goddard, L J " Moreover a mistake in the document served on him after he was in custody cannot, in my opinion, invalidate the original detention or render its continuance invalid It is the actual order signed by the Secretary of State that is the governing document and it is this document that the return should disclose " (Page 117)

Viscount Maugham · " I also agree with their view (the Court of Appeal) that a mistake in that document could not, in any event, invalidate the original detention or render its continuance invalid " (Page 296).

Lord Macmillan " The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the applicant's application It affects the due observance of the procedure prescribed for the further consideration of the case of person who is *ex hypothesi* under lawful detention " (P 298)

Lord Wright · " I see no reason to differ from the opinion of the Court below that this *irregularity* does not vitiate the order made and continued " (P. 300)

Lord Romer " This mistake cannot affect the validity of the order that had been made by the Home Secretary nearly two months before Had the appellant been prejudiced by the mistake, the Court might nevertheless have afforded him some relief But the matter was carefully considered both by the Divisional Court and the Court of Appeal (Pp 309-310)

I do not consider that the above decision taken as a whole, supports the general proposition laid down by the learned Judges in *Venkataraman's case*[1] There is no question here of nullifying the effect of a prior judicial order Section 2 (1) (*a*) of Act I of 1947 merely provides for physical detention by a summary order and it is only at a later stage that the grounds and reasons for the order have to be formulated and canvassed and a final order passed Neither the language of the section nor any binding authority compels me to hold that once the preliminary order for detention is made under section 2 (1) (*a*) everything that follows the order is a mere matter of procedure and non-compliance with it is a mere irregularity not affecting the substantive rights of the detenu.

1. (1949) 1 M.L J. 90

It is as well that I further consider the matter on principle and authority. In so doing I may draw attention to the observations of Brett, L J, in *Dale's case*[1]. It was a case of a person who was arrested without due compliance with the technical formalities prescribed by statute An application was made for a writ of *Habeas Corpus* on the ground that his arrest and detention were illegal. Brett, L J, stated the law in these terms —

"It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity, the Court will not allow the imprisonment *to continue* The question here, therefore, is whether the promoters *after the matter had been properly signified to the Court of Chancery have proceeded regularly* (Italics are mine) In my opinion they have not"

Later in the course of his judgment the learned Lord Justice observed :

"I desire to state that although in this case I consider that irregularity a matter of substance' I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the Courts at Westminster will not allow any individual in this Kingdom to procure the imprisonment of another unless he takes care to follow with extreme precision every form and every step in the process just to procure that imprisonment I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects"

Cotton, L J, agreed with the above observations in these terms ·

"I quite agree with Brett, L J, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not the person imprisoned may be discharged although the particulars in which they have failed to follow these powers may be matters of mere form" (P 402)

To the same effect is the decision of the Judicial Committee in dealing with a question relating to the regularity of forfeiture of a man's property where some of the steps regulating the exercise of the power of forfeiture had not been duly complied with. James, L J, observed as follows .

"It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with A very little inaccurracy is as fatal as the greatest Here the notice is inaccurate. It is therefore bad and the forfeiture is invalid"

Mellish, L J., stated as follows

"I think that if the notice departs in any respect from the statutory form, it is impossible for us to go into the question how much it departs It is a bad notice and the subsequent resolution, which is founded upon it is invalid" *Johnson* v *Lyttle's Iron Agency*[2]

Forfeiture of a man's property or personal freedom can result from the exercise of a power conferred by statute on executive authority and without the intervention of a Court, but to have that effect, the power must be exercised in strict compliance with the formalities and requirements prescribed by the statute. It is open to the person aggrieved by the exercise of the power to question the legality of the forfeiture or arrest and imprisonment on every available ground of non-compliance with the provisions of the statute. In *Premila Devi* v *The Peoples Bank of Northern India, Ltd (in Liquidation)*[3], the Judicial Committee observed that in the matter of forfeiture of shares in a limited company the formalities prescribed by the articles regarding the issue of notices must be strictly observed. Imprisonment except under a sentence or order of a Court in *prima facie* unlawful and the person or authority directing such imprisonment must justify the act in law.

It is true that the Legislature in view of the emergency that it was providing against, has authorised detention under section 2 (1) (*a*) even before informing the person sought to be detained of the grounds for his detention and hearing his explanation. If the statute had authorised detention after service of the grounds of detention and after consideration of the explanation, if any, of the person affected, it could hardly be contended that the provisions as to the service of grounds and

1. (1881) 6 Q B D 376 at 461 and 463
2. (1877) 5 Ch D. 687.
3. I L R (1939) Lah. 1 (P.C.).

the giving of an opportunity for explanation, are not conditions precedent to the exercise of the statutory power of detention. The provisions would then be considered to be mandatory in character. Do they cease to be such merely because by reason of the urgency of the situation, these formalities are directed to be complied with subsequent to the initial order of detention? Is the initial order of detention of greater effect than an interim order passed in a pending judicial proceeding which requires confirmation after notice to the opposite party and hearing his objections? To take another analogy furnished by the Civil Law, does not a condition subsequent have as great an efficacy as a condition precedent in connection with the vesting and divesting of rights in property and is not non-performance or non-compliance with either the one or the other condition, equally fatal? In view of the emergent situations that were in its contemplation and in view of the fact that there might not be enough time to serve a person with notice and hear his objections before detaining him so as effectively to prevent an apprehended breach of public peace or order, the Legislature authorised an immediate detention under section 2 (1) (*a*) But in my judgment substantial compliance with the formalities prescribed by section 2 (2) and section 3 (1) to (3) is quite essential to sustain the legality of the continuance of the detention They are not merely directory provisions whose non-observance would constitute a mere irregularity in procedure If the non-compliance with the provisions of section 2 (2) and section 3 is substantial and serious, it would render the continuance of the detention illegal even though it might have been legal *ab initio* It is not uncommon to find in other fields of law provisions for interim suspension, without previous notice, even of persons holding a freehold or hereditary office pending enquiry into their misconduct The nature of the office may be such that instant suspension from the functions of the office without notice and without giving time for explanation would be necessary in public interest This interim suspension is different from a punitive suspension and is merely incidental to the power of removal or dismissal. If the interim suspension is allowed to continue indefinitely without any enquiry into the alleged misconduct, then it would be a fraud on the power or a *mala fide* exercise of the power The position would be the same if an order for dismissal is passed without giving an opportunity to the persons affected to explain charges of misconduct that might be made against them In such cases, the aggrieved person would have his remedy in the Civil Courts The fact that an interim or initial detention is legal does not secure for it immunity from attack if the subsequent formalities prescribed by section 2 (2) and section 3 of Act I of 1947 are not substantially complied with and the continuance of the detention would become illegal by reason of such non-compliance Any other construction would result in conferring upon the executive a power of arbitrary detention for an indefinite period which certainly was not the object or intention of the Legislature in enacting Act I of 1947 That the continuance of a detention *ab initio* legal, might become illegal by reason of a non-compliance with the mandatory provisions of section 3 (1) was, in substance, the view taken by Horwill and Govinda Menon, JJ, in Criminal Miscellaneous Petition No 2128 of 1948 and by my learned brother and Rajagopalan, J, in Criminal Miscellaneous Petition Nos 200 of 1949 and 91 of 1948 The same view has been taken by Full Bench decisions of other High Courts (see *Murat Patwa* v *Province of Behar*[1], *Nek Muhammad* v *Province of Behar*[2], *Durga Das* v *Rex*[3], *Inder Prakash* v *Emperor*[4] and In re *Raj Dhara*[5] The Full Bench decision in *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[6], dealt only with the challenge against the validity of the initial order of detention and did not consider the question whether the continuance of the detention which was legal as its inception could become illegal or improper in view of what happened subsequently or by reason of what the Government subsequently did or failed to do (*See* the observations of Govindarajachari, J, at page 31 of the report.)

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1. A I R 1948 Pat 135 (F B)
2. A.I R 1949 Pat 1 (F B).
3. A I.R 1949 All. 148.
4. A I R 1949 All 37
5. (1948) 50 Bom L R 183 (F B).
6. (1949) 1 M L J. 1 (F.B).

The statutory formalities whose non-compliance renders the continuance of the detention illegal may now be briefly noticed so far as they are relevant to the cases heard by us An order made by an empowered authority under section 2 (1) (*a*) has to be reported forthwith to the Provincial Government together with the grounds of detention and necessary particulars Under section 3 (1), the Provincial Government has to communicate to the detenu the grounds on which the order for his detention has been made together with relevant particulars. Section 3 (2) requires the Provincial Government to place the grounds and the order of detention, the report, if any, received under section 2 (2) and the representation of the detenu before the Advisory Council Section 3 (4) requires the Advisory Council to submit their report to the Provincial Government after a consideration of the materials placed before it The Provincial Government, after considering the report of the Advisory Council is required to pass an order, confirming, modifying or cancelling the order of detention under section 3 (5). As I have already stated, there have been instances of inordinate delay at every one of the stages enumerated above, in the applications that we have heard. I have no reason to doubt that these delays were due to inadvertence, administrative difficulties and also perhaps, to a lack of appreciation of the heavy responsibility taken by the Provincial Government in constituting itself both an accuser and a Judge. It is true that there is no time-limit fixed by the Act for the performance of the duties above enumerated but the result in law is that these steps have to be taken expeditiously and within a reasonable time, *Murat Patwa* v *Province of Behar*[1] What is a reasonable time must, to some extent, depend upon the circumstance of each case. The general principle regulating the time factor in these cases is thus stated by Horwill, J , in In re *Venkatachala Thevar*[2] .

"It is sufficient to point out that the very magnitude of the powers given to the Government under this Act adds to their responsibility to see that no man is incarcerated a day longer than is necessary without giving good reasons for it"

To the same effect are the observations of Subba Rao, J , in *A. K. Gopalan* v. *District Magistrate, Malabar*[3]. Where the delay in communicating the grounds under section 3 (1) or in submitting the case to the Advisory Council under section 3 (2) or in passing final orders under section 3 (5) is unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground (See *Murat Patwa* v *Province of Behar*[1], *Durga Das* v *Rex*[4], Criminal Miscellaneous Petition No 2128 of 1948 and Criminal Miscellaneous Petition Nos. 91 of 1948 and 200 of 1949)

Another ground of non-compliance with statutory formalities urged before us in some of these applications is that the grounds communicated to the applicants are so vague and so devoid of particulars that it is not possible for them or any one in their position to make any effective representation against the order of detention It cannot be said that, if this allegation were true, there is merely a breach of a directory provision contained in section 3 (1) and a mere irregularity not affecting the legality of the detention Section 3 (1) casts a peremptory duty upon the Provincial Government to furnish the detenu with all the grounds of detention together with the necessary particulars so as to enable him, to make a representation against the legality or the propriety of the order of detention. This object would be frustrated if the grounds are vague and general without any particulars and without any attempt at precision or accuracy This provision is meant as a safeguard for the subject against arbitrary detention by the executive and it is our duty to see that this safeguard is not whittled away in practice. The grounds and particulars must not be vague, indefinite, or incomplete but must convey sufficient information to the detenu to enable him to make an effective representation, supported by facts and figures, if necessary, that the detaining authority was wrong in its belief that his detention was necessary in the interests of public safety or the maintenance of public order. The grounds must contain sufficient details to show that the detention was within the scope and object of the

1. A.I R. 1948 pat 135, 138 (F B).
2. (1948 2 M L.J. 67.
3 (1949) 1 M L J 78 at 80
4 A.I R. (1949) All. 148 (F B.).

Act. If, in the opinion of the Court, the grounds furnished are so vague, indefinite and insufficient, that the detenus could not fairly be expected to make an effective representation against the legality or propriety of the order for detention then, it must be held that his further detention is illegal or improper. The word of "grounds" in section 3 (1) do not merely mean the conclusions of the Government or abstract reasons for their action. They must by themselves or along with particulars which are required to be furnished, include facts and circumstances on which the conclusions or reasons are based If activities which are normally unobjectionable are considered to be objectionable and therefore relied upon as a ground for detention, then, the circumstances in which or the reasons why those activities are looked upon as objectionable must be indicated to the detenus. The grounds and particulars together form a sort of substitute for a charge. General, vague and indefinite grounds are no grounds at all and the detenue should not be left to his own introspection or guess-work to find out what is being alleged against him.

It is true that facts, grounds and particulars may and often do overlap and that under section 3, the Government is not bound to disclose facts which it considers against the public interest to disclose. The Government is also given the discretion to furnish only such particulars as are, in its opinion, sufficient to enable the detenu to make a representation to the Government. The section draws some but not a clear distinction between grounds and particulars and requires the authority to communicate all the grounds and such particulars as are, in its opinion sufficient to enable the detenu to make a representation against the order of detention. While facts can be withheld by the Provincial Government on the ground that their disclosure would be prejudicial to the public interest, grounds and particulars cannot be withheld for that reason. It must be remembered that the only opportunity the detenu has of vindicating his character and defending his liberty is to make a representation to the Government under section 3 (1) and it is but fair and reasonable that the grounds and particulars furnished to him should be clear, precise and accurate Otherwise they would fail to serve the purpose for which they were required to be communicated to him The detenu must know what he is charged with and what reasons or considerations have persuaded the Government to deprive him of his liberty There is no doubt a discretion given to the Government in the matter of furnishing particulars but if the particulars are given in such a way as to make it impossible for the detenu to make an effective representation against the order for detention, then we must hold that there has been a failure to comply with the mandatory requirements of section 3 (1) and the detention becomes illegal thereafter. Having regard to the nature of the grounds that have been alleged against the applicants in many of the applications before us, it is necessary to point out that mere membership of a political party or association would not mean that any particular member was acting in such a manner as to necessitate his detention. The grounds and particulars referred to in section 3 (1) must relate to the particular individual who is detained and must disclose the facts which led to the belief that he was acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order. The question is one of substance on the facts and the circumstances of each case and the applicant will have to satisfy the Court that the grounds and particulars communicated to him are so vague and indefinite that there has been no compliance in substance and in effect with the requirements of section 3 (1) of the Act There is a considerable body of authority in the High Courts of Allahabad, Patna and Bombay, for the views above-stated (See *Durgadas* v. *Rex*,[1] In re *Raj Dhar*[2] and *Nek Muhammad* v *Province of Behar*[3] and In re *Krishnaji Gopal*[4].)

With reference to the individual cases that have been argued before us, I agree with the conclusions of my learned brother. In view of the importance and frequent recurrence of the questions that I have discussed above, I have added my own observations.

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1 A.I.R. 1949 All 148 (F.B.).
2. (1948) 50 Bom. L.R. 183 (F.B.).
3 A.I.R. 1949 Pat 1 (F.B.)
4. A.I.R. 1948 Bom 360.

The first and second steps above enumerated are connected with the initial detention Before at all exercising the power of detention and passing an initial order therefor, the Provincial Government or its duly empowered delegate, must be satisfied that a person is acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order. This is a fundamental requisite essential to give jurisdiction to the detaining authority to act It is the satisfaction of the detaining authority that matters It is a personal or "subjective" and not an impersonal or "objective" standard of satisfaction The Court cannot examine the conscience of the detaining authority to find out whether its reasons for satisfaction were sufficient No outside decision is involved in this matter of satisfaction which rests solely with the detaining authority. The detaining authority can act on hearsay evidence and is not bound to derive its satisfaction from legal evidence The information on which it acts is likely to be of a confidential character which need not be communicated to the detenu or disclosed in Court If the detaining authority has acted in good faith and has come to a decision on relevant materials placed before it that detention is necessary, the Court cannot enquire into the sufficiency of the materials or reasonableness of its satisfaction in regard to the matters of which it is required to be satisfied.

It is open, however, to the applicant, if he can, to establish that the detaining authority has not exercised its mind on the materials placed before it and has not satisfied itself about the necessity for the detention and therefore the order for detention, though purporting to be passed under section 2 (1) (*a*) must be deemed not to be an order under the section If there is sufficient material before the Court for holding that the recital in the order is inaccurate and that the order is merely a routine order mechanically passed or the mere outcome of police recommendation and not of a decision on the part of the detaining authority under section 2 (1) then this Court would interfere under section 491 of the Code of Criminal Procedure *Sibnath Banerji's case*[1] on appeal from the decision in the Federal Court[2] and *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[3] Section 3 (1) requires the Provincial Government to communicate to the detenu the grounds on which an order for his detention has been made against him together with such particulars as it considers necessary to enable him to make a representation against the order for detention If the grounds and particulars furnished disclose that the detaining authority had not exercised its mind at all or had applied its mind to and acted upon considerations, wholly irrelevant to and outside the ambit and scope of section 2 of Act I of 1947, then, I should think it is open to this Court to hold that the detaining authority had not the requisite satisfaction regarding the necessity for detention and that the detention is bad for that reason It has been held in England that where the return to an *habeas corpus* consists of a narrative of acts, it will be bad if the facts stated do not show a legal cause for the detention (*R* v *Jackson*[4])

It is not possible for this Court to go into the correctness of the facts alleged by the detaining authority but it is equally clear that accepting the facts at their face value, the Court can say that the satisfaction of the detaining authority is not a real satisfaction or a satisfaction in accordance with law In *Liversidge's case*[5], Lord Wright said "Satisfied, must mean reasonably satisfied It cannot import an arbitrary or irrational state of being satisfied" Suppose a person convicted of cheating, forgery, or murder, served his sentence ten years ago and is detained under section 2 (1) (*a*) of Act I of 1947 on the ground of his previous conviction and his consequent undesirable antecedents This Court is entitled to say that the detention is bad either because the detaining authority had not exercised its mind at all on the relevant considerations or because that the satisfaction of the detaining authority which is required by section 2 (1) did not exist Similarly

1 (1945) 2 M L J 325 L R 72 I A 241 1945 F L J 229 (P C)
2 (1943) 2 M L J 468 6 F L J 151 1944 F C R 41
3 (1949) 1 M L J 1 (F B)
4 (1891) 1 Q B 671
5 (1942) A C, 206 at 271

if a person is detained merely on the ground of his religious, political or economic beliefs and opinions or because he is addicted to some personal vice, without anything relating to the maintenance of public safety or order appearing from the grounds, then also the detention would be held to be bad for the same reasons. Even if a person had been convicted of an offence involving a breach of the public peace, still, if the event happened in the remote past and the satisfaction of the detaining authority does not relate to conduct persisted in after the coming into force of Act I of 1947, the detention would be bad. I do not mean to suggest that antecedent conduct would not furnish reasonable grounds for finding out the present attitude of a person and for coming to a conclusion that he is acting or likely to act in a manner prejudicial to the public safety or maintenance of public order. All that I mean is that acts done in the approximate and immediate past and not in the remote past, should alone be relied upon to obtain the satisfaction that is required under section 2 (1).

If the grounds and particulars furnished under section 3 (1) are within the ambit and scope of and relevant to section 2 (1), then this Court is not entitled to say that the materials were too slender or too untrustworthy to furnish satisfaction to the detaining authority. Sufficiency of the relevant material or the reasonableness of the inference to be drawn from such relevant material is not for this Court to enquire into. Supposing a man attempts forcibly to enter upon another's property and threatens to assault persons who prevent his unlawful entry, and an order for detention is passed against him under section 2 (1) on the ground that he is likely to act in a manner prejudicial to the maintenance of public order in the locality, this Court cannot question the propriety of the order, merely because, in its opinion, the incident which led to the satisfaction of the detaining authority is an isolated, trivial or easily avertible threat to public peace or the maintenance of public order. The material is relevant and admissible and the quantum of the evidence as well as the propriety of the inference drawn therefrom are not matters left for the consideration of the Court but of the Executive which has latitude of choice.

Take a case where the grounds and particulars furnished under section 3 (1) are such that some of them are within the scope and ambit of section 2 and some are wholly outside it and the satisfaction of the detaining authority is derived from both of them. It is impossible to say whether relevant and admissible or wholly irrelevant and inadmissible considerations gave the requisite satisfaction to the detaining authority. In such a case detention would be bad. Sir Maurice Gwyer, C.J., in delivering the judgment of the Federal Court in *Keshav Talpade's case*[1] (overruled on another point by the Judicial Committee) dealt with such a situation in this way:

> "If a detaining authority gives four reasons for detaining a man without distinguishing between them, and if two or three of the reasons are held to be bad, it (the Court) can never be certain to what extent the bad reasons operated on the mind of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them."

Chagla, C.J., in In re *Raj Dhar Kalu Patil*[2], dealt with the matter in this way:

> "If a reason is given for the detention of a person which is not within the scope and ambit of the Act conferring the power upon the Government to detain, then the whole order is vitiated notwithstanding the fact that the other reasons given are good, because something may have operated upon the mind of the detaining authority which is foreign and extraneous to the purpose of the Act. . ... But some of the grounds given are not outside the scope and ambit of the Act but are merely vague and indefinite, it cannot be said that some extraneous consideration has weighed with the detaining authority in making the order it has made. Therefore, we must draw a sharp distinction between a ground which is outside the purview of the statute and a ground which is bad because it lacks precision and accuracy. In the latter case the ground has to be completely ignored as if no ground was furnished at all."

With these opinions I respectfully agree. I have referred to this aspect of the case at some length because in some of the cases that have come before us, grounds not within the scope and ambit of section 2 (1) of Act I of 1947 but dealing only

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1. (1943) 2 M.L.J. 90 : 6 F.L.J. 28 : I.L.R. 1944 Bom. 183 (F.C.).
2. (1948) 50 Bom.L.R. 183 (F.B.).

with the political affiliations and economic creeds of a detenu and his activities in those fields are stated as grounds for detention. Membership of a party or association which has not been declared an illegal body is prominently mentioned in the grounds communicated to the detenus in some of these cases without any allegation of any acts or facts suggesting that the detenus in question, apart from the party in general, were themselves acting or about to act in a manner prejudicial to public safety or maintenance of public order In such cases the satisfaction of the detaining authority is not a satisfaction about matters relevant to or falling within section 2 so far as the particular individuals are concerned and that is not a satisfaction which is immune from scrutiny in this Court when the legality of the detention is impugned.

I do not consider that the decision of the Full Bench in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[1], precludes us from holding that the detention is illegal because the detaining authority on its own showing, had obtained its satisfaction on a consideration of material irrelevant to and inadmissible under section 2 (1) of the Act and outside its scope and ambit It is no doubt true that on an application under section 491 of the Code of Criminal Procedure, the Court cannot enquire into the sufficiency of the materials or the reasonableness of the inference drawn by the detaining authority The detenu cannot litigate facts and must accept the facts disclosed by the executive authority But if the reasons which influenced the detaining authority in making the order of detention are disclosed and put on the record by the Government, this Court can scrutinise them to find out the condition of the mind of the detaining authority when it made the order. In view, however, of the presumption of regularity and validity attaching to an official order, regular on the face of it, in view of the rule that is only the satisfaction or state of mind of the detaining authority without reference to any external standard that matters and in view of the power vested in the Provincial Government under section 3 (1) of refusing to disclose facts which it considers would be against the public interest to disclose, it will be difficult for the person challenging an order of detention on the ground above stated to substantiate his plea

An order of detention may be bad on the face of it if it does not disclose the satisfaction of the detaining authority that the person ordered to be detained has acted or is about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order (See *A. K Gopalan's case*[2].) In some of the cases which have come before our notice, we find the language of section 2 (1) copied mechanically in the orders of detention without specifying whether the detaining authority is satisfied that the person sought to be detained is actually acting in a manner prejudicial to public safety or the maintenance of public order or is about to act or likely to act in such a manner. The cyclostyle forms which incorporate all these three reasons found in the section are not even corrected before the orders are issued so as to indicate which of the three grounds apply to the particular case. One would expect that if more than one of the three enumerated grounds are relied upon in any particular case, the word " or " would be scored out and the word " and " substituted ; but even this has not been done This mechanical reproduction of the language of section 2 (1) in the cyclostyle orders of detention gives the impression that the empowered authority does not exercise its mind upon the materials placed before it in each individual case, but issues the orders of detention as a matter of course or as a matter of routine without itself being sure about the reason for the detention In a recent case decided by us Crl. M. P. No. 2633 of 1948, we held on an examination of the terms of the order and the attendant circumstances, that the detaining authority might have satisfied itself that the case came within one or other of the two categories specified in the order without pledging itself exactly to any one of them.

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1. (1949) 1 M.L J. 1 (F.B.).
2. (1949) 1 M.L.J. 78.

We also relied on the observations of Spens, C J, in *Sibnath Banerji's case*[1] in the Federal Court affirmed on appeal by the Judicial Committee in *Sibnath Banerji's case*[2] and upheld the validity of the order for detention It must, however, be confessed that orders framed in the terms above indicated leave a suspicion as to whether the mind of the detaining authority followed the act of signing the detention order If, however, the grounds and particulars served on the detenu under section 3 (1) specify the actual grounds on which he has been detained, there is no prejudice to him and the order of detention cannot be questioned on the ground above referred to, see *Greene's case*[3]

There are also other matters into which the Court can and will enquire under section 491 of the Code of Criminal Procedure if occasion arises, *e g*, the *bona fides* of the detaining authority, the authenticity and genuineness of the order of detention itself, the existence of a delegated authority in case the order of detention is passed by a delegate, and the identity of the applicant with the person referred to in the order So much is clear from the unanimous opinion of the Full Bench in *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[4]

It is agreed on all hands that lack of *bona fides* or absence of good faith on the part of the detaining authority vitiates an order of detention The power of preventive detention must be exercised honestly and for the purposes for which it is intended by law and entrusted to the detaining authority The order should not be a fraudulent or colourable exercise or abuse of the powers conferred by the Statute See *Rex* v *Halliday*[5], *Liversidge's case*[6], *Greene's case*[7] and *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[4] It is far easier to formulate this doctrine in the abstract than to apply it to the facts and circumstances of particular cases If, for instance, it can be demonstrated in a particular case that the order of detention was actuated by personal malice or hostility or political animosity or that its object or design was merely to prevent a person or body of persons from the pursuit of a lawful activity for fear that it might be prejudicial to the pecuniary or political interests of other persons or groups, the order would be illegal as being a *mala fide* exercise of the power of preventive detention If an order for detention is made, not in the interests of public safety or the maintenance of public order, but for the purpose of securing the detention in prison of a person who cannot be successfully prosecuted for an offence of which he is merely suspected, then it would be a *mala fide* exercise of the power If a person who has been serving a sentence of imprisonment in jail for a pretty long period, say two years, is served on the day of his release with an order of detention under section 2 (1) (*a*) the order for detention is in effect an illegal extension of the term of his sentence of imprisonment and would be a *mala fide* exercise of the power In such a case it should not be said that he was acting or was likely to act in a manner prejudicial to public safety at the moment of his release Similarly, if a person gets an order for his release on bail from a competent court and just when he is actually released, an order of detention is made so as to nullify the order granting bail and for the purpose of confining him in jail during his trial for offences with which he is charged, it would be a *mala fide* exercise of the power conferred by Act I of 1947 If the primary purpose and avowed intention of the order of detention is only to circumvent the orders of bail issued by Criminal Courts, then it would be a *mala fide* exercise of the power under section 2 (1). See In re *Srinivasan*[8]

In this connection I must notice a point that is raised in some of the applications questioning the validity of an order for the detention of a person already arrested under section 151 of the Code of Criminal Procedure for a cognizable

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1 (1943) 2 M L J 468 6 F L J 151 1944 F C R. 41
2 (1945) 2 M L J 325 L R 72 I A 241 1945 F L J 222 (P C)
3 (1942) A C 284
4 (1949) 1 M L J 1 (F B).
5 (1917) A C 260
6 (1942) A C 206
7 (1942) A C 284
8 Cr M P No 43 of 1949 (1949) 1 M L J 581

offence and remanded to custody It is argued that the action of the detaining authority in resorting to Act I of 1947 and passing an order under section 2 (1) (*a*) when it has evidently realised that there is no case against the applicant under the penal law of the land, is by itself proof of *mala fides* We have already repelled this contention in our judgment in Criminal M P No 2633 of 1948 and held that merely because the order for detention is made where the person concerned has already been arrested under section 151, Criminal Procedure Code, the order cannot be said to be *mala fide* We must not however be understood as laying down that in no case could an order of detention passed against a person already in custody be said to be *mala fide* We have an instance of a man who was detained in jail for over three months under section 117 of the Code of Criminal Procedure for refusing to execute an interim security bond Instead of pursuing the proceedings initiated against him under section 107 of the Code of Criminal Procedure and giving him an opportunity to substantiate his defence under section 118 of the Code, the Police dropped those proceedings and moved the District Magistrate for an order under section 2 (1) (*a*) of Act I of 1947 The order of detention was passed on the ground that because the applicant (who stoutly protested his innocence all along) refused to execute an interim bond for keeping the peace he was likely to act in a manner prejudicial to public safety His refusal to execute an interim bond did not mean or even imply that he was acting or was about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order and an order for his detention passed under section 2 (1) (*a*) of Act I of 1947 based on a refusal of the applicant to execute an interim security bond would be a *mala fide* exercise of the power

Where there is a limited statutory power of interference with the liberty of a person, the power must be exercised *bona fide* for the end specified in the statute Otherwise, it will constitute a fraudulent exercise of the power and an order based on such a fraudulent exercise of power would be bad "Fraud" in this connection does not involve or imply moral turpitude but is used to denote the exercise of a statutory power for purposes foreign to or outside the intendment of the statute however laudable otherwise the intention of the person exercising the power may be The fraud or *mala fides* consists in exercising the power for purposes foreign to those prescribed by the Statute The further question that arises is, whether, assuming the initial detention to be legal, non-compliance with the other requirements of sections 2 and 3 of Act I of 1947 renders the continuance of the detention illegal

The powers conferred upon the Provincial Legislature under the Government of India Act, 1935 (Schedule VII, List 2, Entry No 1) as well as the preamble to Act I of 1947 and sections 2 and 3 of the Act, make it clear that it is only preventive detention for a specified period and not an arbitrary detention or imprisonment for an indefinite time at the pleasure of the executive that has been authorised by Act I of 1947. In an ordinary criminal trial, the accused is given detailed information and particulars about the alleged offence, the prosecution adduces evidence, the accused is given a right to rebut it, and conviction and sentence follow if the offence is found to be proved Section 2 of Act I of 1947 abrogates trial by a Court and empowers the Provincial Government or its delegate, straightaway to imprison a man if it is satisfied that he is acting or is about to act or likely to act in a manner prejudicial to public safety or maintenance of public order It will be observed that no time-limit is prescribed for the communication of the grounds and particulars under section 2 (2), for the communication of the grounds and particulars to the detenu under section 3 (1), for the despatch of the representation of the detenu to the Advisory Council along with other materials under section 3 (2), for the submission of the report of the Advisory Council under section 3 (4) or for the passing of the final orders of the Government under section 3 (5) It is a distressing feature of some of the cases that have come under our notice and a circumstance that had caused us considerable uneasiness, that the applicants have been in jail for periods ranging from four months to one year pursuant to an initial

order of detention without final orders having been passed by the Provincial Government In other words, the applicants have had to endure imprisonment for a much longer period than the period of six months they would have to undergo, even if the initial order for detention had been confirmed by the Provincial Government under section 3 (5).

Another ground of complaint has been that the grounds communicated to the applicants are vague and general and lacking in precision. One of the paragraphs common to all the grounds is that the Communist party to which the applicants belonged was indulging in violence and subversive activities and that most of the members of the party had gone underground and were committing various crimes like arson, looting, murder, etc. The grounds have been expressed in such a form as to be universally applicable to all people who profess to belong to the party without reference to the acts and conduct of the particular individual detained. I shall revert to this aspect of the matter later in the course of this judgment.

The question that arises for consideration is whether it is open to this Court to order the release of a detenu under section 491, Criminal Procedure Code, for the reason that there has been a non-compliance with the provisions of section 2 (2) or section 3 (1), (2) and (5) of the Act either by reason of an inordinate and unreasonable delay in taking the requisite steps or otherwise It is argued that non-compliance with the formalities directed to be carried out by sections 2 and 3 of the Act after the exercise of the statutory power of detention under section 2 (1) (*a*), will not have the effect of invalidating the exercise of the power and the order of detention In other words, it is said that the subsequent formalities prescribed in the various provisions following section 2 (1) (*a*) of Act I of 1947 are not essential to the validity of the order of detention and their non-observance would not in any way render the detention illegal. Support for this contention is to be found in the observations of Subba Rao, J, who delivered the judgment of the Court in *M R. Venkataraman* v *Commissioner of Police, Madras*[1] In that case an order for detention of the applicant was made under section 2 (1) (*a*) by the Commissioner of Police on 1st April, 1948 and communicated to the Government under section 2 (2) on 9th June, 1948 The applicant was arrested only on 17th August, 1948, as he could not be found till then and was subsequently served with the grounds for his detention The applicant relied on the inordinate delay in communicating the order of the Commissioner of Police to the Government under section 2 (2) as invalidating his detention The Court held that inasmuch as the initial order and the grounds thereof had been communicated to the Government and the applicant had been given a copy of the grounds and the necessary particulars and had also submitted his explanation at the time when the application under section 491 came on for hearing before the Court, the inordinate delay of more than two months in the communication of the order by the Commissioner of Police to the Government was a mere irregularity which did not render his detention illegal A detenu who had made himself scarce for more than two months after the order for his detention was made and who could not therefore be arrested, could not reasonably be heard to complain of the *interim* delay in the communication of the order The judgment however contained the following observations of a general nature .—

"If the order was valid at its inception we cannot see how it would become invalid by the subsequent non-compliance with the other provisions of the Act Assuming that in view of this enormous delay, it must be held that the provisions of the section have not been strictly complied with, would it have the effect of invalidating an order that had been validly passed? We think not. Once an order has been passed in strict compliance with the provisions of section 2 (1) it was validly passed Sections 2 (2) and 3 (1) were designed to provide a machinery for the person against whom an order has been passed to seek redress as early as possible If a statutory authority did not comply with the provisions of section 2 or 3 there may be other remedies open to the aggrieved party, but in our view, the non-compliance with the provisions prescribing a procedure to get redress by the aggrieved party against whom an order has been passed under section 2 (1) cannot in law invalidate an order validly passed under section 2 (1) The argument of Mr Pillai (counsel for the detenu) was that assuming the order passed under section 2 (1) was valid at its inception and continued to be so, the further detention after the violation of the provisions of section 2 (2)

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1 (1949) 1 M L J 90

was illegal This argument ignores the distinction between an order of detention and the procedure prescribed for enabling an aggrieved party to seek redress If the authority concerned did not carry out his statutory duty, the petitioner could have taken the appropriate remedy to compel him to perform his duty. He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned. But in our view, the non-compliance with the provisions of sub-section (2) to section 2, could not make the detention illegal "

In another case, In re *Venkatachala Thevar*[1], a copy of the grounds of detention under section 3 (1) was served after a delay of 22 days after the detention and after the filing, but before the hearing of an application under section 491 of the Code of Criminal Procedure, in this Court This Court characterised the delay as unconscionable but held that the irregularity had been cured by the time the application was heard. The relevant portion of the judgment is as follows .

" However, even if in the absence of an order furnishing the reasons under section 3 (1) within a reasonable time, we might have held that the detenu had been unlawfully detained, we would not order his release after the reasons had been furnished and the detention became lawful "

This decision seems to assume that the continuance of the detention might become unlawful if there is unreasonable delay in serving the grounds under section 3 (1)

Though the learned Judges who decided *Venkataraman's case*[2] do not cite any authority, they were perhaps relying upon the observations of Goddard, L J., in the Court of Appeal and of Lord Macmillan in the House of Lords in *Greene's case*[3] couched in similar language. I shall examine *Greene's case*[3] presently but before doing so, I may point out some of the consequences of the view taken by the learned judge. Section 2 of Act I of 1947 does not require that the order of detention should be served on the person ordered to be detained before he is arrested and indeed it does not even require a written order, though in practice such an order is made According to the Full Bench decision in *Narayanaswami Naidu's case*[4], an order of detention based on the personal satisfaction of the detaining authority that the person detained is acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order is all that is required to make the contention legal *ab initio*. The only grounds on which the legality of the initial detention can be challenged are (1) that the order was not duly authenticated, (2) that there has been a mistaken identity, (3) that there has been an absence of good faith, and (4) that there was not on the facts stated or disclosed by the Government, any such satisfaction in the mind of the detaining authority as is required by section 2 (1) The learned Judges in *Venkataraman's case*[2] held that the detention legal *ab initio* does not become illegal even though the formalities prescribed by section 3 are not complied with and therefore the remedy under section 491, Criminal Procedure Code, does not lie, whatever other remedies may be open to the prisoner in respect of such non-compliance Goddard, L J., in the Court of Appeal in *Greene's case*[5] made similar observations citing the remedy by way of *mandamus* But the writ of *mandamus* does not lie in India against the Provincial Government or mufussil authorities. Nor is the remedy by way of damages for false imprisonment available, assuming that money can compensate a man adequately for the unjust deprivation of his freedom. The remedy by *Habeas Corpus* and the claim for damages for false imprisonment are both founded on the illegality of the restraint or imprisonment and if according to the learned Judges in *Venkataraman's case*[2], a detention *ab initio* legal does not become illegal by reason of non-compliance with the terms of section 3, I am unable to visualise any remedy except by way of appealing to the sense of justice and fair play of the Government. But the absence of an effective remedy, though a relevant consideration, is not a conclusive argument if the interpretation of the Act is clear or if the decision in *Greene's case*[3] has authoritatively laid down the law in the sense in which it has been declared by the learned Judges.

To turn to the facts of *Greene's case*[5] Mr Green was arrested under an order of the Home Secretary under Regulation 18-B of the Defence

1 (1948) 2 M L J 67
2 (1949) 1 M L J 90
3 (1942) A C 284, (1942) 1 K.B. 87 (C A)
4 (1949) 1 M.L J 1 (F B).
5 (1942) 1 K B 87, 118 (1941) 3 All E R. 104, 122 , (1942) A C 284

Regulations The order served upon him stated that he was a person of "hostile associations" within the meaning of clause (1-A) of the Regulation and that by reason thereof, it was necessary to exercise control over him By clause (3) of the Regulation the detenu was given a right of appeal to an Advisory Committee constituted under the Regulation on the lines of the Advisory Council under Madras Act I of 1947. Clause (5) of the Regulation cast on the Chairman of the Committee the duty of informing the objector, of the grounds on which the order had been made against him, with such particulars as were, in the opinion of the Chairman, relevant and sufficient The notice from the Chairman instead of specifying "hostile associations" under clause (1-A) as the ground of detention, referred to "acts prejudicial to public safety, defence of the realm, etc" coming under clause (5) of the Regulation as the ground of detention The particulars furnished to the detenu, however, related mostly to "hostile associations" The detenu appeared before the Advisory Committee and put forward his case without complaining about the discrepancy in the notice issued by the Chairman of the Advisory Committee. The Advisory Committee and the Home Secretary confirmed the initial order of detention An application for a writ of *Habeas Corpus* was made. The argument on behalf of the detenu, relevant to the present purpose, was that the discrepancy between the order for his detention and the subsequent notice issued by the Chairman of the Advisory Committee made the detention illegal *ab initio* or alternatively, from the date of notice This contention was repelled both in the Court of Appeal and in the House of Lords on the ground that the defect complained was a defect in procedure and a mere irregularity which did not prejudice the applicant The following observations of the Court of Appeal and the House of Lords taken together and in their context, show, in my opinion, that their Lordships contemplated not only the possibility of the detention being illegal *ab initio* but its continuance becoming illegal, for proper and sufficient reasons.

Scott, L J "As a matter of law, I cannot see anything in the Regulation which would justify the conclusion that such a mistake by the Advisory Committee either invalidates an originally good order or confers a right to release" (Page 106)

Goddard, L J "Moreover a mistake in the document served on him after he was in custody cannot, in my opinion, invalidate the original detention or render its continuance invalid It is the actual order signed by the Secretary of State that is the governing document and it is this document that the return should disclose" (Page 117)

Viscount Maugham "I also agree with their view (the Court of Appeal) that a mistake in that document could not, in any event, invalidate the original detention or render its continuance invalid" (Page 296)

Lord Macmillan "The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the applicant's application. It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention" (P 298)

Lord Wright "I see no reason to differ from the opinion of the Court below that this *irregularity* does not vitiate the order made and continued" (P 300).

Lord Romer "This mistake cannot affect the validity of the order that had been made by the Home Secretary nearly two months before Had the appellant been prejudiced by the mistake, the Court might nevertheless have afforded him some relief But the matter was carefully considered both by the Divisional Court and the Court of Appeal (Pp. 309-310)

I do not consider that the above decision taken as a whole, supports the general proposition laid down by the learned Judges in *Venkataraman's case*[1]. There is no question here of nullifying the effect of a prior judicial order Section 2 (1) (*a*) of Act I of 1947 merely provides for physical detention by a summary order and it is only at a later stage that the grounds and reasons for the order have to be formulated and canvassed and a final order passed. Neither the language of the section nor any binding authority compels me to hold that once the preliminary order for detention is made under section 2 (1) (*a*) everything that follows the order is a mere matter of procedure and non-compliance with it is a mere irregularity not affecting the substantive rights of the detenu.

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1 (1949) 1 M.L J 90

It is as well that I further consider the matter on principle and authority In so doing I may draw attention to the observations of Brett, L J, in *Dale's case*[1]. It was a case of a person who was arrested without due compliance with the technical formalities prescribed by statute An application was made for a writ of *Habeas Corpus* on the ground that his arrest and detention were illegal Brett, L J, stated the law in these terms —

"It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity, the Court will not allow the imprisonment *to continue* The question here, therefore, is whether the promoters *after the matter had been properly signified to the Court of Chancery have proceeded regularly* (Italics are mine) In my opinion they have not"

Later in the course of his Judgment the learned Lord Justice observed

"I desire to state that although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the Courts at Westminster will not allow any individual in this Kingdom to procure the imprisonment of another unless he takes care to follow with extreme precision every form and every step in the process just to procure that imprisonment I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects"

Cotton L J, agreed with the above observations in these terms.

"I quite agree with Brett, L J, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow these powers may be matters of mere form" (P 402)

To the same effect is the decision of the Judicial Committee in dealing with a question relating to the regularity of forfeiture of a man's property where some of the steps regulating the exercise of the power of forfeiture had not been duly complied with James, L J, observed as follows

"It was the established rule of the Court of Chancery and of the Courts of Common Law that no forfeiture of property could be made unless every condition precedent had been strictly and literally complied with A very little inaccuracy is as fatal as the greatest Here the notice is inaccurate It is therefore bad and the forfeiture is invalid"

Mellish, L.J, stated as follows —

"I think that if the notice departs in any respect from the statutory form it is impossible for us to go into the question how much it departs It is a bad notice and the subsequent resolution, which is founded upon it is invalid" *Johnson* v *Lyttle's Iron Agency*[2]

Forfeiture of a man's property or personal freedom can result from the exercise of a power conferred by statute on executive authority and without the intervention of a Court, but to have that effect, the power must be exercised in strict compliance with the formalities and requirements prescribed by the statute It is open to the person aggrieved by the exercise of the power to question the legality of the forfeiture or arrest and imprisonment on every available ground of non-compliance with the provisions of the statute In *Premila Devi* v *The Peoples Bank of Northern India, Ltd.* (*in liquidation*)[3], the Judicial Committee observed that in the matter of forfeiture of shares in a limited company the formalities prescribed by the articles regarding the issue of notices must be strictly observed Imprisonment except under a sentence or order of a Court in *prima facie* unlawful and the person or authority directing such imprisonment must justify the act in law

It is true that the Legislature in view of the emergency that it was providing against, has authorised detention under section 2 (1) (*a*) even before informing the person sought to be detained of the grounds for his detention and hearing his explanation If the statute had authorised detention after service of the grounds of detention and after consideration of the explanation, if any, of the person affected, it could hardly be contended that the provisions as to the service of grounds and

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1 (1881) 6 Q B D 376 at 461 and 463
2. (1877) 5 Ch D 687
3 I L R (1939) Lah 1 (P C)

the giving of an opportunity for explanation, are not conditions precedent to the exercise of the statutory power of detention The provisions would then be considered to be mandatory in character. Do they cease to be such merely because by reason of the urgency of the situation, these formalities are directed to be complied with subsequent to the initial order of detention ? Is the initial order of detention of greater effect than an interim order passed in a pending judicial proceeding which requires confirmation after notice to the opposite party and hearing his objections ? To take another analogy furnished by the Civil Law, does not a condition subsequent have as great an efficacy as a condition precedent in connection with the vesting and divesting of rights in property and is not non-performance or non-compliance with either the one or the other condition, equally fatal ? In view of the emergent situations that were in its contemplation and in view of the fact that there might not be enough time to serve a person with notice and hear his objections before detaining him so as effectively to prevent an apprehended breach of public peace or order, the Legislature authorised an immediate detention under section 2 (1) (*a*). But in my judgment substantial compliance with the formalities prescribed by section 2 (2) and section 3 (1) to (3) is quite essential to sustain the legality of the continuance of the detention They are not merely directory provisions whose non-observance would constitute a mere irregularity in procedure. If the non-compliance with the provisions of section 2 (2) and section 3 is substantial and serious, it would render the continuance of the detention illegal even though it might have been legal *ab initio* It is not uncommon to find in other fields of law provisions for interim suspension, without previous notice, even of persons holding a freehold or hereditary office pending enquiry into their misconduct The nature of the office may be such that instant suspension from the functions of the office without notice and without giving time for explanation would be necessary in public interest This interim suspension is different from a punitive suspension and is merely incidental to the power of removal or dismissal. If the interim suspension is allowed to continue indefinitely without any enquiry into the alleged misconduct, then it would be a fraud on the power or a *mala fide* exercise of the power The position would be the same if an order for dismissal is passed without giving an opportunity to the persons affected to explain charges of misconduct that might be made against them In such cases, the aggrieved person would have his remedy in the Civil Courts The fact that an interim or initial detention is legal does not secure for it immunity from attack if the subsequent formalities prescribed by section 2 (2) and section 3 of Act I of 1947 are not substantially complied with and the continuance of the detention would become illegal by reason of such non-compliance Any other construction would result in conferring upon the executive a power of arbitrary detention for an indefinite period which certainly was not the object or intention of the Legislature in enacting Act I of 1947 That the continuance of a detention *ab initio* legal, might become illegal by reason of a non-compliance with the mandatory provisions of section 3 (1) was, in substance, the view taken by Horwill and Govinda Menon, JJ , in Criminal Miscellaneous Petition No 2128 of 1948 and by my learned brother and Rajagopalan, J , in Criminal Miscellaneous Petition Nos 200 of 1949 and 91 of 1948 The same view has been taken by Full Bench decisions of other High Courts (see *Murat Patwa* v. *Province of Behar*[1], *Nek Muhammad* v *Province of Behar*[2], *Durga Das* v. *Rex*[3], *Inder Prakash* v *Emperor*[4] and In re *Raj Dhar*[5] The Full Bench decision in *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[6], dealt only with the challenge against the validity of the initial order of detention and did not consider the question whether the continuance of the detention which was legal at its inception could become illegal or improper in view of what happened subsequently or by reason of what the Government subsequently did or failed to do (*See* the observations of Govindarajachari, J , at page 31 of the report)

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1 A I R 1948 Pat 135 (F B)
2 A I R 1949 Pat 1 (F B)
3 A I R 1949 All 148.
4 A I R 1949 All 37
5. (1948) 50 Bom L R 183 (F B)
6 (1949) 1 M L J 1 (F B)

The statutory formalities whose non-compliance renders the continuance of the detention illegal may now be briefly noticed so far as they are relevant to the cases heard by us An order made by an empowered authority under section 2 (1) (*a*) has to be reported forthwith to the Provincial Government together with the grounds of detention and necessary particulars Under section 3 (1) the Provincial Government has to communicate to the detenu the grounds on which the order for his detention has been made together with relevant particulars. Section 3 (2) requires the Provincial Government to place the grounds and the order of detention, the report, if any, received under section 2 (2) and the representation of the detenu before the Advisory Council Section 3 (4) requires the Advisory Council to submit their report to the Provincial Government after a consideration of the materials placed before it The Provincial Government, after considering the report of the Advisory Council is required to pass an order, confirming, modifying or cancelling the order of detention under section 3 (5) As I have already stated, there have been instances of inordinate delay at every one of the stages enumerated above, in the applications that we have heard I have no reason to doubt that these delays were due to inadvertence, administrative difficulties and also perhaps, to a lack of appreciation of the heavy responsibility taken by the Provincial Government in constituting itself both an accuser and a Judge It is true that there is no time-limit fixed by the Act for the performance of the duties above enumerated but the result in law is that these steps have to be taken expeditiously and within a reasonable time, *Murat Patwa* v *Province of Behar*[1]. What is a reasonable time must, to some extent, depend upon the circumstance of each case. The general principle regulating the time factor in these cases is thus stated by Horwill, J , in In re *Venkatachala Thevar*[2]

"It is sufficient to point out that the very magnitude of the powers given to the Government under this Act adds to their responsibility to see that no man is incarcerated a day longer than is necessary without giving good reasons for it "

To the same effect are the observations of Subba Rao, J , in *A K Gopalan* v *District Magistrate, Malabar*[3] Where the delay in communicating the grounds under section 3 (1) or in submitting the case to the Advisory Council under section 3 (2) or in passing final orders under section 3 (5) is unreasonable and unexplained to the satisfaction of the Court, it must be held that the continuance of the detention becomes illegal on that ground. (See *Murat Patwa* v *Province of Behar*[1], *Durga Das* v. *Rex*[4], Criminal Miscellaneous Petition No. 2128 of 1948 and Criminal Miscellaneous Petition Nos 91 of 1948 and 200 of 1949)

Another ground of non-compliance with statutory formalities urged before us in some of these applications is that the grounds communicated to the applicants are so vague and so devoid of particulars that it is not possible for them or any one in their position to make any effective representation against the order of detention It cannot be said that, if this allegation were true, there is merely a breach of a directory provision contained in section 3 (1) and a mere irregularity not affecting the legality of the detention Section 3 (1) casts a peremptory duty upon the Provincial Government to furnish the detenu with all the grounds of detention together with the necessary particulars so as to enable him to make a representation against the legality or the propriety of the order of detention This object would be frustrated if the grounds are vague and general without any particulars and without any attempt at precision or accuracy This provision is meant as a safeguard for the subject against arbitrary detention by the executive and it is our duty to see that this safeguard is not whittled away in practice The grounds and particulars must not be vague, indefinite or incomplete but must convey sufficient information to the detenu to enable him to make an effective representation, supported by facts and figures, if necessary, that the detaining authority was wrong in its belief that his detention was necessary in the interests of public safety or the maintenance of public order The grounds must contain

1 A I R 1948 Pat 135, 138 (F B)
2. (1948) 2 M L J 67
3 (1949) 1 M L J 78 at 80
4 A I R 1949 All 148 (F B)

sufficient details to show that the detention was within the scope and object of the Act. If, in the opinion of the Court, the grounds furnished are so vague, indefinite and insufficient, that the detenus could not fairly be expected to make an effective representation against the legality or propriety of the order for detention then, it must be held that his further detention is illegal or improper. The word "grounds" in section 3 (1) do not merely mean the conclusions of the Government or abstract reasons for their action. They must by themselves or along with particulars which are required to be furnished, include facts and circumstances on which the conclusions or reasons are based. If activities which are normally unobjectionable are considered to be objectionable and therefore relied upon as a ground for detention, then, the circumstances in which or the reasons why those activities are looked upon as objectionable must be indicated to the detenus. The grounds and particulars together form a sort of substitute for a charge. General, vague and indefinite grounds are no grounds at all and the detenu should not be left to his own introspection or guess-work to find out what is being alleged against him.

It is true that facts, grounds and particulars may and often do overlap and that under section 3, the Government is not bound to disclose facts which it considers against the public interest to disclose. The Government is also given the discretion to furnish only such particulars as are, in its opinion, sufficient to enable the detenu to make a representation to the Government. The section draws some but not a clear distinction between grounds and particulars and requires the authority to communicate all the grounds and such particulars as are, in its opinion, sufficient to enable the detenu to make a representation against the order of detention. While facts can be withheld by the Provincial Government on the ground that their disclosure would be prejudicial to the public interest, grounds and particulars cannot be withheld for that reason. It must be remembered that the only opportunity the detenu has of vindicating his character and defending his liberty is to make a representation to the Government under section 3 (1) and it is but fair and reasonable that the grounds and particulars furnished to him should be clear, precise and accurate. Otherwise they would fail to serve the purpose for which they were required to be communicated to him. The detenu must know what he is charged with and what reasons or considerations have persuaded the Government to deprive him of his liberty. There is no doubt a discretion given to the Government in the matter of furnishing particulars but if the particulars are given in such a way as to make it impossible for the detenu to make an effective representation against the order for detention, then we must hold that there has been a failure to comply with the mandatory requirements of section 3 (1) and the detention becomes illegal thereafter. Having regard to the nature of the grounds that have been alleged against the applicants in many of the applications before us, it is necessary to point out that mere membership of a political party or association would not mean that any particular member was acting in such a manner as to necessitate his detention. The grounds and particulars referred to in section 3 (1) must relate to the particular individual who is detained and must disclose the facts which led to the belief that he was acting or about to act or likely to act in a manner prejudicial to public safety or the maintenance of public order. The question is one of substance on the facts and the circumstances of each case and the applicant will have to satisfy the Court that the grounds and particulars communicated to him are so vague and indefinite that there has been no compliance in substance and in effect with the requirements of section 3 (1) of the Act. There is a considerable body of authority in the High Courts of Allahabad, Patna and Bombay, for the views above-stated. (See *Durgadas* v. *Rex*[1], In re *Raj Dhar*[2] and *Nek Muhammad* v. *Province of Behar*[3] and In re *Krishnaji Gopal*[4].)

With reference to the individual cases that have been argued before us, I agree with the conclusions of my learned brother. In view of the importance and frequent recurrence of the questions that I have discussed above, I have added my own observations.

1. A.I.R. 1949 All. 148 (F.B.).
2. (1948) 50 Bom. L.R. 183 (F.B.).
3. A.I.R. 1949 Pat. 1 (F.B.).
4. A.I.R. 1948 Bom. 360.

Crl M P No 190 *of* 1949

Satyanarayana Rao, J—This and the connected petitions under section 491 of the Criminal Procedure Code were heard together as they raise common questions of law under the Madras Maintenance of Public Order Act, I of 1947

The facts and the contentions peculiar to the other petitions will be dealt with separately Under section 2 (1) (*a*) of the Act the District Magistrate, Madura, passed an order of detention, dated 1st April, 1948, and the applicant was arrested on the same day He was kept in police custody at Madura till the 3rd April, when he was removed to the Central Jail, Vellore The grounds of detention were communicated to the applicant on 24th April, 1948, and he submitted his explanation on the 10th May, 1948 The Government referred the matter to the Advisory Council on 14th February, 1949 and the matter is still pending with it This application was filed on 18th January, 1949 and till now no final order was passed by the Government under section 3 (5) of the Act

Mr. N S Mani, the learned counsel for the applicant, raised two contentions . firstly that the order of detention was void *ab initio* and not *bona fide* as the grounds now communicated to the detenu would not justify the order , secondly it was argued that as Government had failed to comply with the mandatory provisions required to be carried out after the order of detention under section 2 (1) was passed the continuance of the detention of the applicant is, in any event, illegal

The first of these contentions may be disposed of shortly The order of detention passed by the District Magistrate who was empowered under section 15 of the Act to take action under the Act states that he was satisfied that the applicant was acting in a manner prejudicial to the public safety and that with a view to prevent him from so doing, it is necessary to detain him The satisfaction of the detaining authority is a condition precedent for the order of detention An order which is legal on the face of it is presumed to have been legally made and the jurisdiction of this Court to go into the validity of such an order was considered by the Full Bench in *Narayanaswami Naidu* v *Inspector of Police, Mayavaram*[1] The Full Bench judgment was based upon an elaborate consideration of the decisions of the Courts in England and in India bearing upon the question, particularly the decisions of the House of Lords in *Liversidge* v *Sir John Anderson*[2] and *Greene* v *Secretary of State for Home Affairs*[3] The learned Chief Justice after examining the authorities formulated under four heads the limitations within which this Court could interfere in the exercise of its jurisdiction under section 491 of the Code of Criminal Procedure with orders made under section 2 of the Act They are —

" (1) when the order is not duly authenticated, as for example, when it is passed by an officer or authority not empowered under section 15 of the Act ,

(2) when the person detained in pursuance of the order is not the person intended to be detained, that is to say, when there is a mistake of identity ,

(3) when there is lack of *bona fides* , and

(4) when it is established that the essential requirements of section 2, namely, the satisfaction of the Provincial Government or an officer or authority empowered under section 15 with respect to the particular person that he is acting or about to act in any manner prejudicial to the public safety or the maintenance of public order and with a view to preventing him it is necessary to direct him to be detained or otherwise dealt with under section 2 (1) of the Act, is not present If it is established that neither the Provincial Government nor the officer or other authority empowered under section 15 has exercised its or his mind on the material placed before it or him, then an order of detention though purporting to be passed under section 2 (1) must be deemed to be not an order under section 2 "

The other learned Judges also agreed with this view Under section 2 of the Act, the satisfaction of the detaining authority is a subjective state of mind and not an objective fact It is not open to the Court to go into the question whether the detaining authority could or could not be so satisfied on the grounds subsequently disclosed to the detenu, nor is it open to the Court to compel the Government

1. (1949) 1 M L J 1 (F B)
2. (1942) A C 206
3 (1942) A C 284

or the detaining authority to disclose the facts or the material or the grounds on the basis of which the order was made There is, however, a duty cast upon the Executive Government under section 3 of the Act to disclose the grounds But so far as the satisfaction is concerned, it is the satisfaction of the Provincial Government or of the empowered authority, as the case may be, and not that of the Court. In the words of the learned Chief Justice in the Full Bench —

"If these grounds do not exist, it is well established on the highest authority that this Court cannot investigate the sufficiency of the material or the reasonableness of the grounds upon which the Government or the empowered officer or authority had been satisfied It is not competent for this Court to call upon the Government or the detaining authority to disclose the information and material on which it or he was satisfied as to the necessity for the detention of the person concerned The satisfaction required by the section is the satisfaction of the Government or the empowered authority and not the satisfaction of this Court There is no question of fact which can be submitted to this Court in this matter This position was fairly conceded by learned counsel appearing on behalf of the petitioners"

Govindarajachari, J., the other learned Judge, expressed the same view at page 36 as follows —

"Negatively it can be said that the sufficiency of the available material or information to justify the order of detention and the question whether the officer concerned could be said to have reasonable grounds for the issue of the order in question are not matters which are within the cognisance of the Court The satisfaction is the satisfaction of the officer He is the sole judge and once the conclusion is reached that he was satisfied the detenu cannot invite the Court to go behind it and dissect the reasons which weighed with the officer and find out for itself whether the order should have been issued While the satisfaction of a properly constituted authority is a condition precedent to the issue of an order of detention, whether circumstances called for the issue of such an order is a matter entirely for its consideration and nobody else's"

Govinda Menon, J, also was of the same opinion The learned Judge states at page 49 .—

"It is not open to the Court to find out whether the grounds on which the Provincial Government is satisfied are sufficient Different standards of satisfaction are likely to exist in the case of different individuals even if the society were ideal In the society as it is constituted to-day, we cannot expect the same standard in every individual so that if the executive authority states *bona fide* that it is satisfied, this Court cannot say that it is not a proper or valid satisfaction"

The same view was also taken by the other High Courts construing similar provision in the Public Safety Acts in the respective Provinces

It was argued that if the grounds disclosed are such as would not justify in the opinion of the Court, the conclusion that the detenu was acting or was about to act in a manner prejudicial to public safety or the maintenance of public order, then, the inference should be drawn that the order was not *bona fide* and that this Court would have the jurisdiction to interfere in such a case under category (3) referred to by the learned Chief Justice in the judgment of the Full Bench Even if the grounds do not warrant the making of an order under section 2 of the Act, and the decision of the authority concerned that it was so satisfied is erroneous, it cannot be inferred that either the Provincial Government or the detaining authority were actuated by malice in making the order and that therefore it is *mala fide* A judgment, however erroneous it may be, cannot be held to be a *mala fide* judgment. The discretion under the section of passing an order of detention if the condition is satisfied is vested in the authority concerned and it cannot be questioned.

It was contended on behalf of the applicant that the Full Bench while laying down that the satisfaction cannot be questioned and canvassed in a proceeding under section 491, Criminal Procedure Code, placed no limit on the grounds open for consideration by the detaining authority and that to take an extreme case, if a man was detained under section 2 (1) of the Act on the ground that his nose was long, it would not be open to this Court to consider the legality of the order of detention This contention, no doubt, has considerable force, but, in my opinion, there is a limit and a clear line of demarcation regarding the grounds which are open for consideration by the detaining authority and the Full Bench was not called upon to consider and lay down the limits of that demarcation. It must be remembered that the power of the Provincial Legislature to enact a law of

the kind now under consideration is derived under item 1, list II (Provincial Legislative List) of the Government of India Act, 1935, which is as follows —

> "Public order (but not excluding the use of His Majesty's naval, military or air forces in aid of the civil power), the administration of justice, constitution and organisation of all Courts, except the Federal Court, and fees taken therein, *preventive detention for reasons connected with the maintenance of public order*, persons subject to such detention" (The italics are mine)

The power to legislate is for preventive detention for reasons connected with the maintenance of public order and the preamble of the Act (Madras Act I of 1947) states —

> "Whereas for the maintenance of public safety and to prevent and put down disorders involving menace to the peace and tranquillity of the Province, it is necessary to provide for preventive detention, imposition of collective fines, etc, etc, it is hereby enacted as follows"

The power conferred on the Legislature and the preamble to the Act make it clear that the object of the Legislature is preventive detention and the basis on which the order for detention is made is that a particular person is acting or about to act and after the amendment of 1948, or is likely to act, in a manner prejudicial to the public safety or the maintenance of public order and that therefore with a view to prevent him from so acting, it is necessary to make an order of detention The acts which justify an order of detention under the Act are acts which are prejudicial to the public safety or the maintenance of public order The person sought to be detained must be one who is either acting in such a manner or is about to act in such a manner or is likely to act in such a manner The limitations, therefore, on the grounds that are open to the detaining authority for consideration and are permissible are the acts which are prejudicial to public safety and the maintenance of public order The grounds, therefore, must be grounds which lead to the inference that the person concerned is acting or is about to act or is likely to act in a manner prejudicial to public safety or the maintenance of public order. If the grounds, therefore, are not within the ambit of the Act, the order cannot be justified The Full Bench[1] had not to consider and was not called upon to consider to what extent the acts of a person are permissible and can be taken into consideration under section 2 of the Act by the authority concerned The illustration that is given in the course of the argument by the learned Advocate of a person having a long nose and detained on that account under section 2 (1) of the Act would be an instance of a ground which is entirely outside the purview of the Act and an order of detention based upon material which is not within the ambit of the Act would be wholly illegal. Of course, as pointed out by the Full Bench of the Bombay High Court in In re *Rajdhar*[2], if the grounds disclosed contain grounds, some within the ambit of the Act and some outside it, the order of detention would be vitiated, wholly as in that event, it would be impossible to say which of the grounds and to what extent the detaining authority was influenced by acts outside the Act in making the order of detention If, however, some of the grounds are good and some are vague and indefinite and uncertain, the grounds which are uncertain and vague may be ignored and may be treated as non-existing, and the order of detention can be justified on the grounds which are definite and certain. This is also the view expressed by Chagla, O.C J, in the Full Bench of the Bombay High Court In my opinion, that decision affords a clear line of a demarcation between grounds which are permissible under the Act and the grounds which are not permissible under it in making an order of detention under section 2 of the Act. In dealing with the several petitions now before us, we have to bear these principles in mind in arriving at a correct decision.

It was also argued on behalf of the applicant that it will be open to us to go behind the Full Bench judgment and reconsider the position whether there is justification for the view expressed by the Full Bench that the satisfaction of the detaining authority cannot be canvassed in a proceeding under section 491, Criminal Procedure Code. No reasons are given in support of this extreme contention except inviting us to reconsider the authorities relied on in the judgment of the

1. (1949) 1 M.L.J. 1 (F.B.). 2. A.I.R. 1948 Bom. 334 (F.B.).

Full Bench[1] and I see no reason to accede to this request The decision of the Full Bench is clear and was based, if I may say so with respect, upon a careful consideration of all the authorities bearing on the question and it will be, in my opinion, an unnecessary waste of time to reconsider it

The effect of non-compliance of the Executive Government with the various steps laid down under the Act, after the order of detention under section 2 was passed till the stage of a final order under section 3 (5) on the legality of the continuance of the detention is a more difficult question The Full Bench was concerned only with the original order of detention under section 2 This was made clear in the judgment of Govindarajachari, J, at page 31 of the Madras Law Journal report The learned Judge observed

"The challenge in every one of the cases involved in the batch of applications before us is a challenge against the order of detention itself and not that even if the order was valid at its inception the continuance of the detention has become illegal or improper in view of what happened subsequently or by reason of what the Government subsequently did or failed to do I say this merely to guard myself against being understood as having decided anything more than what is strictly required by the applications under consideration"

The Full Bench judgment, therefore, does not hold us in deciding this difficult question

The object of the Act, as stated already, is preventive detention and not punishment. The preliminary step under the Act is an order of detention under section 2 (1) which is conditional on the satisfaction of the detaining authority The final step contemplated by the Act is the passing of the order by the Provincial Government under section 3 (5) of the Act While the order under section 2 may be passed either by the Provincial Government or by an officer or authority to whom the power was delegated under section 15 of the Act, the subsequent steps should be taken and the final order itself should be passed by the Provincial Government. The officer or authority empowered under section 15 after making an order of detention under section 2 (1) has forthwith to report the fact to the Provincial Government together with the grounds on which the order was made, along with such other particulars as will have a bearing on the order [section 2 (2)]. After this, the officer or authority empowered under section 15 has no statutory function to discharge The next step after the order of detention was made, is provided by section 3 (1) Under it, the Provincial Government has to communicate to the person affected by the order

"so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes a representation against the order"

There is no time-limit fixed under the Act for the Provincial Government to communicate this information After the receipt of the grounds, the person detained has got the right to make a representation to the Government and that very section enjoins upon the Provincial Government to inform the person of his right to make such a representation and also to afford him an opportunity of doing so After the representation is received, the next step is, the Provincial Government has to place the matter before the Advisory Council constituted under the Act The Advisory Council, thereafter, after considering the material placed before it and after calling for such further information from the Provincial Government or from the person concerned has to submit a report to the Provincial Government, and after the receipt of that report, the final step is, the Provincial Government has to pass an order under section 3 (5) either confirming or modifying or cancelling the order made under sub-section (1) of section 2. Under section 4, the order of detention continues in force for a period of six months from the date on which the final order under section 3 (5) was passed by the Provincial Government But, of course, it is open to the Provincial Government to release the detenu even before the expiry of the period of six months For taking the various steps above described, no time-limit is fixed under the Act. It must be remembered that the Act, interfered with the liberty

1 (1949) 1 M L J 1 (F B)

of the subject without any trial and without any other remedy by way of appeal or otherwise to any other authority except the restricted and limited right of making a representation to the Government and through it to the Advisory Council whose opinion, however, is not binding on the Government This restricted right of representation, therefore, should not be still further curtailed by non-observance of any of the steps laid down by the Act We have instances in which a final order under section 3 (5) was not passed by the Provincial Government even though the detention has continued in force for more than several months, in some cases nearly a year The result of this is if ultimately the Government were to decide after considering the representations made by the detenu that the person should be set at liberty, such person would have unjustly been deprived of his liberty for no fault of his Even if the Government were to decide that the original order of detention should be confirmed under section 3 (5), the result even in such a case would be that while the Government would be entitled to keep him in custody for a period of six months only from the date of the final order, by reason of the delay on the part of the Provincial Government in taking the steps contemplated by the Act, his detention would be unnecessarily, and perhaps unjustly, prolonged which is contrary to the spirit of the Act

It is therefore necessary to consider to what extent the provisions of the Act enjoining the Provincial Government to take certain steps are mandatory and whether if those provisions were not observed properly by the Provincial Government, the continuance of the detention would become illegal or improper within the meaning of section 491 of the Code of Criminal Procedure There is no time-limit fixed by the Act for either communicating the particulars and grounds under section 3 (1) or for referring the matter to the Advisory Council after the representation of the detenu is received, or even to pass a final order under section 3 (5) after the report of the Advisory Council is received The absence of the time-limit is probably responsible for the inordinate delay we have noticed in some of these petitions on the part of the Government in taking the steps It is an accepted rule of construction of a statute, that where no time-limit is fixed for the doing of an Act enjoined by it, the act should be performed within a reasonable time and it is unnecessary to consider the authorities in support of this rule of construction and it would be sufficient to refer to the Full Bench decision of the Patna High Court in *Murat Patwa* v *Province of Behar*[1] In the petitions before us, there is no complaint of unreasonable delay in furnishing the grounds under section 3 (1) We may however observe that the question was considered by Subba Rao and Mack, JJ, in *Venkataraman* v *Commissioner of Police, Madras*[2], in which the question that arose for consideration was the effect of the delay caused by the detaining authority in communicating to the Provincial Government the grounds of detention under section 2 (2) of the Act The learned Judges held that the subsequent non-compliance with the provisions of the Act after an order of detention under section 2 (1) was made, would not affect the legality of the original order of detention and would not make it *ab initio* void. They were also of opinion that the delay in communicating the grounds under section 2 (2) would not even affect the further detention. In dealing with the contention that by reason of the non-observance of the subsequent provisions of section 2 (2), the continuance of detention became illegal, Subba Rao, J, observed at page 92 :

> "This argument ignores the distinction between the order of detention and the procedure prescribed for enabling the aggrieved party to seek redress The petitioner, as we found, was legally detained under section 2 (1) of Madras Act I of 1947 Under section 4 of the Act this order of detention shall be in force for six months from the date on which it is confirmed or modified under sub-section (5) of section 3 If the authority concerned did not carry out his statutory duties, the petitioner could have taken the appropriate remedy to compel him to perform his duty He may have other remedies if he was prejudiced by the breach of a statutory duty by the authority concerned But in our view the non-compliance with the provision of sub-section (2) to section 2 could not make the detention illegal In any view as the order was communicated to the Government and the grounds for detention were duly served on the petitioner it would be impossible to hold that the detention of the petitioner at present is invalid "

1. A I R 1948 Pat. 135 (F B) 2 (1949) 1 M L J. 90.

The question of the effect of the delay in communicating the grounds to the Provincial Government under section 2 (2) by the detaining authority does not directly arise for consideration before us. We are, however, unable to see what remedy a person would have to compel the detaining authority to perform the statutory duty of communicating the grounds under section 2 (2) If the authority concerned is outside the original jurisdiction of the High Court, even a *Mandamus* would not lie It is difficult to see what other remedies a person in such a situation would have if there was a clear breach of a statutory duty by the authority concerned. The man was deprived of his liberty, was in jail and there is no means of enforcing the statutory obligation to communicate the grounds under section 2 (2) to the Provincial Government The question came up for consideration before a Full Bench of the Patna High Court in which the delay complained of was the delay in communicating the grounds under section 4 of the Bihar Maintenance of Public Order Act corresponding to section 3 of the Madras Act If the grounds of detention were not communicated to the detenu within a reasonable time and there is no acceptable explanation for the delay, the further detention becomes illegal If the complaint before us in the petitions now under consideration was one of delay in communicating the grounds under section 2 (2) or in communicating the grounds under section 3 (1), in the light of the decision of the Full Bench of the Patna High Court, the decision in *Venkataraman* v *Commissioner of Police, Madras*[1], in my view, would require reconsideration and would have necessitated a reference to a Full Bench for an authoritative decision on the point But as the objection before us is of a different nature, it is unnecessary to follow such a course

The main ground of complaint before us in the several petitions is that the Provincial Government failed to carry out the duty of communicating to the detenu the grounds on which the order has been made, and such other particulars as are, in their opinion, sufficient to enable the detenu to make an effective representation to the Government The contention is that the grounds are vague, indefinite and uncertain and that no particulars were given in any of the cases As the detenu was not placed by the Executive Government in a position of making an effective representation to Government, he was deprived of the usefulness of the only remedy that is open to him under the Act to prove to the satisfaction of the Government and the Advisory Council that he was not guilty of any of the activities attributed to him The relevant provision of section 3 (1) is .

"Where an order in respect of any person is made by the Provincial Government under sub-section (1) of section 2 or where any such order is made by any officer or authority subordinate to them, after receipt of the report specified in sub-section (2) of that sction, the Provincial Government shall communicate to the person affected by the order, so far as such communication can be made without disclosing the facts which they consider it would be against the public interest to disclose, the grounds on which the order has been made against him and such other particulars as are in their opinion sufficient to enable him to make, if he wishes, a representation against the order"

This provision is mandatory and imposes on the Provincial Government a duty of communicating to the detenu the grounds on which the order was made. So far as the grounds are concerned, there is no power under the Act to withhold any of the grounds, as the grounds to be communicated are the grounds on which the order has been made which implies that all the grounds should be communicated to the detenu So far as the facts are concerned, it is no doubt left to the Provincial Government to consider whether all the facts should be disclosed to the detenu or only some of them They are not bound to disclose all the facts if they consider that such a disclosure would be against public interest The Act makes a distinction between facts, grounds and particulars While all the grounds have to be communicated and such facts as would not endanger public interest alone could be disclosed, so far as the particulars are concerned, the Government are to communicate to the detenu so much of the particulars as would be sufficient in their opinion to enable the detenu to make a representation against the order The Provincial Government, therefore, has to decide whether the particulars given and disclosed would be

1. (1949) 1 M L J. 90

sufficient to enable the detenu to make a representation against the order I the grounds are vague and uncertain, it would be open to the Government to supplement them by giving particulars to enable the person concerned to make a proper representation If the grounds communicated are vague and uncertain, and no particulars are given, does the non-observance of the rule make the further detention illegal or improper?

Under the Act the liberty of the subject is curtailed without trial by Courts established by law and the only safeguard provided by the Act for the detenu is the right to make a representation to the Advisory Council through the Provincial Government This right is a substitute for a trial under ordinary law In order to enable the detenu to present his case properly he should know the grounds and the particulars of the grounds on the basis of which an order for detention is made under section 2 (1) The duty of providing this information was laid by the Act on the Provincial Government The power conferred upon the Provincial Government of curtailing the liberty of the subject by the Act should, in my opinion, be exercised subject to the conditions and limitations imposed by the Act It is the function of the Court to see whether the conditions laid down by the statute are properly carried out or not If they are not duly observed and fulfilled, the very foundation of the power to continue to detain the person comes to an end and the further detention becomes illegal If the grounds furnished are no grounds at all in the sense that they convey no information to the person detained, or even if they are grounds outside the purview of the Act, the continuance of the detention cannot be justified It may not be necessary that the Provincial Government should furnish legal evidence or proof of the accusations against the detenu, as in cases where he is charged with a crime, but the information furnished must be such which enables the detenu to present his case effectively

In *Dale's case*[1] dealing with an application for a writ of *habeas corpus*, the rule requiring the observance of the steps laid down by law and its effect upon the detained person is stated thus by Brett, L J, (page 461)

"It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the Court will not allow the imprisonment to continue"

And again, at page 463

"I desire to state that, although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form, because, as I said before, I take it to be a general rule that the Courts at Westminster will not allow any individual in this kingdom to procure the imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of her Majesty's subjects"

Cotton, L J, in the same case concurred with Brett, L J, and stated the rule in his own words as follows (at 469)

"I quite agree with Brett, L J, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form Here, however, the departure from the correct procedure is not, in my opinion a mere matter of form, but is a matter of substance'

The other High Courts, which considered a similar question under the Public Safety Act, have unanimously held that where the particulars given are indefinite and vague and uncertain there is no compliance with the provisions of the Act and the continuance of the detention is illegal Vide *Nak Muhammad* v *Province of Behar*[2] In re *Krishnaji Gopal Brohme*[3] and *Durgadas* v *Rex*[4] I respectfully agree with the reasons given in those judgments for holding that where there is no substantial compliance with the provisions of section 3 of the Act, the continuance of

1 (1881) 6 Q B D 376
2 A I R 1949 Pat 1 (F B)
3 A I R 1948 Bom 380
4 A I R 1949 All 148 (F B)

the detention becomes illegal It is unnecessary to examine these decisions at length

The Court of Appeal in *Greene's case*[1] considered the effect of an error in the grounds communicated to the detenu on the continuance of the detention The detenu there was informed of the grounds on which the order of detention was made and was also furnished with the particulars to enable him to present his case to the Advisory Council. The grounds communicated stated that he was concerned in one kind of acts endangering public safety, while the order of detention was made in fact, on a totally different ground. The detenu, however, was served with a true copy of the actual order and the particulars clearly stated the correct ground of detention He did not, however, draw the attention of the Advisory Council to the material discrepancy between the two. Goddard, L J , with whom the other Lord Justices agreed, held

"That a mistake in the document served on the detenu after he was in custody would not invalidate the original order of detention nor does it render its continuance invalid. There was nothing to show that the detenu was in any way prejudiced by mistake "

This aspect of the case was referred to and dealt with by the House of Lords on appeal The House of Lords[2], agreed with the Court of Appeal, that as no prejudice was caused to the appellant by the error in the document sent to him by the Advisory Committee, the detention or its continuance was not illegal Lord Macmillan at page 298 observed

"The mistake, the occurrence of which your Lordships deplore, does not in any way affect the validity of the detention order which is the answer to the appellant's application It affects the due observance of the procedure prescribed for the further consideration of the case of a person who is *ex hypothesi* under lawful detention Consequently the mistake affords no ground for invalidating the detention order and does not help the appellant in his present application "

The test applied by the House of Lords was whether by reason of the mistake, there was no prejudice to the detenu and if there was no prejudice no question of its effect on the detention arose for consideration, particularly as in that case the mistake was one which could be remedied

In cases where on the basis of vague, indefinite and uncertain grounds a representation was made by the detenu to the best of his ability and after the matter was considered by the Advisory Council, the Provincial Government passed a final order of detention, there was no further means of remedying the defect and it cannot be said that, when a Provincial Government failed to discharge its duty, by the fact that the detenu did not complain at the time of making the representation of want of particulars he is precluded from agitating the question now The grounds, therefore, in each of the petitions before us have to be examined in the light of these principles

In some of the petitions we have noticed that there is considerable delay on the part of the Provincial Government in referring the matter to the Advisory Council even after the representation by the detenu was received In other cases, there was also delay in passing final orders after the report of the Advisory Council was received. The Government, it must be mentioned, has to deal with a number of applications of this nature and actually time would be taken in examining the representations made in the light of the information available and in referring the matter to the Advisory Council. It may be that the Provincial Government requires in certain cases further information from the District Magistrates and that might occasion some delay Making due allowance for all these considerations, a delay of several months, if not properly explained, cannot be altogether ignored The question of the effect of the delay in referring to the Advisory Council was considered by me and Rajagopalan, J , in Crl M P No 200 of 1949, and we stated in the judgment in that case

"We should however be inclined to say that any period in excess of the statutory limit of six months made applicable to an order under section 3 (5) would by itself be proof *prima facie* of unreason-

1. (1942) 1 K B 87 2 1942 A C 284.

ableness But whether delay in any given case is unreasonable or not has to be judged with reference to the circumstances of that case, taking also into account that the period was far in excess of six months"

Horwill and Govinda Menon, JJ, observed in Crl M P No 2128 of 1948 that

"Any further delay beyond a fortnight after the date of the order passed by the learned Judges would be sufficient to show that further detention would be illegal The delay, therefore in the two stages, namely, in referring the matter to the Advisory Council and in passing a final order under section 3 (5) after the report from the Advisory Council was received, if unreasonable and is not properly explained would have the effect of making the continuance of the detention illegal"

In the present application, excluding the activities in 1946 and before August, 1947, when the applicant was released from detention, the only ground communicated to him would not, in my opinion, convey any information, nor does it refer to any activities on his part showing that he is acting in a manner prejudicial to the public safety and its maintenance The Communist party was not declared illegal, in which case, it will be open to the Government to take action under section 17 of the Criminal Law Amendment Act, if the person continued thereafter to associate himself with that party Even if a party is declared illegal, the mere association with that party would not justify the inference that the person was acting in a manner prejudicial to public safety In the Allahabad and Patna cases already referred to, which deals with cases of members of Rashtriya Swayam Sewak Sangh, it was pointed out that their mere association as such with the party after it was declared illegal is not an activity which endangers public safety We are not concerned with the objects of a particular political party, nor are we prepared to accept the argument advanced on behalf of the applicants that the proceedings under the Act are actuated by political animosity and that therefore they are *mala fide* We are concerned only with the question whether the grounds communicated are definite and are such as would enable the applicant to present his case properly to the Provincial Government To take a sample of the grounds communicated to the present applicant, one of the grounds stated that the applicant ridiculed the proposals of the Government to award compensation to the zamindars and inamdars; that he was also actively engaged in the Municipal election propaganda to get Communist candidates elected These grounds besides being vague, are, in our opinion, entirely outside the purview of the Act A political party is entitled to take part in municipal or other elections and for that reason alone it cannot be said that the activity of a person concerned is such as to endanger public safety, nor his criticism of the proposals of the Government to award compensation to the zamindars and inamdars under legislation now pending sanction before the Governor-General for the abolition of the zamindaries No dates are given as to when and where the person concerned ridiculed the policy of the Government And the only other ground that is added is that he spread alarmist ideas about the number of workers that would be retrenched if the recommendations of the Committee were given effect to Nobody knows and there is nothing to indicate what this Committee is and what the reference to the alarmist ideas about the number of workers to be retrenched is The grounds are not outside the purview of the Act but are indefinite and vague. With these grounds, if they can be called grounds, it is impossible for any person to make any representation to the Government to show his innocence and to establish that he is not guilty of any of the conduct attributed to him We are therefore satisfied that as the statutory requirements have not been satisfied and as even no particulars were given, the continuance of the detention of the applicant is not justified We direct, therefore, that the applicant should be set at liberty forthwith

Crl M P No 191 *of* 1949—The applicant in this case was arrested under section 151, Criminal Procedure Code, on the 27th March, 1948 The order of detention under section 2 (1) of the Act was passed on 9th April, 1948, by the District Magistrate, Tanjore The District Magistrate states in the order that the applicant is acting, or about to act in a manner prejudicial to public safety, and maintenance of public order He was removed to Central Jail, Vellore, on 12th April, 1948.

The grounds of detention were furnished to him on 21st April, 1948 On 11th May, 1948, the applicant sent a representation to the Provincial Government The matter was referred to the Advisory Council on 22nd June, 1948 On 22nd December, 1948, the Advisory Council recommended that the applicant should be released. The Provincial Government, however, did not accept this recommendation but confirmed the original order of detention under section 3 (5) of the Act

In this case also the grounds alone were communicated and no particulars were given The only substantial ground is that he advocated acts of violence and was engaged in intimidating local and imported workers The ground does not say when and where he advocated acts of violence and the reference to intimidation of local and imported workers is wholly unintelligible and is indefinite in that it does not even give the approximate time and date Some of the grounds are outside the purview of the Act There is no compliance with the provisions of section 3 (1) of the Act and we, therefore, direct that the petitioner should be set at liberty forthwith

Crl M P No 192 *of* 1949 —The applicant in this case was arrested under section 151, Criminal Procedure Code, on 2nd May, 1948, and an order of detention was passed on 15th May, 1948, and thereafter he was removed to the Vellore Jail The grounds were communicated on 6th June, 1948 He submitted his representation on 29th June, 1948, and the matter was referred to the Advisory Council on 14th July, 1948 The Advisory Council recommended by its report, dated 20th January, 1949, that he should be released, but the Provincial Government passed a final order on 15th February, 1949, confirming the original order of detention

On an examination of the grounds, we are satisfied that the grounds contain sufficient particulars and are not vague and indefinite The original order of detention was objected to on the ground that the authority of the District Magistrate passing an order under section 2 (1) was not disclosed in the order of detention It is not necessary to state the authority and if the petitioner had raised the objection and seriously contended that the District Magistrate was not empowered under section 18 of the Act, the order would have been easily produced We therefore think that there is no substance in this contention

It was also argued that the order of detention was passed after he was arrested under section 151, Criminal Procedure Code, and this indicated that the order was not *bona fide* Section 151, Criminal Procedure Code, authorises a police officer to arrest a person designing to commit a cognisable offence, and, therefore, if there was material justifying the action under section 2 (1) of the Act, there is no reason to hold that the order of detention is illegal We think, therefore, that there is no case for interference made out in this application The application is therefore dismissed.

B V V

Crl M P Nos 190 *&* 191 *allowed and*
Crl M P No 192 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE RAJAGOPALAN

Ramaswami Chettiar *Petitioner**

Indian Penal Code (XLV of 1860), sections 186 and 342—Government Firka Supply Officer entering accused's house to seize paddy—Absence of authority to seize—Obstruction to officer and locking him in—Offence

The accused was a villager, who on the day of the occurrence had in his possession 17½ bags of paddy The Firka Supply Officer had come to that village to procure the surplus paddy and he had with him a list apparently containing names of persons from whom he had to procure The name of the accused was admittedly not in that list When the officer entered the house of the accused and found the 17½ bags, he asked the accused if he had a permit and when the accused stated he had none, asked him to surrender the entire quantity The accused resisted the claim, whereupon the officer recorded the statement of the accused and declaring his intention to seize the stock went inside the house The accused then locked the outer door and the officer had to stay inside till he was released next morning by the village munsif The accused was convicted for offences under sections 186 and 348 of the Code In revision,

Held, that the conviction under section 186 cannot be sustained There was no authority to the officer to seize any paddy in the house of any ryot and there was nothing to indicate that any portion of the 17½ bags was surplus within the meaning of the rules, and in the circumstances the officer could not be said to be discharging his function as a public servant, when he entered the house with the avowed intention of taking away the 17½ bags of paddy But, though the accused had the right of private defence of property, in keeping the officer locked up far beyond the limits dictated by the need to protect the property and to prevent criminal trespass, the accused committed an offence under section 342

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Sub-Divisional Magistrate, Erode, dated 9th December, 1947, in C A No 43 of 1947, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Dharapuram, in C C No 138 of 1947

K S Jayarama Aiyar for *C K Venkatanarasimham* for petitioner.

Balasubramaniam for the Public Prosecutor for the Crown

The Court delivered the following

ORDER —There need be no dispute about the facts of the case at this stage. The accused-petitioner was a resident of Nochipalayam and on 6th March, 1947, he had in his possession 17½ bags of paddy P W 1 the Firka Supply Officer, reached the house of the accused at about 8-30 P M, or possibly a little later P W 1 had come to that village that day to procure the paddy, apparently, the surplus paddy within the meaning of G O Mis No. 467, dated 15th June, 1946, published at page 526 in the *Fort St George Gazette*, dated 25th June, 1946, (part II) P W 1 had a list with him, the "D" list apparently containing the names of the persons from whom P W 1 had to obtain that surplus paddy It was a common ground that the name of the accused was not in that "D" list. When P W 1 entered the house of the accused and found 17½ bags of paddy, he asked the accused if the latter had a permit for the possession of those bags. When the accused stated that he had no such permit P W 1 asked the accused to surrender the entire quantity, but the accused resisted that claim After recording Exhibit P-1, the statement the accused made, which, however, he refused to sign, P W 1 declared his intention of seizing the stock and went inside the house, apparently, to effect that seizure P W 1 himself explained that what he meant by seizure was "to seize and remove the stock". When P W 1 went inside the house the accused locked the outer door P W 1 had to stay inside that house till he was released the next morning by the village munsif, P W 4, who had to open the lock on the front door.

The appellant was convicted under section 342 and section 186, Indian Penal Code. The conviction under section 186, Indian Penal Code, cannot be sustained There is nothing in the G O No 467, dated 15th June, 1946, which I can construe as authorising the Firka Supply Officer to seize any paddy he found in the house of any ryot As I have already pointed out it was common ground

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* C R C No 1362 of 1947 (Cr R.P No. 1257 of 1947) 5th November, 1948.

that the name of the accused was not included in the "D" list There was nothing to indicate that any portion of 17½ bags of paddy which the accused had in his possession was surplus within the meaning of those rules What exactly P W 1 meant by a permit was not clear from the evidence on record No doubt rule 5 of the rules promulgated in G O No 467 states,

> "that the officer could seize stocks of such paddy or rice in respect of which he has reason to believe that a contravention of this order has been committed"

What constituted the contravention of an order? Was it possession of surplus as defined by the rules or was it a refusal to surrender that surplus? In the absence of proof that any portion of the 17½ bags of paddy constituted such surplus P W 1 could have no reason to believe that possession of any portion of that stock was in contravention of the order From the rules that have been brought to my notice, I am unable to gather any authority for P W 1 to have seized and removed the paddy in the possession of the accused on the night of 6th March, 1947 Quite obviously P W 1 was not discharging his function as a public servant when he entered the house of the accused that night with the avowed intention of taking away the 17½ bags of paddy The conviction and sentence under section 186, Indian Penal Code, are set aside

The next question is whether the conviction under section 342, Indian Penal Code, can be sustained. Mr Jayarama Aiyar for the petitioner relied on *Doraiswami Pillai* v *Emperor*[1], which was followed by Govinda Menon, J, in *Muni Reddi* v *Emperor*[2], and contended that section 104, Indian Penal Code, should apply and exonerate the accused of all criminal liability in locking up P W. 1 Section 99, Indian Penal Code, which bars the right of private defence against an act attempted to be done by a public servant acting in good faith under colour of his office though that act may not strictly be justifiable by law, may not help the prosecution in the absence of proof of good faith Section 52, Indian Penal Code, lays down,

> "Nothing is said to be done or believed in 'good faith' which is done or believed without due care and attention"

Quite obviously, P.W 1, who was new to his job, was not even familiar with the rules, nor was he aware of the exact scope of G O No. 456 He had, apparently, no idea of what constituted stock or what constituted surplus stock But section 104, Indian Penal Code, will have to be read subject to the provisions of section 105, Indian Penal Code The accused had certainly the right of private defence against the trespasser and in law what P W 1 committed when he entered the house of the accused with the intention of wrongfully taking the paddy was a criminal trespass—and the accused had a right to eject the trespasser The right of private defence to the property terminated when the reasonable apprehension of danger to the property terminated Though section 105, Indian Penal Code specifies

> "the right of private defence of property against criminal trespass continues as long as the offender continues in the commission of criminal trespass"

it cannot be held that P W 1 was guilty of continued criminal trespass, that he had to stay in the house till the morning was not of his seeking In keeping P W. 1 locked up far beyond the limits dictated by the need to protect the property and to prevent criminal trespass the accused committed an offence punishable under section 342, Indian Penal Code

The conviction of the appellant under section 342, Indian Penal Code, is confirmed Considering that it was P W 1 who had put himself in the wrong in the first instance, I do not think it is necessary to maintain the sentence that was awarded to the appellant The sentence is reduced to the period of imprisonment already undergone

V P S. *Conviction under S. 342, I P C, confirmed. Sentence reduced.*

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1. (1903) 13 M L J 285 I L R 27 Mad 52 2 (1948) 1 M L J 377.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE GOVINDA MENON AND MR JUSTICE MACK

G Narayanaswami Naidu *Petitioner* *

v

The Inspector of Police, Mayavaram and another *Respondents*

Madras Maintenance of Public Order Act (I of 1947)—*Insertion of wrong section in the order of detention—Effect on the legality of the order of detention*

The mere circumstance that a wrong section is inserted in the order of detention cannot by itself be taken as leading to the only conclusion that the District Magistrate did not bestow any attention on the action he took, but merely acted or purported to act in a stereotyped fashion Where the operative portion of the order makes definite mention that the person to be detained was acting in a manner prejudicial to the maintenance of public order and that with a view to prevent him from so doing, it is necessary to detain him, there is no necessity to make mention of any particular section of the statute

Petition under section 491, Criminal Procedure Code, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a *Habeas Corpus* directing the second respondent to produce the petitioner before the High Court for being set at liberty.

A K Pillai for *Row and Reddy* and *S Krishnamurthi* for Petitioner

The Public Prosecutor for the Crown

The Court delivered the following

ORDER—The Full Bench[1] has now decided that the powers of this court to interfere under section 491, Criminal Procedure Code, are strictly confined to the various categories enumerated in the judgment and unless any one of such categories exists, this court cannot interfere with an order of detention made by the Provincial Government If the petitioner can bring his case within one of these instances, then according to the Full Bench, the detention is not one made in exercise of the powers conferred under the Act or in accordance with the provisions of the Act

Mr A K Pillai contends that the Provincial Government in ordering the detention of the petitioner was actuated by *mala fides* with the result that the third circumstance mentioned in the judgment of the learned Chief Justice can be invoked in his client's favour and that the petitioner is therefore entitled to be released. For this argument, he placed reliance on the affidavit of Mr K G Sivaswamy, dated the 24th May, 1948, wherein the deponent states that the grounds of detention served on the petitioner are not true to facts It is pertinent to observe that Mr. Sivaswamy is a permanent resident of Madras having his abode in No 8, Westcott Road, Madras, and the grounds of detention relate to facts and circumstances which occurred in the Tanjore district and therefore Mr Sivaswamy could have had no personal knowledge of what happened in Tanjore Even if we are to accept the statements contained in that affidavit they amount only to this, that Mr. Sivaswamy believes that the petitioner has not committed any of the acts mentioned in the order of detention From the mere circumstance that a senior member of the Servants of India Society does not believe that the acts mentioned in the order of detention can be attributed to the petitioner, it cannot be said that the Provincial Government has acted *mala fide* We have carefully perused the grounds of detention submitted to the Provincial Government by the District Magistrate as well as the Government Order, dated 8th April, 1948, Memorandum, No 334/48-8, and we cannot find any reason to doubt that the action of the Provincial Government was *mala fide*

It is next contended by Mr Pillai that the order of detention has been made by an authority not competent to make it and if that is so, the provisions of Madras Maintenance of Public Order Act, 1947, cannot be invoked against the petitioner. Reliance is placed upon the circumstances that the Government Order referred

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1 (1949) 1 M L J 1 (F B).

* C.M P. No. 1072 of 1948. 31st August, 1948.

to above does not make mention of the fact that it was issued under the authority and by the order of His Excellency the Governor, but is signed only by the Chief Secretary to Government. According to section 59 (1) of the Constitution Act, all executive actions of the Government of the Province shall be expressed to be taken in the name of His Excellency the Governor and since on the face of the order of the Government it does not appear that the action was taken in the name of His Excellency the Governor, learned Counsel strenuously contends that the order of detention does not conform to the Act Even if this is a defect, we are of opinion that it is only one of form and not of substance In *Gas Plant Manufacturing Co., Ltd* v *Emperor*[1], the Federal Court has decided that where instead of the words "Governor-General in Council" a particular order referred to the Central Government, the contention that the order was invalid has to be rejected The learned Public Prosecutor also invites our attention to sub-section (2) of section 59 of the Constitution Act which states that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the rules to be made by the Governor and the validity of an order or instrument which is so authenticated shall not be called into question on the ground that it is not an order or instrument made or executed by the Governor He also informs us that there are rules made under this sub-section empowering the Chief Secretary to issue the order on behalf of the Governor We are not inclined to accept the contention of the learned Counsel for the petitioner that the Government Order, dated the 8th April, 1948, was not issued by order of His Excellency the Governor as contemplated in section 59 (1) of the Constitution Act This contention has therefore no force

Another line of attack is that the detention order made by the District Magistrate on 13th March, 1948, is expressed to be made under section 2 (2) of the Madras Maintenance of Public Order Act, 1947, whereas the provision of law applicable is section 2 (1) of the Act It has to be observed that the District Magistrate was empowered by the Provincial Government to act under section 15 of the Act which lays down that the Provincial Government may direct that any power or duty conferred or imposed on them shall, in such circumstances, and under such conditions, if any, as may be specified in that direction, be exercised or discharged by any officer or authority subordinate to the Provincial Government That the District Magistrate of Tanjore was so empowered under section 15 is not denied and when once that power is given to him, if he takes action under section 2 (1), he has to report under section 2 (2) to the Provincial Government of the action taken by him. The mere circumstance that a wrong section is inserted in the order of detention cannot by itself be taken as leading to the only conclusion that the District Magistrate did not bestow any attention on the action he took, but merely acted or purported to act in a stereotyped fashion as suggested by the learned Counsel for the petitioner. The operative portion of the order makes definite mention that the petitioner was acting in a manner prejudicial to the maintenance of public order and that with a view to preventing him from so doing, it is necessary to detain him In view of this clear exposition, there is no necessity to make mention of any particular section of the statute. Even if it is obligatory to make mention of the particular section of the statute, we are far from satisfied that the mention of section 2, sub-section (2) is not apposite. This objection is overruled.

The last contention of the learned Counsel is that the Madras Maintenance of Public Order Act, 1947, came into force on the 12th March, 1947, and was to remain in force for a period of one year thereafter. The petitioner in this case was arrested by order dated the 13th March, 1948, on which date unless the operation of the Act was extended by the Provincial Government, the Act would not have been in force. Since the Act could not have been in force for more than a year, the delegation to the District Magistrate under section 15 of the Act also could not have enured for more than that period and therefore according to the petitioner at the time he was arrested, it was done by means of an order which was entirely null

1. (1947) 2 M.L J 402 (1947) F L J 71.

and void and without jurisdiction as the District Magistrate had become *functus officio* by that time The learned Public Prosecutor has invited our attention to G O Ms No 446, Public (General), dated 27th February, 1948, printed in Part I, page 168, of the *Fort St George Gazette*, dated 2nd March, 1948, by which the operation of the Act was extended by His Excellency the Governor In view of this order which extended the operation of the Act some days before it had automatically ceased to be in force, it cannot be said that at the time the District Magistrate passed the order, the Act was not in force and moreover it is not disputed that the delegation to the District Magistrate was a very general one which was to enure so long as the Act was to be in force No materials have been placed before us nor has any attempt been made to substantiate the contention that the District Magistrate when he acted on 13th March, 1948, was doing an act for which he was not given any authority This contention has also to be rejected. We have not been shown how this order of detention offends against any of the categories mentioned in the judgment of the Full Bench[1] In these circumstances, it has to be held that the petitioner was validly and properly detained in accordance with the Madras Maintenance of Public Order Act, 1947, and this court has no jurisdiction to interfere with that order and to release him under section 491, Criminal Procedure Code The petition is accordingly dismissed

Mr A K Pillai now states that he did not contend before us that the Act was not in force when the petitioner was arrested But both of us understood his argument in the way stated in the judgment and the learned Public Prosecutor countered that argument by showing us the Gazette notification. Any way we are making this note in response to Mr Pillai's request.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE MACK.

Captain S Sunkavally .. *Appellant* *

v

Singaraju Malaparaju *Respondent.*

Madras House Rent Control Order (1941), *section* 7—*Landlord getting fair rent fixed—If can prosecute suit in Civil Court for eviction of tenant on the basis of termination of tenancy on preceding facts*

Where a landlord applies under the House Rent Control Order for the fixation of fair rent to be paid by a tenant in occupation, he cannot after getting the fair rent fixed continue to prosecute any suit in a Civil Court for eviction on the basis of a termination of the tenancy on preceding facts Two legally inconsistent and incompatible positions are not open to the landlord The landlord may prosecute a suit for eviction on the basis of termination of his tenancy under the ordinary law, but he cannot do so after obtaining a fixation of fair rent by the House Rent Controller on an application on the basis of a clear and specific recognition of the continuation of the tenancy.

Appeal against the order of the Court of Subordinate Judge, Masulipatam, dated 29th November, 1946, in A S No 87 of 1946, preferred against the decree of the Court of the District Munsif, Vijayawada, dated 19th September, 1944, in O S. No 580 of 1943.

P Satyanarayanaraju, M B Rama Sarma and *M A. Narasayya* for Appellant.

K Kameswara Rao and *V Sethumadhava Rao* for Respondent.

The Court delivered the following

JUDGMENT—The appellant is the defendant, a medical practitioner, who from 1st April, 1942, rented a house in Bezwada from the plaintiff-respondent at a rent of Rs 50 There was at the time evacuation from Madras, where the defendant was in practice and also to a lesser extent from Bezwada owing to a war scare from Japanese military potentialities which led to a decrease in rents in both places The appellant in this house he rented in Bezwada started a medical

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1 (1949) 1 M.L J 1 (F B)

* A A O No 54 of 1947 22nd April, 1949.

practice and a nursing home which he is said to be still carrying on On 31st July, 1943, his landlord filed original Suit No 580 of 1943 after notice to quit or pay enhanced rent of Rs 140 a month, for ejectment and recovery of rent at this rate from 1st April, 1942 The District Munsif of Bezwada dismissed the suit so far as it related to ejectment in view of section 7 (*a*) (1) and (2) of the House Rent Control Order, 1941, as amended in 1944 holding that it deprived him of jurisdiction to pass a decree for eviction He however gave the plaintiff a decree for eight months' arrears of rent at Rs 50 a month, the admitted unpaid rent due at this rate , and allowed him to reserve his right to recover in a separate suit the balance of about Rs 51 the tenant claimed in respect of repairs, etc , he had expended on the house The landlord filed an appeal in which the Subordinate Judge remanded the suit for disposal as regards the relief for eviction holding on the strength of *Moothalinda Chetti* v *Venkatesam Chetti*[1], that the District Munsif had jurisdiction to pass a decree for eviction, section 7-A of the amended Act which came into force on 11th July, 1944, having no application to this suit filed on 31st July, 1943 This appeal is against that order of remand

The legal position is now concluded by a Bench decision in *Muhammadunny* v. *Melepurakkal Unnin*[2], by Rajamannar, C J , and Raghava Rao, J , who very recently held this year that the jurisdiction of a civil court to entertain a suit for eviction and pass a decree in such a suit for eviction of a tenant is not expressly or impliedly taken away by any of the provisions of the Madras Non-Residential Buildings Rent Control Order, 1942, despite clause (8) thereof which lays down that the tenant shall not be evicted therefrom whether in execution of a decree or otherwise, and whether before or after the termination of the tenancy except in accordance with the provision of this clause. That Act also contained a clause to the effect that a landlord wishing to evict a tenant in possession shall apply to the Controller for a direction in that behalf These provisions are reproduced in section 7-A of the House Rent Control Order, 1945, and also in section 7(1) of the Madras Buildings (Lease and Rent Control) Act, 1946. The learned Judges overruled the decision of Chandrasekhara Aiyer, J , in *Mahmmood, H Y* v *Kerala Corporation, Limited*[3], where he held that there was by these provisions an ouster of the jurisdiction of Civil Courts The order of remand is therefore correct in law as settled by this decision of the Bench, but for another legal point raised in this appeal which requires separate consideration

Though the point was not specifically taken before the lower appellate court, it is one substantially of law raised on the admitted material on record and, as it appears to me, can be urged and decided at any stage The point is this, namely, that plaintiff by his subsequent conduct after the decree in his suit O S No. 580 of 1943, dated 19th September, 1944, is now precluded from prosecuting it on the basis of a termination of the tenancy The record shows that he filed his Appeal, A S No. 227 of 1944, in the first instance on 24th November, 1944, in the Sub-Court, Bezwada, with a very limited scope, merely to set aside the reservation of the right of the tenant to sue separately for the recovery of Rs 51 On his appeal he paid a court-fee of only Rs 5-9-0 The plaintiff then filed an application before the House Rent Controller on 22nd December, 1944, for fixation of a fair rent at Rs 140 from 1st May, 1942, and for an order for ejectment if the tenant failed to pay In his application, H R C No 84 of 1944 he prayed to quote his own language

" In the event of the respondent not ready and willing to pay fair or standard rent, for ejectment of the respondent from the said bungalow "

Ultimately on 17th July, 1945, the House Rent Controller fixed a fair rent for the house at Rs 115 per month from 22nd December, 1944, the date of his application After obtaining this order the landlord then proceeded to file two interlocutory applications, Nos 835 and 836 of 1945 to have his appeal amended by additional reliefs for ejectment and damages These applications along with the

1 (1945) 1 M L J. 441

2 (1949) 1 M L J 452

3 (1945) 1 M.L J 44

appeal No. 227 of 1944 were transferred to the Sub-Court, Masulipatam and numbered there as Appeal No. 87 of 1946 The amendments were allowed, the deficit court-fee was paid and the Judgment of remand under appeal passed.

It is strenuously contended for the appellant that the landlord's application before the House Rent Controller for a fair rent was clearly based on an admission that the tenancy was still continuing and had not been terminated in law, and that it is not open to him to press in any Civil Court for eviction on the basis of termination of the tenancy by a notice to quit Mr V V Srinivasa Ayyangar has argued contra at some length that the landlord was, as I understood his position, at perfect liberty to pursue all remedies open to him under the House Rent Control Order, quite independently of his ordinary rights in a civil court and that whatever position he takes before the House Rent Controller he cannot be deprived of his right to obtain a decree for eviction in a Civil Court My attention has been drawn by the learned advocate for the appellant to the English decision *Hartell* v. *Blackler*[1], on the question of waiver of notice It is illuminating and relevant A tenant whose tenancy had been determined by notice to quit wrote to his lessor enclosing money for rent due since the expiry of the notice. The solicitors on behalf of the lessor sent the following reply

"Our client does not recognise you as her tenant, and we will retain the money for the time on account of use and occupation of her premises but not as rent"

It was held that notwithstanding the terms of that letter the acceptance and retention of the money operated as a waiver of the notice and a recognition of a continuance of the tenancy There can be no doubt that in the present case the landlord obtained the fixation of a fair rent and incidentally a substantially enhanced rent from the House Rent Controller on the basis of his recognition of the continuance of the tenancy I am quite unable to see how a landlord who applies under the House Rent Control Order for the fixation of fair rent to be paid by a tenant in occupation, on getting this done, can then continue to prosecute any suit in a Civil Court for eviction on the basis of a termination of the tenancy on preceding facts. I can find nothing in *Muhammadunny* v *Melepurakkal Unniri*[2], which lends any support to two legally inconsistent and incompatible positions being open to a landlord The landlord may prosecute a suit for eviction on the basis of termination of his tenancy under the ordinary law, but he cannot do so after obtaining a fixation of fair rent by the House Rent Controller on an application on the basis of a clear and specific recognition of the continuation of the tenancy

For these reasons, I hold that it is not open to this landlord to prosecute any further his suit for eviction in the ordinary Civil Court

The appeal is allowed and the remand judgment of the Subordinate Judge is set aside with costs throughout The Subordinate Judge quite rightly held that the District Munsif was wrong in permitting the defendant to reserve his rights to counterclaim Rs 51-4-7 by a separate suit This finding is not challenged nor indeed can it be canvassed in this appeal The result is that the District Munsif's decree is restored with only this modification. Leave refused.

V S *Appeal allowed.*

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1 (1920) 2 K B 161 2. (1949) 1 M.L J 452.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR. P V. RAJAMANNAR, CHIEF JUSTICE AND MR JUSTICE BALAKRISHNA AYYAR.

C V Muni Samappa .. *Appellant**

v.

Kolala Gurunanjappa (dead) and others *Respondents*

Specific Performance—Agreement to sell by Hindu father—Suit for specific performance—Inability of the father to convey the shares of his sons—If a ground for refusing relief to plaintiff

Where a person sues for specific performance of an agreement to sell executed by a Hindu father and another and simply impleads them alone without making the sons parties, the question of the inability of the father to convey the shares of his sons cannot be pleaded in defence as a ground for refusing specific performance where the purchaser is willing to take such title as the father has

Appeal against the decree of the Court of the Subordinate Judge, Anantapur, dated 13th March, 1945, in O S No 50 of 1944

P Chandra Reddy and *C Chinnappa Reddi* for Appellant

N Appu Rao, T K. Subramania Pillai, G C. Venkatasubba Rao and *Ch Suryanarayana Rao* for Respondents.

The Order of the Court was pronounced by

Chief Justice—This is an appeal by the first defendant in O S No 50 of 1944 in the Court of the Subordinate Judge of Anantapur against a decree granting specific performance of an agreement to sell executed by the appellant and the second respondent (second defendant) on 3rd July, 1944 There is no dispute as to the execution of the agreement The two defences in the lower court were (1) that as there were four sons of the first defendant, he could not convey anything more than his share and (2) that the breach was on the part of the plaintiff, as time was of the essence of the contract The learned Subordinate Judge held that as the agreement did not make any reference to the sons of the first defendant or the binding nature of the alienation such pleas need not be gone into in this suit He also held that time was not of the essence of the contract and the breach was by the defendant. He, therefore, held that the plaintiff was entitled to specific performance

The learned counsel for the appellant has pressed before us only one of the points, and that is that the suit for specific performance must fail so far as the first defendant at least is concerned, because he could not be compelled to convey his sons' shares and the agreement to sell the entire house is not valid and binding on his sons He cited to us, the ruling of the Full Bench in *Baluswami Aiyar* v *Lakshmana Aiyar*[1]. What happened in that case was that a suit was brought by certain plaintiff to enforce specific performance of a contract to sell a house and ground in Madras made by the first defendant alone. The plaintiffs claimed that the first defendant's son, the second defendant, who was not a party to the contract was nevertheless bound by the agreement entered into by the father, because he had assented to it and also because the sale was for the benefit of the family These pleas were denied, and the learned trial Judge held that the pleas were not established, and the suit was dismissed against the son The question for decision was whether in such circumstances specific performance could be decreed against the first defendant alone, and if it could be, on what terms The learned Judge's answer to the question was that specific performance could not be granted of the contract so as to direct execution of the conveyance of the entire property but it was open to the purchaser to get specific performance so far as the share of the vendor was concerned on payment of the consideration agreed upon without any abatement. It will be noticed that the facts are entirely different in this case.

* Appeal No 549 of 1948 18th April, 1949.

1 (1921) 41 M L J. 129, I.L R. 54 Mad 605 at 620 (F B).

There is no allegation in the plaint that the agreement to sell executed by the first defendant was binding on his sons In fact, the plaint does not make any reference to any sons of the first defendant The plaint contains the bare allegation of the execution of the agreement by the defendants and the usual allegations of default on the part of the defendants and the readiness and willingness on the part of the plaintiff to perform the contract To such a case as this, the following observations of Kumaraswami Sastri, J, in *Baluswami Iyer* v *Lakshmana Aiyar*[1] directly apply,

> "Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has But where a party seeking specific performance seeks to bind the interests of persons not parties to the contract, alleging grounds which under Hindu law would bind their interests and enable the vendor to give a good title as against them and makes them parties, it is difficult to see how the question as to the right of the contracting party to convey any interest except his own can be avoided and a decree passed the effect of which will merely be to create a multiplicity of suits"

The case before us is a case which falls within the former category, that is, where a person sues simply for specific performance of the agreement to sell The learned Judge was, therefore, right in passing a decree for specific performance against the two defendants, the executants to the agreement

The appeal fails and is dismissed with costs of the plaintiff's legal representatives.

V S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HORWILL AND MR JUSTICE RAGHAVA RAO

Venktrapragada Viraraghava Rao and another *Petitioners* *

v

Sri Rao Bahadur Mothey Narasimharao Zamindar Garu and others *Respondents*

Civil Procedure Code (V of 1908), *section* 110—*Suit for ejectment and damages—Decree for ejectment and damages at a particular rate—High Court confirming decree for ejectment and modifying the quantum of damages in favour of the defendants—Subject-matter of suit and appeal more than Rs* 10,000 *in value—Leave to appeal to Federal Court by the defendants, if can be granted*

A suit for ejectment of the defendants from a picture house was decreed and a decree for damages was also passed in favour of the plaintiffs at the rate of Rs 200 a day from a particular date to the date when defendants might hand over possession The High Court agreed with the trial Court as regards ejectment but as regards the quantum of damages the decree of the lower Court was modified in favour of the defendants in certain ways Both the subject-matter of the suit and appeal exceeded Rs 10,000 On the question whether the defendants were entitled to appeal to the Federal Court as the decree was not one of affirmance in its entirety of the decree of the trial Court,

Held, leave to appeal to the Federal Court should be granted

Per *Horwill, J*—It would be in accord with the principles accepted and followed in *Lakshmanan Chettiar* v *Thangam*, (1946) 2 M L J 465 I L R 1947 Mad 744, to grant leave to appeal on the ground that decree of the High Court is not one of affirmance on the question of damages

Per *Raghava Rao, J*—If *quo ad* the party seeking leave to appeal, the decree sought to be appealed against is not one of wholesale affirmance, it does not matter in what particular or to what extent the variation has taken place or whether the variation wholly or to the extent to which it has gone is in favour of the party seeking to appeal or against him In such a case, so long as the statutory requirements of value of the subject-matter of the suit as well as of the proposed appeal, inclusive of course even of portions on which there have been concurrent findings against the party seeking leave to appeal, stands satisfied, the party is entitled, without showing that a substantial question of law is involved in the proposed appeal, to a certificate which cannot be limited by the exclusion of such portions of the subject-matter from its ambit

Lakshmanan Chettiar v *Thangam*, (1946) 2 M L J 465 I L R 1947 Mad 744, commented upon.

Even on the narrower view adopted by this Court in *Lakshmanan Chettiar* v *Thangam*, (1946) 2 M L J 465 : I L R 1947 Mad 744, the applicant is entitled to the certificate asked for

Case-law discussed fully

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1 (1921) 41 M L J 129 I L R 44 Mad 605 at 620 (F B)

*C M P No 2647 of 1949 20th April, 1949

Petition under sections 109, 110 and Order 45, rules 2 and 3 of the Civil Procedure Code praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order granting leave to appeal to the Federal court against the decree and judgment of the High Court, dated 20th April, 1949, in Appeal No 549 of 1948 preferred against the decree of the District Court, Eluru, in O S No 2 of 1948

C A Vaidhyalingam, T Venkatadri and *K Ramachandra Rao* for Petitioners

P Somasundaram and *M Dwarakanath* for the Respondents

The Court made the following

ORDER —*Horwill J* —The plaintiffs, who were the owners or lessees of a picture house, sued to evict from it the defendants, who were partners of the third defendant in the conducting of the cinema business in the picture house The defendants resisted the suit mainly on the ground that they were entitled under Act XV of 1946 (the Madras Buildings Lease and Rent Control Act) to remain in possession since they satisfied the definition of "tenants" found in section 2 (4) of that Act They had no lease deed in their favour, but they sought to support their claim by contending that by virtue of the partnership, they had entered into with the lessee (the third plaintiff) with the express consent of the first plaintiff, there was either an equitable assignment of the lease (Exhibit A-6) by the third plaintiff in favour of the partnership of themselves and the third plaintiff or that this lease in favour of the third plaintiff must be regarded as a lease to the partnership These and other points were considered by the learned District Judge and decided in favour of the plaintiffs A further important issue in the suit was with regard to the quantum of damages to which the plaintiffs were entitled The learned Judge passed a decree in favour of the plaintiffs for damages at the rate of Rs 200 a day from the date when the lease in favour of the third plaintiff expired to the date when the defendants might hand over possession to the new lessees, plaintiffs 3 to 7 In appeal, we agreed with the lower court that the defendants obtained no right as lessees and were not tenants within the meaning of section 2 (4) of Act XV of 1946, and that upon the expiry of the lease in favour of the third plaintiff, the defendants became trespassers and were bound to pay damages to the plaintiffs With regard to the quantum of damages, we however modified the decree of the lower Court in the defendants' favour in three ways In the first place, we found that the rate of Rs 200 a day was excessive and decreased it to Rs 50 a day We also held that for two short periods, the non-working of the cinema was due to the acts of the plaintiffs themselves and that for those periods the defendants were not therefore liable for any damages at all The third modification of the lower Court's decree on the question of damages was that we held that while the business was being conducted by the first defendant alone, or by him in conjunction with the fourth plaintiff, no damages could be awarded, for the first defendant, as receiver, was bound to account to the court for the actual profits made and that the amount due to the plaintiffs for the periods in which the receiver was or the reeivers were conducting the cinema, the profits would have to be ascertained by the court in execution The question is whether the defendants are entitled to leave to appeal to the Federal Court against our decree, since the value of the subject-matter of the suit and appeal exceeds Rs 10,000, and our decree is not one affirming in its entirety the decree of the lower court

It is seen that the only modifications made in the decree of the lower court were in favour of the defendants ; and in those respects in which we have modified the decree of the lower court in the defendants' favour, there is no ground for appeal to the Federal Court

The question whether an appeal to the Privy Council where the variation of the decree of the trial court by the appellate court is in favour of the person who seeks to appeal to the Privy Council lies or not has been considered in several cases of this court. Those which seem most relevant to the case here under consi-

deration are *Venkitaswami* v *Sekkutti*[1], *Velayya* v *Hindu Religious Endowments Board*[2], *K V. Pandian* v *Rev Pignot*[3] and *Lakshmanan* v *Thangam*[4] In the first of these cases, the trial court passed a decree against defendants 1 and 4 for the full amount claimed in the plaint ; but against defendants 2 and 3 the decree was for a lesser amount than that claimed The plaintiff appealed, and the decree was affirmed with regard to the third defendant The second defendant sought for leave to appeal to the Privy Council It was held that as far as the second defendant was concerned, the decree was one affirming the decision of the trial court and that therefore the second defendant could not be granted leave to appeal The learned Judges considered the previous case-law on the subject and said,

> " The right way of construing section 110 is to read the words ' decree or final order ' in clause 3 in conjunction with and to treat them as relating to ' the subject matter ' mentioned in clause 1 "

and came to the conclusion that there was overwhelming authority in support of the view that where the proposed appeal to the Privy Council was with regard to subject-matters in which the appellate court had confirmed the decision of the trial court, no appeal lay ; and agreeing with *Bibhootibhooshan Datta* v *Sripati Datta*[5], they pointed out the anomalies that would result from a different interpretation of sections 109 and 110 of the Civil Procedure Code, which would refuse leave to appeal if there had been no variation in the petitioner's favour ; whereas he would have a right if some modifications had been made in favour of another party to a suit which did not affect the petitioner's right In *Velayya* v *Hindu Religious Endowment Board*[2], the trial court held against the archakas of a temple that five items belonged to the deity In appeal it was held that only three of the items did The archakas then sought for leave to appeal to the Privy Council The learned Judges while expressing their agreement with *Venkitaswami* v *Sekkutti*[1] gave the further ground for holding that the archakas under circumstances had no right of appeal, for, according to the third clause of section 110 no appeal lies

> " where the *decree* or final order appealed from affirms the *decision* of the Court immediately below the Court passing such decree or final order "

unless the appeal involves some substantial question of law The learned Judges pointed out the difference in the two words above italicised and said that many matters may be decided in a suit and that if the decree of the appellate court affirms any one of those decisions, no appeal can lie against the appellate decree with regard to that decision In *K V Pandian* v *Rev Pignot*[3], the plaintiff's suit was dismissed. In appeal, he pressed his case only with regard to one item and against one respondent On account of some arrangement arrived at between the parties and approved of by the court, the decree of the trial court was varied with regard to that particular item There again, the distinction between the two words " decision " and " decree " was stressed ; and it was said with regard to the subject matter of the proposed appeal to the Privy Council that the decree of the appellate court was one of affirmance These decisions and others came up for consideration before a Full Bench of this court in *Gangadara Aiyar* v *Subramania Sastri*[6] There, the plaintiff filed a suit for a declaration that the alienations of eleven items were not binding on him The trial court decided in his favour with regard to six items and disallowed his claim with regard to the remaining five, The defendants filed an appeal with regard to the six items and the plaintiff filed a memorandum of cross-objections with regard to four out of the five items with regard to which a declaration had been refused The appeal was dismissed and the memorandum of cross-objections allowed The defendants sought for leave to appeal to the Privy Council, which was granted That is seen to be a case in which the variation of the decree of the trial court was against the persons who sought for leave to

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1 (1936) 71 M L J 580 I L R 1937 Mad 121
2 (1938) 1 M L J 487
3 (1942) 2 M L J 350
4 (1946) 2 M L J 465 I L R 1947 Mad 744
5 (1934) I L R 62 Cal 257
6 (1946) 2 M L J 69 I L R 1947 Mad. 6 (F B).

appeal to the Privy Council The matter had apparently been posted before a Full Bench because of a decision in *Ramanathan Chetti* v *Subramania Chetti*[1] in which on somewhat similar facts, the court had held that no appeal lay The question before the learned Judges was complicated because the value of the four items was below Rs 10,000, whereas the value of the six items was above Rs 10,000. The question was whether in view of the fact that the value of the four items, which formed the subject-matter of the memorandum of cross-objections was less than Rs 10,000, an appeal would lie to the Privy Council. It was held that since the subject-matters of the suit, the appeal and the proposed appeal to the Privy Council were all of a value of more than Rs 10,000, an appeal would lie The learned Judges held that the decree of the appellate court was one decree and it certainly varied the decree of the trial court In *Ramanathan Chetti* v *Subramania Chetti*[1] the learned Judges seemed to have regarded the appeal and the memorandum of objections as two separate appeals and the decree of the court thereon as embodying two separate decrees However, the matter before the Full Bench was, as would appear from the judgment of the learned Chief Justice at the bottom of page 8 and the beginning of page 9 " the question whether there is a right of appeal in circumstances such as we have here " During the course of the judgment, the learned Chief Justice had to consider *Venkitaswami* v *Sekkutti*[2] which he found to be not in point He said that in that case

> " the appellate decree had certainly affirmed the trial Court's decree so far as the second defendant was concerned and that the application for leave did not travel beyond him Although we do not accept all the observations made in the judgment, we see no reason to question the correctness of the decision in the peculiar facts of the case "

What observations in the judgment of Venkatasubba Rao, J , the learned Chief Justice and the other learned Judges did not accept does not appear , but it is clear that the Full Bench felt that *Venkitaswami* v *Sekkutti*[2], was not in point, and they did not therefore have to consider the correctness or otherwise of the observations made therein So that case remains good law despite the Full Bench decision. With regard to *Velayya* v *Hindu Religious Endowment Board*[3], all that the learned Chief Justice had to say was that it did not go beyond *Venkitaswami* v *Sekkutti*[2] and that therefore it was not necessary to discuss the case in detail No disapproval is noted with regard to this reasoning of the learned Judges in *Velayya* v *Hindu Religious Endowment Board*[3] or of the observations of the learned Judges in that case with regard to the important distinction between the words " decision " and " decree ".

The effect of the above Full Bench decision upon the earlier decisions came up for consideration in *Lakshmanan Chettiar* v *Thangam*[4] where all the authorities bearing on the question were discussed in considerable detail The cases above discussed may be distinguished from the case here under consideration in that they related to decisions with regard to the rights of various defendants to properties in which they were separately interested ; and so it could be argued that those cases were authorities only for the position that where the appellate court had affirmed the decision of the trial court with regard to the interest of a particular defendant or a particular item of property, no appeal would lie with regard to that interest or property In *Lakshmanan Chettiar* v *Thangam*[4], however, the plaintiff filed a suit for partition attacking the genuineness of a partition deed evidencing an earlier partition The suit was dismissed , and the decision of the trial court was substantially affirmed in appeal But there was a variation in two respects ; one with regard to the maintenance of the tenth defendant and the other with regard to the debts of the first defendant, which he alleged were payable by the family The learned Judges carefully considered not only the previous authorities of the Madras High Court on this subject, with which they expressed their agreement, but also the decisions of other High Courts, agreeing with the views expressed

1 (1926) 51 M L J 295
2 (1936) 71 M L J 580 I L R 1937 Mad 121
3 (1938) 1 M L J 487
4 (1946) 2 M L J 465 I L R 1947 Mad. 744

by the High Court of Calcutta, Bombay and Lahore and preferring them to the views held by the Patna and Allahabad High Courts They approved of the distinction drawn in *Velayya* v *Hindu Religious Endowments Board*[1] and *K V Pandian* v *Rev Pignot*[2] with regard to the words "decision" and "decree" and again held that where the decision of the court on any matter was affirmed by the appellate court, no further appeal to the Privy Council would lie unless it raised a substantial question of law

The principles to be applied by us in this application could not have admitted of much discussion had it not been for the remarks of the Privy Council in allowing an application for special leave to appeal in *Annapurnabai* v *Ruprao*[3] There, the plaintiff brought a suit for the possession of certain property on the ground that he was the adopted son of the last male holder The second defendant raised certain contentions which were not accepted , and so a decree was passed in favour of the plaintiff. The court however decreed a maintenance for the first petitioner (in the special leave application) at the rate of Rs 800 per annum In appeal, the decree was modified by increasing the maintenance of that petitioner from Rs 800 to Rs 1,200 The first petitioner then applied for leave to appeal to the Privy Council which was refused Thereupon, the petitioner filed an application to the Privy Council for special leave. That application being unopposed the matter was heard *ex parte* ; and Lord Dunedin on behalf of their Lordships pronounced this very short order .

> "In the opinion of their Lordships the contention of the petitioner's counsel as to the effect of section 110 of the Code of Civil Procedure is correct, and the petitioners had a right of appeal. They should have special leave to appeal, but it should be limited to the question as to the maintenance allowance"

This decision was considered in all the cases above referred to, as well as in numerous cases in other High Courts. Rankin, C J , in *Narendra Lal Das Chaudhury* v. *Gopendra Lal Das Chaudhury*[4] said,

> "The question is, whether, on the strength of the only case before the Privy Council which we have for our guidance, the views hitherto adopted in this and other High Courts require to be further considered The question is whether the judgment of their Lordships means that, in every case where the decree of the High Court is not a mere decree dismissing the appeal or a mere decree affirming the order of the Court below, the necessity for showing a substantial question of law is done away with It appears to me that the case of *Annapurnabai* v *Ruprao*[3], is not in itself a sufficient authority to justify this Court in abandoning the principle which it has with other High Courts acted upon , that is to say, I do not think that it shows that it is an erroneous view that we have to look to the substance and see what is the subject-matter of the appeal to His Majesty in Council"

A similar view was expressed by the Chief Justice of Bombay in *Kapurji* v *Pannaji*[5], and by Din Mohammad, J , in *Brahmanand* v *S D Sabha*[6] The learned Judges of this Court in the various decisions referred to have agreed with these remarks In *Gangadara* v *Subramania*[7], the learned Chief Justice set out the facts which gave rise to the application for special leave in *Annapurnabai* v *Ruprao*[3], but did not say that in view of the Privy Council decision, the earlier decisions of this court seemingly to the contrary were bad The learned Judges in *Lakhsmanan Chettiar* v *Thangam*[8], in interpreting the Full Bench decision did not regard it as overruling or disapproving of any of the decisions of this court other than *Ramanathan Chetti* v *Subramaniam Chetti*[9] The learned Judges, however, added towards the end of their Judgment,

> "If the subject-matter of the dispute in appeal had been the amount of the decree or the amount of damages, a variation whether to the prejudice or in favour of the petitioner would not alter the decree of variance into one of affirmance"

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1. (1938) 1 M L J 487
2. (1942) 2 M L J 350
3. (1924) L R 51 I A 319 : I L R 51 Cal 969 (P C).
4. (1927) 31 C W N 572 (575).
5. A I R 1929 Bom 359
6. A I R 1944 Lah. 329 (F B)
7. (1946) 2 M L J 69 I L R. 1947 Mad 6 (F B).
8. (1946) 2 M L J 465 . I L R 1947 Mad. 744
9. (1926) 51 M L J 295

It is possible to argue that even in determining the quantum of damages we came to many decisions, and that against the decisions in favour of the petitioners no further appeal is sought, but no case to which our attention has been drawn has carried the process of anatomical dissection of the judgment anything like as far as the learned counsel for the respondents would have us do in this application I think it would be more in accord with the principles accepted and followed in *Lakshmanan Chettiar* v *Thangam*[1] where the learned Judges seemed to consider that *Annapurnabai* v *Rupirao*[2] had at least a limited applicability to cases on all fours with it, if we granted leave to appeal on the ground that our decree is not one of affirmance on the question of damages

I am not very impressed with the argument that substantial questions of law are involved, but since the petitioners are entitled to a certificate on other grounds, it is not necessary to give reasons for rejecting it The petition is allowed with costs

Raghava Rao J—I agree that this petition should be ordered. The facts of the matter before us as well as the facts of the several rulings dealt with in the judgment of my learned brother are so fully stated in it that in this supplementary judgment which I am now delivering, I propose to confine myself to a discussion of the principles emerging from the rather confused case-law on the subject and to indicate the points of view from which I have endeavoured to arrive at my decision

The statutory provisions relevant to the decision of the question before us are what are contained in sections 109 and 110 of the Civil Procedure Code of 1908 In construing them it is necessary to bear in mind a few fundamental principles which, I conceive, are incapable of dispute While it is clear that a right of appeal which is always the creature of statute cannot be enlarged beyond the letter of the statutory provision conferring the right, it is equally clear that the right cannot be curtailed in a manner not warranted by such letter It is the letter, in my opinion, that essentially matters for the construction of the statutory provision into which speculations ought not to enter about what the Legislature may or may not have intended, apart from what it has expressed by the language that it has employed Further, to use the words of Reilly, J, in *Perichiappa Chettiar* v *Nachiappan*[3]

"Section 109 (*a*), Civil Procedure Code gives a right of appeal to His Majesty in Council from any decree made on appeal by a High Court Section 110, Civil Procedure Code qualifies that right of appeal by making two exceptions to it First, there is no appeal under section 109 (*a*) if the amount or value of the subject-matter of the suit in the Court of first instance or in dispute in the proposed appeal is less than Rs 10,000 and the decree does not involve directly or indirectly some claim or question to or respecting property of that amount or value Secondly, there is no appeal under section 109 (*a*) if the decree of the High Court affirms the decision of the Court immediately below the High Court and the proposed appeal does not involve any substantial question of law These two exceptions, as they partially take away the right of appeal given by section 109 (*a*) must be strictly construed"

The result yielded by the application of these rules of construction to section 109, Civil Procedure Code cannot I think, be better expressed than in the language of the same learned Judge in the same case appearing lower down in a passage which I take leave to quote here

"At one time it was held by the Calcutta High Court that, even when a decree of that Court had modified a decree of the lower Court on appeal, it was an affirming decree for the purpose of section 110, Civil Procedure Code, so far as it agreed with the decision of the lower Court, and that, if the proposed appeal to His Majesty in Council referred only to that part of the decree, some substantial question of law was necessary to give a right of appeal That view, which it may be pointed out involved the implication of words not found in section 110, was taken in *Raja Sree Nath Bahadur* v *The Secretary of State for India in Council*[4] and *Annapurnabai* v *Ruprao*[2], but has been shown to be incorrect by the decision of the Judicial Committee in the latter case Although that implied extension of the exceptions to section 109 (*a*) is no longer possible, it is urged for defendant 2 that we are still

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1 (1946) 2 M L J 465. I L R 1947 Mad 744

2. (1924) L R. 51 I.A. 319 · I L R 51 Cal 969 (P C)

3 (1930) 35 L W. 206 at 207.

4 (1904) 8 C W.N 294.

entitled to effect a different extension of the exceptions by reading the last clause of section 110 as if it ran "provided that, so far as the decree or final order appealed from in respect of any separable part of the case affirms etc" and that, if that part involves no substantial question of law, it should be excluded in calculating the necessary Rs 10,000 The view appears to have been taken in *Narendralal Das Chowdry* v *Gopendra Lal Chowdry*[1] and *Kapurji Magniram* v *Pannaji Debichand*[2] But with great respect I am not prepared to follow those decisions If a decree is really a composite decree or a series of decrees dealing with what should strictly be the subject of separate suits—*e g*, a decree dealing with alienations in favour of different defendants, which by long established practice we have allowed to be made the subject of one suit—then it may be proper to separate each decree of the series for the purpose of appeal to His Majesty in Council But apart from that in my opinion we are bound by the plain language of section 110, Civil Procedure Code, and are not at liberty to read into it any words which are not to be found there actually or by necessary implication"

Anantakrishna Aiyar, J, the other learned Judge, who was a party to the decision in *Perichiappa Chettiar* v *Nachiappan*[3], remarks much to the same effect in these words at page 215 of the report

"The argument advanced on behalf of the respondent necessitates that very many words should be implied in section 110 to justify the interpretation of the section contended for by him We feel that it is not open to us to do so Section 109 gives a right of appeal to the Privy Council Section 110 is a proviso to section 109 It is a rule of law that a proviso should receive a strict construction It is not open to the Court to add words to a proviso with a view to enlarge the scope of the proviso The proviso must be restricted to the scope reasonably conveyed by the words used therein"

This result, as will be seen from the quotations, is the logical corollary to the reasoning accepted by the Judicial Committee of the Privy Council in *Annapurnabai* v v. *Ruprao*[4]. It seems to me that it is not open to any court in India to whittle down or eviscerate that decision in any manner, or to recognise any implied extension of the exceptions to section 109 (*a*) which are not to be found in the statute itself That the pronouncement by the Judicial Committee was made in a short judgment or on an application heard *ex parte* is hardly any ground for any Indian High Court to refuse to follow and give effect to their Lordships' clear and categorical language Nor does Rankin, C J's judgment in *Narendralal* v *Gopendralal*[5] which has been followed in later cases of this court which have differed from *Perichiappa Chetti* v *Nachiappa*[3], disclose any convincing reason for limiting the overruling effect of the Privy Council decision to the invalidation of *Sreenath Roy's case*[6], on its own facts without more. The learned Chief Justice observes at page 544, column 1 of the report that that case is the origin of the doctrine that the language which now finds place in section 110 of the Code is to be construed with reference to the subject matter in dispute in the appeal to the Privy Council His Lordship observes too at page 545, column 2 that the particular application made in that case of the principle that you have to have regard to the subject matter of dispute in appeal to the Privy Council must be taken as overruled, and yet His Lordship shrinks from holding that the doctrine itself stands overruled and winds up his discussion with a conclusion expressed in the following words at page 546 of the report

"We may take it, I think, that where the amount is a question in dispute, the fact that the Courts differ and that the higher Court differs in favour of the applicant does not mean that the decision is one of affirmance, but I am not, in a case of this kind, prepared to say that because on a totally different point, namely, a point about the share, the applicant has succeeded and succeeded altogether so that he has no further grievance in that matter, he can without showing a substantial question of law have a right to litigate upon other points upon which both the Courts have been in agreement"

This illogical, laboured and not particularly well reasoned process—to speak with all deference to the learned Chief Justice of the High Court of Bengal—of delimiting the effect of the Privy Council decision in a manner not warranted by the plain language of their Lordships which further accords with the plain language of the Statute has been followed by another Bench decision of the Calcutta High Court reported in *Bibhootibhooshan Datta* v *Sripati Datta*[7] in the course of which the learned Judges (Mukerji A C J. and S K Ghose J) refer at page 260 of the report to all the cases decided by the several High Courts subsequently to

1 (1927) 31 C W N 572
2 (1929) 31 Bom L R 619
3 (1930) 35 L W 206
4. (1924) L R 51 I A 319 · I L R 51 Cal. 969 (P C)
5 A I R 1927 Cal 543 31 C W N 572
6 (1904) 8 C W N 294
7. (1934) I L R 62 Cal. 257.

the Privy Council decision in *Annapurnabai* v *Ruprao*[1], in which a contrary view was taken The learned Judges refer in that list of authorities to *Perichiappa Chettiar* v *Nachiappa*[2], but they do not anywhere in the judgment attempt to meet the cogent reasoning behind *Perichiappa Chettiar* v *Nachiappan*[2] or the three Patna decisions to which they make a reference in the same connection They then refer to *Sreenath Roy's case*[3] and Rankin, C J's view in *Narendralal* v *Gopendralal*[4] —with which they agree—that that case is no longer good law after the Privy Council ruling in *Annapurnabai* v *Ruprao*[1]. They accept Rankin, C J's conclusion expressed at the end of the judgment in words which I have quoted earlier and also the conclusion of the Nagpur Judicial Commissioner's court to the same effect expressed in words which they quote at page 263 of the report, namely,

> " Where the modification of a decree of a lower Court consists of a modification of a pecuniary nature in the appellant's favour on a matter to be debated before the Privy Council, it amounts to a variation of the decree of the trial Court, and it is immaterial as far as that point is concerned, whether under section 110, any substantial question of law is involved But the appellant cannot make that decision a basis of appeal to the Privy Council on grounds unconnected with or dissociable from those on which he has *succeeded* and on which the Courts were of one mind "

By the way, I may observe here that the word " succeeded " is a mistake and ought to have been " failed " The learned Judges then refer to *Bansilal* v *Gopal Lal*[5] and *Nathulal* v *Raghubir Singh*[6], the one accepting and the other rejecting the test of substantial and not trivial variance as being of the essence of the test applicable They then wind up the discussion of the case-law with this observation

> " The above in short is the position of authorities bearing on the point We have carefully considered the matter and are inclined to agree in the view of Rankin, C J , as to the true effect of *Annapurnabai's case*[1], and we would prefer to adhere to it until a more definite and authoritative pronouncement is made by the Judicial Committee to the contrary "

It is a pity that in this judgment which *seems* indeed well considered, there is, if at all, no adequate consideration—I mean by way of an attempt to refute—of the reasoning so pointedly set forth in *Perichiappa Chetti* v. *Nachiappan*[2] That may have been because the Bench which decided *Bibhootibhooshan Datta* v *Sripati Datta*[7] felt itself apparently bound by an earlier Bench decision of their own High Court and could not of course be expected to give it up in favour of the view of this High Court or of any other High Court and did not feel itself called upon to enter into any detailed discussion of the case of our High Court reported in *Perichiappa Chettiar* v *Nachiappan.*[2]

But how does the matter stand in this High Court after *Perichiappa Chettiar* v. *Nachiappan*[2]. Since that decision which is of 16th October, 1930, there has been a catena of decisions all speaking in one single voice discordant to that of *Perichiappa Chetti* v *Nachiappa*[2] of which the latest reported is *Lakshmanan* v *Thangam*[8], of the 11th October, 1946, but for the decision of a Full Bench reported in *Gangadara* v *Subramania*[9] Strong reliance was placed for the petitioners before us on this ruling of the Full Bench, while it was contended for the respondents, that the Full Bench ruling as interpreted by the latest Bench decision—*Lakshmanan* v *Thangam*[8], concludes this petition against the petitioners

Before dealing with these respective contentions of the parties based upon these two decisions, I may as well refer to two decisions reported in *Venkitasami Chettiar* v *Sekkutti Pillai*[10] and *Velayya* v *Hindu Religious Endowments Board, Madras*[11], to both of which Venkatasubba Rao, J., was a party, his colleague having been in the former case Cornish, J and in the latter Abdur Rahman, J The learned Judge pronounced the judgment of the Court in the one case and the leading

1. (1924) L R 51 I A. 319 : I L R 51 Cal. 969 (P C)
2. (1930) 35 L W 206.
3. (1904) 8 C W N 294.
4. A I R 1927 Cal 543 31 C W N 572
5. (1928) I L R. 10 Lah 688
6. (1931) 29 A.L J 968.
7. (1934) I.L.R. 62 Cal. 257
8. (1946) 2 M L J 465 : I L R 1947 Mad 744
9. (1946) 2 M L J 69 I.L R. 1947 Mad 6 (F.B).
10. (1936) 71 M L J 580 : I.L.R 1937 Mad. 121.
11. (1938) 1 M.L J 487

judgment in the other in which after expressing hesitation Abdur Rahman, J., eventually concurred. The earlier of them which alone refer to the ruling in *Perichiappa Chettiar* v *Nachiappa*[1] does not on a careful scrutiny seem to deal with it fairly and squarely or address itself to the reasoning underlying the interpretation placed by the learned Judges in that case on the relevant sections of the Civil Procedure Code. Curiously enough, Venkatasubba Rao, J., in *Venkitasami Chettiar* v *Sekkutti Pillai*[2], characterises the observations of the learned Judges in *Perichiappa Chettiar* v *Nachiappa*[1] with reference to the effect of the Privy Council decision in *Annapurnabai* v *Ruprao*[3] as *obiter*, little realising that they were part of the *ratio decidendi* of *Perichiappa Chettiar* v *Nachiappa*[1] concerning the proper interpretation of section 110, Civil Procedure Code. The learned Judge, perhaps truly enough, observes that the argument negatived by the Court in *Perichiappa Chettiar* v *Nachiappa*[1] was that there should be deemed to be as many subject-matters as there were items in dispute. Says the learned Judge then:

> "This is precisely what we have been trying to show; there is a distinction between the decree taken as a whole and the several decisions in respect of the various subject-matters comprised in that decree."

The learned Judge fails to realise here that the distinction so made by him stands however completely negatived by the decision in *Perichiappa Chettiar* v *Nachiappa*[1]. It may be noticed that the case in *Venkitasami Chettiar* v *Sekkutti Pillai*[2], was one in which the variation of the High Court's decree was in respect of other parties than the party seeking to appeal to the Privy Council, although the discussion embraced a case of variation in respect of subject-matter as well as in respect of parties. Then, as regards the later decision in *Velayya* v *Hindu Religious Endowments Board, Madras*[4], it may be noticed that, there, the variation by the High Court's decree was in respect of certain items which concerned the same party seeking leave to appeal as had lost in both the courts in India concerning the other items. So far as the reasoning of Venkatasubba Rao, J., is concerned it adds but little to that of the earlier ruling. Abdur Rahman, J., however, it may be observed, gives reasons in support of a contrary view formed in his mind during the hearing which he did not command the courage to adhere to till judgment as a result of his discussion with his learned brother.

These two decisions depend for their soundness upon three considerations revealed by a careful perusal: (a) that the right way of construing section 110, Civil Procedure Code, is to read the words "decree or final order" in clause (3) in conjunction with, and to treat them as relating to, the "subject-matter" mentioned in clause (1) (see *Venkitasami Chetti* v *Sekkutti Pillai*[2],) (b) that in section 110, Civil Procedure Code, the words used in relation to the High Court whose judgment is sought to be appealed against are "the decree" whereas in regard to the lower Court the expression used is "decision" (see *Velayya* v *Hindu Religious Endowments Board, Madras*[5],) and (c) that there are bound to be a number of anomalies resulting from a contrary view, the enormity of which the learned Judges in *Bibhootibhoosan Datta* v *Sreepati Datta*[6], emphasised (see *Velayya* v *Hindu Religious Endowments Board, Madras*[4]) and that the possibility of a certificate for leave to appeal to the Privy Council so as to embrace matters on which there have been concurrent findings of fact against the petitioner does not, if the contrary view is accepted, stand excluded, although at the hearing of the appeal by the Privy Council no such concurrent findings of fact can be assailed.

Now to take these three points seriatum, the first does not seem to my mind to be well founded. The collocation of the words "the subject-matter in dispute

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1 (1930) 35 L.W. 206.
2 (1936) 71 M.L.J. 580 : I.L.R. 1937 Mad. 121.
3 (1924) L.R. 51 I.A. 319 : I.L.R. 51 Cal. 969 (P.C.)
4 (1938) 1 M.L.J. 487.
5 (1938) 1 M.L.J. 487 at 490.
6. (1934) I.L.R. 62 Cal. 257.

on appeal to His Majesty in Council" of the first clause of section 110, Civil Procedure Code and of the words in the third clause "the decree or final order appealed from" is not such as to necessitate the reading together of the two sets of words so as to curtail a right of appeal which, on the only mode of construction justified by the plain positions in the section occupied by the two sets of words or at any rate on an equally possible manner of construction of which they are susceptible, is available to the litigant This mode of reading together of the two sets of words it is that lay at the root of the doctrine of *Sreenath Roy's case*[1], which admittedly stands overrued by *Annapurnabai* v *Ruprao*[2] and which, as I shall show in the sequel, the Full Bench in *Gangadara* v. *Subramania*[3], also disapproves of by necessary implication, if not in express terms The mode of construction indicated in *Perichiappa Chettiar* v. *Nachiappa*[4] is, in my opinion, quite natural and simple while that adopted in by Venkatasubba Rao, J, is highly strained, laboured and artificial As regards the second point, I am inclined to think that the interpretation which Abdur Rahman, J, was first disposed to place on the word "decision" as observed by him in *Velayya* v. *Hindu Religious Endowments Board, Madras*[5] is the correct interpretation. As regards the third point, there are two observations which fall to be made The first is that a consideration of possible anomalies is not a ground for construing the plain words of a statute in a manner opposed to their plain meaning Further a concurrent finding of fact though not ordinarily liable to be disturbed by the Privy Council is not invariably quite so sacrosanct as is supposed by the learned Judge It may be useful in this connection to bear in mind the observations made by the Federal Court in the judgment of Mahajan, J, in which the Chief Justice and the other learned Judges concurred in a recent case, *Gangadara Aiyar* v *Subramania Sastrigal*, not still reported so far as I know[6], concerning the rule against the re-opening of concurrent findings of fact of the courts below,

"Their Lordships of the Privy Council have always expressed unwillingness to depart from the general rule which prevents the fresh examination of facts for the purpose of disturbing concurrent findings by the lower Courts In *Moung Tha Hnyeen* v *Moung Pan Nyo*[7], Lord Hobhouse, in delivering the opinion of the Board, observed as follows 'Although acute criticisms have been made upon some points in the case, there has been nothing to show that there has been a miscarriage of justice, or that any principles of law or of procedure have been violated in the Courts below, This case is one which very decidedly falls within the valuable principle recognised here, and commonly observed in second Courts of Appeal, that such a Court will not interfere with concurrent judgments of the Courts below on matters of fact, unless very definite and explicit grounds for that interference are assigned' The rule was again re-stated by Lord Lindley in *Rani Srimati* v *Khajendra Narayan Singh*[8] and by Lord Macnaghten in *Sarivalsingh* v *Satrupu Kunwar*[9], and recently by Viscount Sumner in *Mohamed Ali* v *William Stansfield Grosvenor Harvey*[10] In *Jehangir Shappooji* v *Revd Savarkar*[11], Lord Wright observed as follows 'Their Lordships have examined the whole history in some detail, because in regard to issue No 7 the question is rather one of law, and in any case there are not on that issue concurrent findings of fact, accordingly the whole case had to be considered in order to deal with that issue But their Lordships must not be taken to have in any way failed to give effect to the rule, that on an issue of fact, concurrent findings should be conclusive, unless indeed where the enforcement of the rule would work obvious injustice, or the violation of some principle of law or procedure The importance of the rule is to discourage bringing before this Board issues of fact in which the appellant has failed in two Courts The present case as regards the issue to which the rule applies, affords a complete illustration of the wisdom of the rule Apart from their decision on the merits, their Lordships are for dismissing the appeal on that issue simply on the ground of the concurrent findings' All the cases bearing on the point commencing from 1849 have been reviewed by Lord Thankerton while delivering the judgment of the Board in *Bibhabati* v *Ramendra Narayan*[12] and a number of propositions have been enunciated explaining the scope of the rule

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1 (1904) 8 C W N 294
2 (1924) L R 51 I A 319 I L R. 51 Cal 969 (P C)
3. (1946) 2 M L J 69 I L R (1947) Mad 6 (F B)
4. (1930) 35 L W 206
5. (1938) 1 M L J. 487
6 Since reported in (1949) 1 M L J 568 at 573 1949 F L J 90 (96)
7. (1900) L R. 27 I.A 166 · I L.R. 28 Cal. 1 (P C)
8 (1904) L R 31 I A 127 I.L R. 31 Cal. 871 (P C).
9 (1905) 16 M L J 77 L R 33 I A. 53: I L R 28 All 215 (P C)
10 (1928) 33 C W N 675 115 I C 722
11 (1932) 63 M L J 408 (P C).
12 (1946) 2 M L J 442 L R. 73 I A. 246 51 C.W N 98 (P C).

I have considered it necessary to refer to these cases because this is really the first case that came before us after the enlargement of the jurisdiction of the Court and in which an attempt was made to reopen conclusions on questions of fact concurrently arrived at in the two courts below The rule as to concurrent findings is not a rule based on any statutory provision It is a rule of conduct which the Privy Council had laid down for itself Following this rule the Judicial Committee usually declined to review the evidence for a third time unless there were special circumstances which would justify a departure from this practice As observed by Lord Thankerton in *Bibhabati* v *Ramendra Narayan*[1], The practice is not a cast iron one and the grounds given in the decisions justifying departure from the above rule are merely illustrative In an appropriate case and on a suitable occasion this matter may have to be fully considered and elucidated in all its aspects, but for the purposes of this case it is enough to state that in the absence of circumstances justifying departure from this rule, this Court would adhere to the practice developed by the Judicial Committee during the course of a century "

It may likewise be pertinent to refer in this connection to the observations of Anantakrishna Ayyar, J , in *Perichiappa Chettiar* v *Nachiappa*[2], which run in these terms

" When a petitioner is given a right of appeal to the Privy Council and he *prima facie* satisfied the conditions prescribed by the section, we think it is our duty to grant him leave to appeal in such a case As remarked by the Privy Council, ' the chance of success of the appellant in the proposed appeal to the Privy Council is not material to such an application for leave The Privy Council has repeatedly remarked in several cases that as regards the amount of maintenance to be decreed to a litigant in India, the Privy Council will not ordinarily interfere, and yet the Privy Council granted leave to appeal in the case reported in *Annapurnabai* v *Ruprao*[3], regarding the amount of maintenance The Privy Council will not ordinarily interfere with concurrent findings of fact arrived at by Courts in India on any particular point, yet if the decree of the High Court did not affirm the decision of the trial Court, and if the value of the subject-matter of the suit in the trial Court and in the appeal to the Privy Council be Rs 10,000 or upwards, a party desirous of appealing to the Privy Council would seem to be entitled to leave to appeal from the decree of the High Court under section 110, Civil Procedure Code, as interpreted by the Privy Council in the case reported in *Annapurnabai* v *Ruprao*[3], though no substantial question of law is involved in the proposed appeal "

Having thus disposed of the three points gatherable from the two decisions of Venkatasubba Rao, J., I now turn to the Full Bench ruling of this Court reported in *Gangadara* v *Subramania*[4] That Full Bench, I agree with the respondents' learned advocate, expressly settled only the limited conflict between the two Divisional Bench decisions of this Court in *Ramanathan Chetti* v. *Subramanian Chetti*[5] and *Sundara Mudaliar* v *Ratnavelu Mudaliar*[6], both by the same Judges, Phillips and Odgers, JJ. True, also, there was no order of reference to a Full Bench made in that case ; no question formulated by a Divisional Bench for the decision of a Full Bench. The civil miscellaneous petition for leave to appeal in the Full Bench case having been originally posted before the Divisional Bench as a matter of course, was presumably directed by that Bench of which the learned Chief Justice was apparently a member to go before a Full Bench for disposal The decision of the Full Bench was that the earlier decision in *Ramanathan Chetti* v *Subramanian Chetti*[5] was wrong and the later decision in *Sundara Mudaliar* v. *Ratnavelu Mudaliar*[6] was right. But there are statements of the law to be found in the Full Bench decision as to the interpretation of sections 109 and 110, Civil Procedure Code, the exact scope of the Privy Council ruling in *Annapurnabai* v *Ruprao*[3], and the true meaning and effect of the decision in *Venkitasami Chettiar* v *Sekkutti Pillai*[7], and of later decisions which have followed it, which are material to the present discussion and which accordingly I wish to refer to

First, there is a passage at page 9 of the report which runs in these terms :

" Appeals to the Privy Council are governed by the provisions of sections 109 and 110 of the Civil Procedure Code Where the case fulfils the requirements of the Code with regard to value

1 (1946) 2 M L J 442 L R 73 I.A 246 : 51 C W N 98 (P C)
2 (1930) 35 L W 206.
3 (1924) L R 51 I.A 319 I L R 51 Cal 969 (P C)
4 (1946) 2 M L J 69 I L R 1947 Mad 6 (F B).
5 (1926) 51 M L J 295.
6 (1928) 56 M.L.J. 476 : I L R 52 Mad. 521
7 (1936) 71 M L.J 580 : I L R 1937 Mad. 121

a party has a right of appeal, if the decree of the appellate Court varies the decree of the trial Court Where the appellate Court affirms the decision of the Court below, an appeal lies only when it involves some substantial question of law In this case it is admitted that there is no substantial question of law Undoubtedly, the decree of this Court varied the decree of the trial Court in an important respect, because it gave four more items of property to the plaintiff"

Two observations fall to be made on this passage Firstly this, in my opinion, is a statement of the law on the basis of the language of the sections of the Civil Procedure Code as they stand, made in broad and general terms which do not take in restrictions laid down by the two decisions of Venkatasubba Rao, J Secondly, the variance of the decree of the trial Court by the High Court to the prejudice of the party seeking leave to appeal seems here to be made a point of But whether the point so seeming to be made was in reality intended must, I consider, be gathered from the second passage in the Full Bench judgment which I wish to refer to next That passage at page 10 of the report comes close on a discussion of the facts of the Privy Council ruling in *Annapurnabai* v *Ruprao*[1], and is in the words following

"In delivering the judgment of the Board, Lord Dunedin said that the contention of their counsel that they were entitled to leave by virtue of the provisions of section 110 of the Code was correct They had a right of appeal Lord Dunedin added that the petitioners' chance of success was not material to their application As the petitioners accepted the finding with regard to the plaintiff's adoption, the special leave given was limited to the question of maintenance There is here a pronouncement of the Judicial Committee that, where there is a variance of the decree passed by the trial Court the party affected thereby is entitled as of right to a certificate subject, of course, to the requirements of the Code being fulfilled with regard to value"

The words occurring in the last sentence of the passage quoted above are "affected thereby" which it must be noticed do not necessarily mean "prejudicially affected thereby" but only mean "which has had a material effect produced thereby". I have consulted the Concise Oxford Dictionary in this connection which confirms me in the interpretation of the words which I have just given Moreover, the context of the learned Chief Justice's decision with reference to the Privy Council ruling in *Annapurnabai* v *Ruprao*[1], which was itself a case of beneficial and not prejudicial variation lends support to the meaning I am assigning to this expression affected thereby *Prima facie*, it may be strange indeed that a party who has not been prejudicially but beneficially affected by a variation should be allowed to have by reason of such variation a right of appeal in regard to the other matters which have gone against the party seeking leave to appeal in both the courts below or to have his right of further appeal even in regard to the matter on which he has had partial variation to his benefit in the High Court determined without exclusion from consideration of that part of the subject-matter which has gone in his favour in the High Court The learned Chief Justice however accepts this position, however strange it may seem, in the passage quoted above, because of the Privy Council ruling reported in *Annapurnabai* v *Ruprao*[1], whose facts he discusses at length in the context

The next passage of the Full Bench judgment which I may refer to but need not quote is at page 11 of the report and discusses the case in *Perichiappa Chetti* v. *Nachiappa*[2] with no word of adverse comment and apparently with approval. This is the decision on which adverse comment was made by Venkatasubba Rao, J., in *Venkitasami Chetti* v *Sekkutti Pillai*[3] Nor only is there no adverse comment made on this decision by the judgment of the Full Bench, but there is adverse comment made by the Full Bench on the decision in *Venkitasami Chetti* v *Sekkutti Pillai*[3] in a passage to be found at pages 12 and 13 of the report (*Gangadara* v *Subramania*[4]) of which it is necessary to refer only to these following sentences at page 13,

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1 (1924) L.R. 51 I A 319. I L R 51 Cal 969 (P C)
2 (1930) 35 L W 206
3. (1936) 71 M L J 580 I.L.R 1937 Mad. 121
4 (1946) 2 M L J 69 I L R 1947 Mad 6 (F B)

"It was held by Venkatasubba Rao and Cornish, JJ, that he (plaintiff) was not entitled to a certificate because this Court's decree in respect of the second defendant was one of affirmance A distinction was drawn between the words 'decree or final order' in clause 3 of section 110 and the term 'the subject matter' mentioned in clause 1 There, all that the plaintiff was wanting to do was to challenge in the Privy Council the finding that the second defendant was only liable for a small portion of the decree The appellate decree had certainly affirmed the trial Court's decree so far as the second defendant was concerned and the application for leave did not travel beyond him Although we do not accept all the observations made in the judgment we see no reason to question the correctness of the decision on the peculiar facts of the case"

Before I enunciate what I gather to be the effect of the Full Bench ruling on the point now under consideration I desire to observe with reference to the last quotation made by me from *Gangadara* v *Subramania*[1] that the sentence therein "A distinction was drawn between the words 'decree or final order' in clause 3 of section 110 and the term 'the subject-matter' mentioned in clause 1" is the outcome of a little confusion of thought on the part of the learned Chief Justice. Venkatasubba Rao and Cornish, JJ, did not draw a distinction but instituted a correlation between the words "decree or final order" in clause 3 of section 110 and the term "the subject-matter" mentioned in clause 1 by reading them together for the purpose of determining the scope of the right of appeal to the Privy Council If we correct the confusion and read the sentence in the proper manner, it follows that the clause at the beginning of the last sentence of the last quotation, namely, "Although we do not accept all the observations made in the judgment" contains a disapproval by the Full Bench of the mode of construction of section 110, Civil Procedure Code, which began in *Sreenath Roy's case*[2], and ended with *Annapurnabai* v *Ruprao*[3] The effect of the Full Bench decision in *Gangadara* v *Subramania*[1] is, in my judgment this, that it has not only accepted *Sundara Mudaliar* v *Ratnavelu Mudaliar*[4], in preference to *Ramanathan Chetti* v *Subramania Chetti*[5] but also has accepted *Perichiappa Chetti* v *Nachiappa*[6] in preference to *Venkitasami Chetti* v *Sekkutti Pillai*[7] and to later decisions which have followed the last with regard to the proper mode of interpretation of section 110, Civil Procedure Code The approval made by the Full Bench of the decision in *Venkitasami Chetti* v *Sekkutti Pillai*[7] is I think only on the basis of the peculiar facts of that case and not with reference to the entire exposition of the law contained therein The decision in *Venkitasami Chetti* v *Sekkutti Pillai*[7] was, in other words, held correct, because the party seeking leave, *i e*, the plaintiff, sought to take advantage of the High Court's reversal of the decree of the trial Court against the third defendant for making out a right of appeal against the second defendant against whom he had concurrently lost in both the courts It was held incorrect so far as it read together the words "decree or final order" in clause 3 of the section 116, Civil Procedure Code and the words "the subject-matter" in clause 1

In the light of what I have said, it follows that I cannot agree with the view expressed in *Lakshmanan* v *Thangam*[8] that the distinction that was drawn in Venkatasubba Rao J's judgment in *Venkitasami Chetti* v *Sekkutti Pillai*[7] between the words "decree or final order" in clause 3 and the term "subject-matter" mentioned in clause 1 was specifically referred to by the Full Bench without dissent. There was no such distinction drawn by Venkatasubba Rao, J, as pointed out by me already and as in some little confusion erroneously supposed by the learned Chief Justice in *Gangadara* v *Subramania*[1], what was done by him being only to read the words "decree or final order" in clause 3 in conjunction with the expression "the subject-matter" in clause 1 Nor was this process of reasoning referred to by the Full Bench without dissent as supposed by the Court in *Lakshmanan* v *Thangam*[8], a disapproval of this process of reasoning being, in my opinion, what

1 (1946) 2 M L J 69 I L R 1947 Mad 6 (F B)
2 (1904) 8 C W N 294
3 (1924) L R 51 I A 319 I L R 51 Cal 969 (P C)
4 (1926) 56 M L J 476 : I L R 52 Mad 521
5 (1926) 51 M L J 295
6 (1930) 35 L W 206
7 (1936) 71 M L J 580 I L R 1937 Mad 121
8 (1946) 2 M.L.J. 465 I L R 1947 Mad. 744

is implied in the declared declination of the Full Bench to accept all the observations made in the decision in *Venkitasami Chetti* v *Sekkutti Pillai*[1] I therefore hold that the Full Bench decision in *Gangadara* v *Subramania*[2] has been wrongly understood by the Divisional Bench which decided *Lakshmanan* v *Thangam*[3] and that the true view to take of the matter in the existing state of the case-law of this Court and with due regard in particular to the Full Bench ruling in *Gangadara* v *Subramania*[2] is that if *quo ad* the party seeking leave to appeal the decree sought to be appealed against is not one of wholesale affirmance, it does not matter in what particular or to what extent the variation has taken place or whether the variation wholly or to the extent to which it has gone is in favour of the party seeking to appeal or against him In such a case, so long as the statutory requirement of value of the subject-matter of the suit as well as of the proposed appeal, inclusive of course even of portions on which there have been concurrent findings against the party seeking leave to appeal, stands satisfied, the party is, in my opinion, entitled, without showing that a substantial question of law is involved in the proposed appeal, to a certificate which cannot be limited by the exclusion of such portions of the subject-matter from its ambit

While this is my view of the matter, on which it follows that the certificate of leave to appeal to the Federal Court asked for in this case should be granted, it goes without saying that even on the narrower view adopted by this Court in *Lakshmanan* v *Thangam*[3], which is what my learned brother is prepared to accept, the applicant is entitled to the certificate asked for, because this is not a case of complete variance of the lower Court's decree on the question of damages, which leaves no further grievance to be agitated in this regard before a higher tribunal

V.S. *Certificate granted*

[THE FEDERAL COURT OF INDIA.]

[On appeal under section 205 of the Government of India Act, 1935 from the judgment of the Patna High Court dated the 13th April, 1949].

PRESENT :—H. J. KANIA, *Chief Justice*, S FAZL ALI, M. PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B. K. MUKHERJEA, JJ.

Jatindra Nath Gupta .. *Appellant* *

v

The Province of Bihar and others .. *Respondents*

Bihar Maintenance of Public Order Act (1947), *section* 1 (3), *Proviso—Delegation of power to extend duration of the Act—If* ultra vires *the powers of the Bihar Legislature—Government of India Act* (1935), *section* 92 (1)—*Power of the Governor to extend Act with an* ultra vires *provision*

The Bihar Maintenance of Public Order Act of 1947 came into force on 16th March, 1947 and by sub-section (3) of section 1, its operation was limited to one year from the date of its commencement There was, however, a proviso to the effect " that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification " On the 11th of March, 1948, after a resolution of both Houses the Provincial Government issued a notification extending the life of the Act for one year from 16th March, 1948 to 15th March, 1949 By the Bihar Act V of 1949 which came into force on the 15th of March, 1949, in sub-section (3) of section 1 of the Act, 1947, for the words "for a period of one year from the date of its commencement " the words and figure " till the 31st March, 1950 " were substituted As the Bihar Act of 1947, could not of its own force operate in the Chhota Nagpur Division which had been declared to be a " partially excluded area " under section 91 of the Government of India Act, the Governor of Bihar issued a notification on the 16th of March, 1947, directing that the Bihar Act of 1947 should apply to the Chhota Nagpur Division But when the life of the Act of 1947 was extended in 1948, it was not followed by fresh notification under section 92 (1) of the Government of India Act though subsequently the Bihar Act V of 1949 was

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1 (1936) 71 M L J 580 I L R 1937 Mad 121 (F B)

2 (1946) 2 M L J 69 I L R 1947 Mad 6

3 (1946) 2 M L J. 465 I L R 1947 Mad 744

* Case Nos 6-16 of 1949, 28th May, 1949.

extended to that area by a notification The appellants who were arrested in that area in January and February of 1949 under the Bihar Act as extended, applied under section 491, Criminal Procedure Code, for their release on the ground that their arrest and detention were unauthorised and illegal inasmuch as the proviso to section 1 (3) of the Act was *ultra vires* the powers of the Bihar Legislature and as such there was no Act in existence after the expiry of the period of one year fixed under the Act and even otherwise the Bihar Act with its extended duration was not effectually brought into operation in that area

Held (*Kania, C J, Mehrchand Mahajan and Mukherjea, JJ*) —The proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act of 1947 was *ultra vires* in that it amounted to a delegation of legislative power That Act which was a temporary Act came to an end when the one year expired and had not been validly re-enacted when the appellants were arrested and the Governor had no power to adopt it to Chhota Nagpur as there was nothing to adopt When the Bihar Amending Act V of 1949 was passed there was no Bihar Maintenance of Public Order Act, 1947, in operation in the Province which could be amended

Patanjali Sastri, J—The application of the first proviso to section 1, sub-section (3) of the Bihar Maintenance of Public Order Act to Chhota Nagpur by the Notification of 16th March, 1947 was unconstitutional and, assuming without deciding, that the enactment of the Proviso by the Provincial Legislature was *ultra vires* and the notification issued by the Provincial Government on the 11th March, 1948, under that proviso was effective to extend the duration of the Act for one more year, a fresh notification by the Governor was necessary to bring the extended Act into force in Chhota Nagpur and in the absence of such notification the arrest and detention of the appellants must be held to be unauthorised and illegal.

Fazl Ali, J—The proviso to sub-section (3) to section 1 of the Bihar Act of 1947 is only a piece of conditional legislation and it cannot be impugned so far as it confers upon the Provincial Government the power to extend the Act for a further period of one year The mere fact that this power is coupled verbally with the power to modify the Act will not make the entire proviso void If the provision as to modification is not valid, it can be ignored and the proviso can be read as if that provision was not there The notification of the 11th of March, 1948, is valid.

Per *Kania, C J*—The power contained in the impugned proviso to extend the Act for a period of one year, with modifications, if any, is one power and not two severable powers and is legislative power Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is as conditional legislation by the Provincial Government Applying the principles laid down by the Privy Council in the *Queen* v *Burah* and *Russel* v. *Queen*, I do not think the extension of the Act beyond the first year by the Notifications could escape being classed as delegated legislation

Per *Mehrchand Mahajan, J*—The proviso which has been assailed in this case, comes within the ambit of delegated legislation and is thus an improper piece of legislation and void The power given in the proviso to re-enact the Act for another year is legislative power and does not amount to conditional legislation

Per *Mukherjea, J*—The proviso to section 1 (3) of the Bihar Maintenance of Public Order Act must be held to be *ultra vires* the powers of the Bihar Provincial Legislature and *a fortiori* it would be *ultra vires* the legislative authority with which the Governor is invested under section 92 (1) of the Government of India Act

Basanta Chandra Ghose, Advocate, Federal Court, instructed by *S. P. Varma*, Agent, for Appellants

S K Mitra, Government Advocate, Bihar and Senior Advocate, Federal Court (*Raghunath Jha*, Advocate, Federal Court, with him), instructed by *Ram Chandra Prasad*, Agent, for Respondent.

The Court delivered the following

JUDGMENTS · *Kania, C J*—These are eleven appeals from the judgments and orders of High Court at Patna, rejecting the applications of the appellants under section 491 of the Code of Criminal Procedure In Case No VI, under an order dated the 12th February, 1949 and made by the Provincial Government of Bihar, the appellant was arrested on the 23rd of February, 1949, under section 2 of the Bihar Maintenance of Public Order Act, 1947 Under section 4 of the said Act, the grounds for his detention were served on him on the 8th of March, 1949. The appellant filed a petition under section 491 of the Criminal Procedure Code before the Patna High Court on the 24th of March, 1949 His petition came for hearing before a Special Bench of three Judges and the same was dismissed. They granted a certificate under section 205 (1) of the Government of India Act In Cases VII to XIII of 1949, the appellants were detained under the provisions of the same Act, on different dates in December, 1948 and February, 1949. This difference is however immaterial for the decision of the appeals. Their applications under

section 491 of the Code of Criminal Procedure were heard by a Bench of two Judges of the Patna High Court On a difference of opinion between the Judges on the true interpretation of the Notification, dated 7th March, 1949, a reference was made and heard by the same Special Bench of three Judges which dismissed the application of the appellant in Case No VI of 1949 The question referred to the Special Bench by the Division Bench was

"whether, assuming that the provisions of section 4 (1) of the Bihar Maintenance of Public Order Act, 1949, have been complied with in these cases the detention of the petitioners is illegal in view of the Notification dated the 7th March, 1949, issued by His Excellency the Governor under section 92 (1) of the Government of India Act, 1945 ?"

The Special Bench held that a reference to this notification was not relevant because the notification issued by the Governor in 1947 applying the whole of the Act to the Chhota Nagpur Division was valid and operative and therefore the detention of the appellants was legal After the Special Bench gave its judgment, the Division Bench dismissed the applications of these persons also In cases XIV, XV and XVI of 1949, the appellants were detained under orders made by the Provincial Government after 15th March, 1949 Their applications under section 491 of the Code of Criminal Procedure were dismissed by another Bench of the Patna High Court All of them however gave certificates under section 205 (1) of the Government of India Act, 1935 The appellants have therefore brought these appeals to this Court They have also filed applications under section 205 (2) of the Government of India Act praying for leave to urge grounds other than the constitutional grounds In the view I take on one constitutional question, which is common to all the appeals, it is convenient to give one judgment covering all of them

Section 1 (3) of the Bihar Maintenance of Public Order Act, 1947, provides that it shall remain in force for a period of one year from the date of its commencement. It has a proviso in the following terms —

"Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification"

(The further proviso is not material for the decision of the appeals) By the order of the Governor of Bihar, the Chief Secretary issued a notification in the Political Department, Special Section, dated the 16th March, 1947, stating that in exercise of the powers conferred by sub-section (1) of section 92 of the Government of India Act, 1935, the Governor of Bihar is pleased to direct that the Bihar Maintenance of Public Order Act, 1947 (Bihar Act V of 1947) shall apply to the Chhota Nagpur Division and to the Santhal Parganas District The Bihar Legislative Assembly and the Bihar Legislative Council having passed resolutions to extend the Act for a further period of one year, under the order of the Governor of Bihar a notification was published in Government Gazette dated the 11th March, 1948 It stated that in exercise of the power conferred by the first proviso to sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947 (Bihar Act V of 1947), the Governor of Bihar, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, is pleased to direct that the said Act shall remain in force for a further period of one year with effect from the 16th March, 1948 On the 7th of March, 1949, the Governor of Bihar, in exercise of his power under section 92 (1) of the Government of India Act, issued a further notification directing that the said Bihar Maintenance of Public Order Act shall apply and shall always be deemed to have applied to the Chhota Nagpur Division and to the Santhal Parganas District with effect from the 16th March, 1948 On the 15th March, 1949, Bihar Act V of 1949, being an Act to amend the Bihar Maintenance of Public Order Act, 1947, was passed The Act material part is in these terms —

"Whereas it is expedient to amend the Bihar Maintenance of Public Order Act, 1947, in the manner hereinafter appearing, it is hereby enacted as follows —

* * * * *

(2) in sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, for the words, for a period of one year from the date of its commencement the words and figures 'till the 31st March, 1950' shall be substituted"

Following that, on the 12th March, 1949, a public notification was published in the Government Gazette stating that in exercise of the powers conferred by section 92 (1) of the Government of India Act, as adapted by the India (Provisional Constitution) Order 1947, the Governor of Bihar was pleased to direct that the Bihar Act V of 1949 shall apply to the Chhota Nagpur Division and to the Santhal Parganas District.

On behalf of the appellants it was argued before us that section 92 of the Government of India Act conferred on the Governor of Bihar legislative powers The words of sub-section (1) clearly exclude the application of any Dominion or Provincial Act to the excluded area unless the Governor, by public notification, directs it to be applied to that area In giving such direction, he is given power also to direct that the Act shall have effect subject to such exceptions or modifications, as he thinks fit Under section 92 (2), the Governor is given powers to legislate independently for that area He is given the wide power to override the Acts of the Central or Provincial Legislature, but subject to the consent of the Governor-General being obtained in such case. It was argued that the two parts of the section thus confer complete legislative powers on the Governor over the excluded or partially excluded area to the exclusion of the legislative powers, both of the Dominion and Provincial Governments The powers contained in both parts of the section were therefore clearly legislative powers The nature of the power of the Governor contained in section 92 (1) of the Government of India Act, 1935, was debated before this Court in *Chotturam and others v Commissioner of Income-tax, Bihar*[1] Emphasising that as the Governor had power also to modify the Act of the Dominion or Provincial Government, the Court held that the power given to the Governor under section 92 (1) was legislative In my opinion, it is not necessary to discuss the question further in the present case It is not disputed by either party that the power given to the Governor under section 92 (1) is legislative power and was to be exercised in his individual discretion, under the Constitution Act as it existed in March 1947

The main discussion in all the appeals centred round the proviso to section 1 (3) in the Bihar Maintenance of Public Order Act, 1947, quoted above On behalf of the appellants, it was argued that this Act (and the proviso to section 1 (3) is included in the Act) was enacted by the Bihar Provincial Legislature Section 1 (3) prescribed the life of the Act as one year The proviso contained a power to extend the operation of the Act for a further period of one year by the resolutions of the two Houses of Legislature of the Province and further gave the Provincial Government the power of modification, if any, of the Act It was contended that the power to extend the life of an Act, beyond the prescribed period, was clearly legislative power and the Provincial Legislature had no power by the proviso to delegate this power to the two Houses of the Legislature of the Province of Bihar so as to extend the life of the Act by their resolutions only It was urged that this is not conditional legislation at all, because the power of modification is an essential characteristic of the power given by the proviso That gives power to the authority named in the proviso to make changes in the Act passed by the Legislature Such power of modification—and there is no limitation to the extent of the modifications in the Act permitted to be made, under the power—is therefore necessarily legislative power It was pointed out that the Government of India Act is divided in different parts and part III deals with the Governor's Provinces Chapter III of that part contains the general provisions relating to the Provincial Legislature Section 60 in that Chapter provides that there shall, for every Province, be a Provincial Legislature which shall consist of His Majesty represented by the Governor *and* two Chambers in the Province of Bihar It was therefore contended that the Provincial Legislature had created by the Proviso an entirely new body consisting of the two Chambers only to make legislation It was further urged that the legislative procedure prescribed in section 73 and subsequent sections of the Constitution Act

1 (1947) 2 M.L J 432 (1947) F L J 92 (1947) F C R 116.

was substituted by the special procedure of making legislation by resolutions only of the two Chambers of the Province It was contended that the creation of such a legislative body by a Subordinate Legislature like the Bihar Legislature was in contravention of the provisions of the Constitution Act and therefore any extension of the life of the Act made by such a body in accordance with the terms and procedure of the proviso was *ultra vires* the Provincial Government This was argued not to be a case of conditional legislation as the Legislature had not passed the Act itself and made its operation, either as to its commencement or the area, dependent on the order of an extraneous authority

On behalf of the respondent it was not disputed that to the extent the proviso conferred the power of modification it was legislative power. But it was argued that only that portion of the power might be considered *ultra vires* and therefore excluded from the proviso. It was pointed out that by their resolutions the two Chambers and the Provincial Government had made no modifications in the Act. The power to extend the legislation for one year more was legislative power but was conditional legislation and therefore it was not *ultra vires* the Provincial Government. Our attention was drawn to a decision of the Allahabad High Court in *Gaurinandan* v. *Rex*[1]

In my opinion, the contention of the appellants on this point is correct The proviso contains the power to extend the Act for a period of one year, with modifications, if any It is one power and not two severable powers The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power. The power to extend the operation of the Act beyond the period mentioned in the Act *prima facie* is a legislative power. It is for the Legislature to state how long a particular legislation will be in operation That cannot be left to the discretion of some other body The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power. It is not a power confined subject to any restriction, limitation or proviso (which is the same as an exception) only. It seems to me therefore that the power contained in the proviso is legislative. Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is, as conditional legislation by the Provincial Government Section 1 (3) and the proviso read together cannot be properly interpreted to mean that the Government of Bihar in the performance of its legislative functions had prescribed the life of the Act beyond one year. For its continued existence beyond the period of one year it had not exercised its volition or judgment but left the same to another authority, which was not the legislative authority of the Province The proviso is framed in the affirmative form, stating that it shall be extended for a period of one year by the Provincial Government on a resolution passed by the two Chambers I also think that on a true construction of the proviso this power of legislation to extend the life of the Act beyond the first year is not left in the legislative body established by the Government of India Act for the Province, but in a different body For the extension of the Act beyond the first year, the consent of the Governor of the Province is not required under the proviso While section 69 of the Constitution Act makes the Governor an essential part of the Government of the Province in performing its legislative functions, the procedure laid down for the extension of the Act beyond the first year is also different from the procedure prescribed under section 78, etc., of the Constitution Act. Applying the principles laid down by the Judicial Committee of the Privy Council in *The Queen* v *Burah*[2] and *Russell* v *The Queen*[3], I do not think the extension of the Act beyond the first year by the notifications can escape being classed as a delegated legislation It is not and cannot be disputed that delegated legislation will be *ultra vires*

On behalf of the respondent it was argued that even though there might be defect in this legislation, when passing orders on the applications made under

1 A I R 1948 All 414 (P C)
2 (1878) L R 5 I.A 178 I L R 4 Cal 172. 3 (1882) 7 A C. 829.

section 491 of the Criminal Procedure Code, the Court has to decide whether according to the law then in existence the appellants should be released. It was pointed out that by Bihar Act V of 1949, the words " for a period of one year from the date of its commencement " in section 1 (3) of the Bihar Maintenance of Public Order Act, 1947, were substituted by the words " till the 31st March, 1950 ". It was argued therefore that the Bihar Maintenance of Public Order Act, 1947, was in operation in the Province of Bihar throughout and by the notification issued by the Governor on the 18th of March, 1949, the Act was similarly in operation in the Chhota Nagpur Division It was therefore contended that the appellants could not be released. In my opinion this contention has no substance. Bihar Act V of 1949 is an amending Act It is not a new Act It purports only to amend the Bihar Maintenance of Public Order Act, 1947 That Act, which was a temporary Act, as its duration was fixed for one year by the Act itself, came to an end when the first year expired. The result is that when the Bihar Amending Act V of 1949 was passed, there was no Bihar Maintenance of Public Order Act, 1947, in operation in the Province which could be amended and the notification of the 18th March, 1949, issued in the name of the Governor, could not improve the position. As regards temporary legislation, it is stated in Craies on Statute Law (4th Edition) that every statute for which no time is limited is called a perpetual Act and continues in force until it is repealed If an Act contains a proviso that it is to continue in force only for a certain specified time, it is called temporary Act. As a general rule and unless it contains some special provisions to the contrary, after a temporary Act has expired, no proceedings can be taken upon it as it ceases to have any further effect In England, it is the practice to pass an Expiring Laws Continuance Act each session and to put into a schedule each temporary Act which it is intended to continue. When, however, an Act is not continued by a further statute, before the expiration of the time mentioned in the temporary Act, but a bill has been introduced for its extension which has not been passed and therefore has not become a statute, it is provided by the Acts of Parliament Expiration Act, 1808, that if the bill subsequently becomes a statute it would be considered as if it had been a statute from the date the bill was introduced The necessity of passing those Acts in England lends strong support to the view that once a temporary Act ceased to be in operation, because the period mentioned in it had passed, if the measure has to be brought into operation again, fresh legislation must be resorted to. Under the circumstances, this contention of the respondent cannot support the detention of any of the appellants.

On behalf of the appellants, several other grounds mentioned in their petitions were raised and argued In view of my conclusion in respect of the proviso to section 1 (3) it is not necessary to deal with those arguments In the same way it is not necessary to deal with the application for leave to urge further grounds under section 205 (2) of the Government of India Act, although I must say that if the decision on the constitutional questions had gone against the appellants, I would not be prepared to entertain the applications under section 205 (2)

The result is that all the appeals are allowed. In my opinion in place of the order of High Court, the order that the appellants should be released, should be substituted.

Patanjali Sastri, J—These appeals arise out of applications made to the High Court of Judicature at Patna under section 491 of the Code of Criminal Procedure for the release of the appellants who are under detention in pursuance of orders purporting to be made by the Governor of Bihar under section 2 (1) (*a*) of the Bihar Maintenance of Public Order Act, 1947 (hereinafter referred to as " the Act ") The High Court dismissed the applications holding that the detention was not illegal and certified in each case that a substantial question of law as to the interpretation of section 92 (1) of the Government of India Act, 1935, was involved

The detenus were arrested in the Chhota Nagpur Division of Bihar, some in January and the others in February, 1949. Their main contention is that the Act

was not in effective operation in the Chhota Nagpur Division at the time when they were arrested and the orders for their detention were made The Act came into force on 16th March, 1947 and by section 1 (3) its operation was limited to one year from the date of its commencement There was, however, a proviso to the effect that

> " the Provincial Government may, by notification on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification "

Although by section 1 (2) the Act was declared to extend to " the whole of the Province of Bihar," it could not of its own force operate in the Chhota Nagpur Division which had been declared to be " a partially excluded area " under section 91 of the Government of India Act, as section 92 (1) provides, *inter alia*, that

> " notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area unless the Governor by public notification so directs "

The Governor of Bihar accordingly issued a public notification (No 900, dated the 16th March, 1947) in exercise of his powers under that section directing that the Act should apply to the Chhota Nagpur Division On the 11th March, 1948, *i e*, a few days before the Act was due to expire, its life was extended for a further period of one year from the 16th March, 1948, by the Provincial Government on a Resolution passed by both Houses as required by the proviso to section 1 (3) already referred to This extension, however, was not followed by a fresh notification of the Governor directing its application to Chhota Nagpur and it is the appellant's contention that, in the absence of such a notification, the Act with its extended duration was not effectively brought into operation in that area in view of the provisions of section 92 (1) of the Government of India Act, with the result that the appellant's arrest and detention were unauthorised and illegal The appellants in cases Nos 7 to 13, accordingly applied under section 491 of the Code of Criminal Procedure on 21st February, 1949, and the applications were heard by the Chief Justice and Nageshwar Prasad, J , and judgment was reserved on 7th March, 1949

On the latter date, however, the Governor issued a public notification under section 92 (1) directing that the Act

> " shall apply and shall always be deemed to have been applied to the Chhota Nagpur Division and to the Santhal Parganas District from 16th March, 1948"

When this was brought to the notice of the learned Judges they heard further arguments as to the effect of this notification and came to different conclusions. While both agreed that the Governor's power under section 92 (1) was legislative in character and that without a fresh notification by him the Act as extended for one more year could not validly be brought into force in Chhota Nagpur, they differed as to the retrospective effect of the notification of 7th March, 1949 The learned Chief Justice held that the Governor had the power under section 92 (1) to apply the Act retrospectively which must accordingly be deemed to have continued in operation in Chhota Nagpur after 16th March, 1948, and thus legalised the detention Nageshwar Prasad, J , on the other hand, was of opinion that the Governor's power of legislation under section 92 (1) was limited and did not enable him to validate past acts or to apply statutes retrospectively to excluded or partially excluded areas and the detention was, therefore, illegal In view of this difference of opinion they referred the question to a bench of three Judges under clause 28 of the Letters Patent The reference was heard by Meredith, Shearer and Imam, JJ , along with the application of the appellant in Case No 6 who had, in the meanwhile, applied for his release on similar grounds The learned Judges were of opinion that, the Governor having applied the whole of the Act, including the proviso to section 1 (3) to Chhota Nagpur by his notification of 16th March, 1947, the Act was in force in that area for whatever its duration might eventually be, and, when it was extended for another year from 16th March, 1948, by the Provincial Government in exercise of its powers under the proviso after fulfilling the conditions therein laid down

such extension was operative in Chhota Nagpur as well Such extension by notification by the Provincial Government was not fresh legislation which would need a fresh notification by the Governor under section 92 (1) to remove the bar to its operation in Chhota Nagpur In this view, they thought that the notification of 7th March, 1949, was unnecessary for legalising the detention, but they expressed the view that the Governor acting under section 92 (1) had no power to apply an Act retrospectively They answered the question referred accordingly, and dismissed the application of the appellant in Case No 6 rejecting his other contentions and holding that his detention was not illegal The applications in Cases Nos 7 to 13 were subsequently dismissed, conformably to the opinion of the Special Bench, by the Division Bench which originally heard those applications Following the decision of the Special Bench the applications of the appellants in Cases Nos 14 to 16 were also dismissed

In *Chatturam and others* v *Commissioner of Income-tax, Bihar*[1], this Court expressed the view that when the Governor made a notification under section 92 (1) of the Constitution Act he exercised a legislative power It may be mentioned here in passing that Meredith, J. appears to have understood the decision in the above-mentioned case as holding that the Governor exercised a legislative power only when he applied an Act with modifications This is a misapprehension The power of modification was stressed and relied on in that case only as throwing light on the true nature of the power conferred under section 92 (1) On this view, the question arises whether, in applying the proviso to section 1 (3) of the Act to Chhota Nagpur, the Governor exceeded his power under section 92 (1) of the Government of India Act, 1935 The proviso leaves it to the discretion of the Provincial Government and the two Chambers of the Provincial Legislature to prolong the duration of the Act for a further period of one year with such modifications as they may think fit This, in my opinion, is also a legislative power and not a matter of mere administrative discretion It was accordingly suggested that the delegation of such a power was beyond the competence of the Provincial Legislature and that the proviso was *ultra vires* and void On the other hand, learned counsel for the respondent, submitted, that it was only a case of "conditional legislation" such as was held to be within the competence of Legislatures with plenary powers in *Queen* v *Burah*[2], *Russell* v *Queen*[3] and *King-Emperor* v *Benoari Lal Sarma*[4] In the first-mentioned case, their Lordships appear to have regarded the power entrusted under section 39 of Act XXIII of 1861 to the Local Government of extending the Code of Civil Procedure of 1859 to certain areas

"subject to any restrictions, limitation or proviso which the Local Government may think proper"

as an instance of valid conditional legislation although alteration of an enactment by way of "restriction, limitation or proviso" may involve the exercise of a legislative power as much as its "modification," which is only a more comprehensive term Their Lordships criticised the view taken by the majority of the Judges of the Calcutta High Court on two grounds They pointed out that the Indian Legislature was not in any sense an agent or a delegate of the British Parliament in exercising its legislative powers, as was supposed That Legislature, when acting within the limits defined by the Imperial Parliament, had plenary powers of legislation

"as large and of the same nature as those of Parliament itself"

Secondly, they observed that the decision of the majority rested upon a mistaken view of the "nature and principles of legislation" Legislation could be either absolute or conditional on the use of "particular powers" or on the exercise of a "limited discretion" by local administrative authorities In the particular case before them they held that

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1 (1947) 2 M L J 432 (1947) F C R 116 1947 F L J 92

2 (1878) L R 5 I A 178 · I L R 4 Cal. 172 (P C).

3 (1882) 7 A C 829

4 (1945) 1 M L J 76 (1945) F C R 161 72 I A 57 · 1940 F L J 1 (P C)

"the proper Legislature has exercised its judgment as to place, person, laws, powers",

but left to the Lieut.-Governor, "the time and the manner" of carrying the legislation (for removing certain districts from the jurisdiction of the High Court) into effect. But neither in this, which is the leading case on the point, nor in the subsequent decisions already referred to, is any clear indication discernible as to the true dividing line between a "limited discretion" whose delegation is permissible and a legislative power which cannot constitutionally be delegated. It is not easy, nor perhaps wise to attempt to define the limits beyond which the one broadens into the other. While it may be a satisfactory working test in many cases to see whether the power delegated is a legislative power, it may not always be a conclusive test. The trend of modern legislative practice has been in favour of conferring on administrative authorities the power of making rules and bye-laws which may, in a certain sense, be said to be legislative. It is, however, unnecessary to pursue this point further, as I am of opinion that, whether or not it was competent for the Provincial Legislature to enact the proviso in question, the Governor, acting under section 92 (1) of the Government of India Act had no power to direct that the proviso should apply to Chhota Nagpur. For, the power under section 92 (1), though it may be legislative in character, is a very limited power and has been specially vested in the Governor whose personal discretion and judgment are an important factor in its exercise. The securing of "the peace and good government" of the partially excluded areas is made the "special responsibility" of the Governor under section 52 (1) (e), in respect of which he is to exercise his individual judgment under sub-section (3). This arrangement, which "excludes" those areas from the purview of normal legislation, had its origin, as is well known, in the consideration that the people inhabiting those areas were not, on account of their primitive or backward condition, fully capable yet of safeguarding their welfare by joint political action in the Legislatures of the country, and might otherwise suffer neglect or oppression. The Governor is thus made the sole judge as to whether an Act of the Provincial Legislature is suitable for application to those areas, having regard to their peculiar needs and local conditions which greatly vary from those prevailing in the rest of the Province. His divesting himself in effect of this personal responsibility and delegating in advance to that very Legislature the discretion as to whether or not to prolong the operation of the Act in those areas for another year from 16th March, 1948—for, his application of the proviso to Chhota Nagpur could mean nothing less—amounted, in my opinion, to abdication of his function in that regard. Such a shifting of the burden of his responsibility could not have been contemplated by section 92 (1) of the Government of India Act. It follows that the application of the first proviso to section 1, sub-section (3) of the Act to Chhota Nagpur by the notification No. 900, dated the 16th March, 1947, was unconstitutional and, assuming, without deciding, that the enactment of the proviso by the Provincial Legislature was *intra vires*, and the notification issued by the Provincial Government on the 11th March, 1948, under that proviso was effective to extend the duration of the Act for one more year, a fresh notification by the Governor was necessary to bring the extended Act into force in Chhota Nagpur, and in the absence of such notification the arrest and detention of the appellants must be held to be unauthorised and illegal. In this view it is unnecessary to consider the other contentions raised on behalf of the appellants.

It was argued by the respondent's learned counsel that the Bihar Act V of 1949, which came into force on 15th March, 1949 and which was applied by the Governer by a notification under section 92 (1) to Chhota Nagpur, having amended the Act of 1947 by the substitution of the words and figures "till the 31st March, 1950" for the words "for a period of one year from the date of its commencement" in sub-section (3) of section 1 of the Act of 1947, the arrest and detention of the appellants were retrospectively legalised. This argument cannot be accepted. If, as I have held above, the Governor's notification No. 900, of 16th March, 1947, was inoperative in so far it purported to apply the proviso to Chhota Nagpur, the Act must be taken to have expired in that area on 15th March, 1948, notwith-

standing the notification of the Provincial Government of 11th March, 1948, purporting to extend it from 16th March, 1948 to 15th March, 1949 Even if the Act was kept in force in the rest of the Province by such notification when the amending Act No V of 1949 was passed and was effectually amended thereby, notification by the Governor under section 92 (1) which accompanied the amending Act could not effectually bring the amendment into operation in Chhota Nagpur, where the Act had already expired and was no longer in force at the time of the last mentioned notification

Reliance was also placed on behalf of the respondents on the Governor's notification of 7th March, 1949, as validating the arrest and detention of the appellants. That notification, it will be recalled, purported to extend the Act of 1947 retrospectively from the 16th March, 1948 All the learned Judges excepting the Chief Justice in the Court below were of opinion that it was beyond the power of the Governor to apply an existing Act with retrospective effect, and I share that opinion As already pointed out, the Governor's only power under section 92 (1) is to apply an existing Act of the Central or Provincial Legislature to excluded or partially excluded areas and it is only on such application by him that the Act can begin to operate in those areas This implies to my mind that he cannot by his notification apply an Act retrospectively, that is to say, make it operate even prior to the date of his notification I am therefore of opinion that the notification of the 7th March, 1949, is of no avail to the respondents

In the result, the appeals are allowed and the appellants will be set at liberty forthwith

Mahajan, J—The appellant, Jatindra Nath Gupta, at present detained in the Hazaribagh Central Jail, is an employee of Messrs Jagjiwan Trambaklal & Co , coal merchants at Calcutta and was at the time of his arrest on 23rd February, 1949, in charge of their Jharia office as manager He was served with an order of detention purported to have been passed by the Governor of Bihar on 17th February, 1949, under the Bihar Maintenance of Public Order Act, 1947 On 24th March, 1949, an application was filed in the High Court of Patna under section 491 of the Code of Criminal Procedure challenging the legality and propriety of the detention (Criminal Miscellaneous No 149 of 1949) This was dismissed by a Special Bench of the High Court consisting of Meredith, Shearer and Imam, JJ , on 13th April, 1949 It was certified under section 205 of the Government of India Act that the case involved a substantial question of law as to the interpretation of the various sections of the said Act This appeal has been preferred to this Court on the foot of that certificate and as invariably happens in all such cases, an application has been made for leave to argue other points This application however does not require any serious consideration as the points raised are not of such exceptional importance as to incline us to re-open the case on the merits in the exercise of the jurisdiction vested in us under sub-clause (2) of section 205 of the Constitution Act

As regards the constitutional issue, it lies within a narrow compass The facts which raise this point are these the Bihar Maintenance of Public Order Act, 1947 (Act V of 1947) came into force on 16th March, 1947 Sub-clause (3) of section 1 of the Act says

" It shall remain in force for a period of one year from the date of its commencement

Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification "

On the 11th March, 1948, after the resolution of both the Houses the Provincial Government issued a notification extending the life of the Act for one year from the 16th March, 1948, to the 15th March, 1949 By Bihar Act V of 1949, which came into force on 15th March, 1949, in sub-section (3) of section 1 of the Act of 1947 for the words " for a period of one year from the date of its commencement,"

the words and figure "till the 31st March, 1950." were substituted. It is thus clear that the Bihar Maintenance of Public Order Act, 1947, is a statute of the Provincial Legislature and can be said to be in force in Bihar with effect from 16th March, 1947, and its life will expire on 31st March, 1950.

Chhota Nagpur, within which area the appellant was arrested, though a part of the Province of Bihar, is a partially excluded area and is outside the reach of the legislative power of the Provincial Legislature. Though section 99 of the Government of India Act, 1935, enacts that a Provincial Legislature may make laws for the Province or for any part thereof, excluded and partially excluded areas have been removed from the field of legislation of this Legislature by section 92 of the Act. This section is in these terms:

"(1) The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Dominion Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make regulations for the peace and good Government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Dominion Legislature or of the Provincial Legislature, or any existing law, which is for the time being applicable to the area in question.

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him shall have no effect."

The first part of the section extends the executive authority of a Province to excluded or partially excluded areas, *i.e.*, in regard to the exercise of executive authority, excluded areas stand on the same footing as the rest of the Province. As regards legislative power, the Provincial Legislature is completely deprived of it in these cases. The statute in unambiguous words enacts that:

"notwithstanding anything in this Act, no Act, of the Dominion Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area."

Having deprived the Provincial Legislature of its plenary powers of legislation over such areas, the section proceeds to confer a power on the Governor of a Province to make laws for such areas. It does it in two ways. In the concluding part of section 92 (1), it empowers the Governor to direct by public notification that a Provincial Act shall in its application to the excluded area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit. It necessarily follows from this provision that the Governor is constituted as the legislative authority for the excluded parts as the Parliament has conferred on him the power to modify an Act of the Provincial Legislature or to make exceptions in it before giving effect to it in that area. Unless the Governor has legislative power co-extensive with the Legislature of that Province, it is difficult to see how he can have the power to modify a statute of that Legislature. It is in the exercise of his legislative authority that the Governor can without any exceptions or modifications adopt as his own the Provincial Act as such and notify that it shall apply to excluded areas. No sooner the notification is issued, the Provincial statute becomes law in that area, not because of the authority of the Provincial Legislature but by virtue of the law-making power of the Governor. If the Governor thinks it fit to modify a statute or make exceptions in it, he is empowered to do so. (Cf. *Chatturam and others* v. *Commissioner of Income-tax, Bihar*[1].) It is obvious that under section 92 (1) the scope of the legislative power of the Governor is not larger than the scope of the statute of the Provincial Legislature. He has no power to enlarge the statute or extend its scope under section 92 (1). Limits have been laid down within which his power extends. The condition precedent for the exercise of the power conferred is the pre-existence of a statute of the Provincial Legislature. If no such statute has been passed by that Legislature, no occasion can possibly arise for the exercise of the legislative power of the Governor under section 92 (1). The second limit

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1. (1947) 2 M.L.J. 432: 1947 F.L.J. 92: (1947) F.C.R. 116.

laid down is that the scope of the statute of the Provincial Legislature is the outside reach of the Governor's power. He cannot go beyond it, he must function within it. He can subtract from its provisions and can modify it. If the statute is not retrospective, he cannot make it retrospective by his notification as it would amount to going beyond the range of the Provincial statute, the existence of which alone brings into play the powers of the Governor. He can, of course, give effect to the statute by the notification in the excluded areas from the date of its commencement. It will thus be seen that a limited field of legislation has been given to the Governor under section 92 (1) regarding excluded areas or partially excluded areas. He can exercise his legislative power within that field but he cannot trespass beyond the prescribed limits.

Section 92 (2), however, gives the Governor plenary power of legislation concerning excluded areas by framing regulations. He may repeal or amend any Act of the Dominion Legislature or of the Provincial Legislature or any existing law. He has sovereign authority to legislate for an excluded area subject to the assent of the Governor-General. Unless a law made for the peace and good government of an excluded area has been assented to by the Governor-General, it can have no effect. Thus wherever a Governor wishes to act at his own initiative and wants to make laws, he can make them acting in his sovereign legislative authority by himself with assent of the Governor-General, but when he wishes to adopt a line of convenience and wishes not to legislate in exercise of his powers under section 92 (2) and subject to its safeguards and acts under section 92 (1), then he can only do so subject to the conditions and limitations provided therein.

As already mentioned, the Bihar Maintenance of Public Order Act, 1947, came into force on the 16th March, 1947. The Governor acting under section 92 (1) applied it in its entirety including the proviso to sub-section (3) of section 1, to Chhota Nagpur on the same date by notification No. 900 (Extraordinary). Acting under the proviso the Provincial Government on the 11th March, 1948, extended by notification the life of the Act by one year. Having applied the proviso to Chhota Nagpur and having delegated to the Provincial Government the power to extend the life of the Act, provision for which already existed within the four corners of the statute, the Governor assumed that he need issue no second notification under section 92 (1) for giving validity to the extension of the life of the Act in the excluded area. Accordingly, no notification was issued in terms stating that the life of the Act had been further extended by one year so far as Chhota Nagpur was concerned.

The appellant was served with a detention order in February, 1949. When he raised the question of the propriety of his arrest in his petition under section 491, the Governor was advised to issue a validating notification on 7th March, 1949, No. 3430-C, saying that the Act stood extended by one year to Chhota Nagpur from 16th March, 1948, and that it should be deemed that it always had application there. This notification was impugned on the ground that under section 92 (1) the Governor could not exercise his powers with retrospective effect. When by the Bihar Act of 1949 the life of the Act was extended to 31st March, 1950, by substituting the words already quoted in the Act of 1947, the amending Act was applied to Chhota Nagpur by a notification of the Governor, dated 15th March, 1949.

The question to decide is whether on the date of the appellant's arrest the Bihar Maintenance of Public Order Act, 1947, was validly in force in Bihar and also in the excluded area. On behalf of the detenu it is contended that the Act had come to an end as the one year period for which it was to remain in force expired on 16th March, 1948, and that the proviso to sub-clause (3) of section 1 of the Act was void as it amounted to delegation of legislative power by the Provincial Legislature and this it was not empowered to do. It was argued that a Legislature is not permitted to abdicate or transfer to others the essential legislative functions with which it is invested. The attack on the proviso is this: that it

amounts to an improper delegation of the powers of the Provincial Legislature If this contention has force and the proviso to sub-clause (3) of section 1 is *ultra vires* of the Bihar Provincial Legislature, then it follows that the Act ceased to be law in Bihar on 16th March, 1948, and on the relevant date of the arrest of the appellant neither that Act was in force in Bihar nor could the Governor legitimately issue any notification prospectively or retrospectively applying a non-existing Act under section 92 (1) to Chhota Nagpur The result would be that the detention of the appellant would be illegal and it shall have to be directed that he be released

It was observed by their Lordships of the Privy Council in *King-Emperor* v *Benoari Lal Sarma*[1] that :

"It is undoubtedly true that the Governor-General acting under section 72 of Schedule IX must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities"

This observation applies with equal force to cases of all legislative authorities. They are not allowed to transfer to others the essential legislative functions with which they are invested. It has therefore to be determined whether the proviso offends against the maxim *delegatus non potest delegare.* Distinction between delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring discretion or authority as to its execution to be exercised under and in pursuance of the law is a true one and has to be made in all cases where such a question is raised In cases of conditional legislation, on fulfilment of the condition the legislation becomes absolute But in cases of delegated legislation, the delegate has to take a decision whether that legislation is to continue or has to be modified, amended or varied

The proviso which has been assailed in this case, judged on the above test, comes within the ambit of delegated legislation and is thus an improper piece of legislation and void To my mind, it not only amounts to abdication of legislative authority by the Provincial Legislature, it goes further and amounts to setting up a parallel Legislature for enacting a modified Bihar Maintenance of Public Order Act and for enacting a provision in it that that Act has to be enacted for a further period of one year. A careful analysis of the proviso bears out the above conclusion. It may be asked what does the proviso purport to do in terms and in substance ? The answer is that it empowers the Provincial Government to issue a notification saying that the Provincial Act shall remain in force for a further period of one year with such *modifications*, if any, as may be specified in the notification As stated in the earlier part of this judgment, unless the power of the Provincial Government is co-extensive with the power of the Provincial Legislature, it is difficult to see how it can have the power to modify a statute passed by that Legislature Modification of statute amounts to re-enacting it partially It involves the power to say that certain parts of it are no longer parts of the statute and that a statute with X sections is now enacted with Y sections In the act of modification is involved a legislative power as a discretion has to be exercised whether certain parts of the statute are to remain law in future or not or have to be deleted from it The power to modify may even involve a power to repeal parts of it A modified statute is not the same as original statute. It is a new Act and logically speaking, it amounts to enacting a new law The dictionary meaning of the word "modify" is to make something existing much less severe or to tone it down or to make partial changes in it. What modifications are to be made in a statute or whether any are necessary is an exercise of law making power and cannot amount merely to an act of execution of a power already conferred by the statute The extent of changes is left to external authority, *i e*, the Provincial Government. Nothing is here being done in pursuance of any law What is being delegated is the power to determine whether a law shall be in force after its normal life has ended and if so, what that law will be, whether that what was originally enacted or something different The body appointed as a delegate for declaring whether a penal Act of this character shall

1. (1945) 1 M L J. 76 : L R 72 I A 57 : 1945 F.L J 1 . (1945) F C.R. 161 (P.C.).

have longer life than originally contemplated by the legislature and if so, with what modification, is a new kind of legislature than entrusted with the duty under the Government of India Act, 1935 Under section 99 of the Act, a Provincial Legislature alone can make laws for a Province The legislative procedure for enacting such laws is laid down by sections 73, 74 and 75 of the Act and when a Bill is passed by the two Houses of Legislature and is assented to by the Governor, it becomes law ; but under the proviso, it is said that the Provincial Government can modify the law on a resolution of the two Houses and a new legislative authority is vested by the proviso in the Provincial Government as a substitute for the authority constituted under the Government of India Act, 1935, for modifying or enacting a Provincial statute In my opinion, no external body can be delegated with the duty of making modifications in a statute, but that is what the proviso has done This novel device of defeating the Constitution Act adopted by the Provincial Legislature cannot have the approval of this Court. It is a dangerous device to defeat the clear and unambiguous provisions of the Constitution Act and if encouraged, may lead to the substitution of new law making bodies under cover of so-called conditional legislation If both the Houses of the Provincial Legislature were to meet to pass a resolution, one fails to understand why could they not meet to re-enact the law for a further period of one year , instead of passing a resolution, a Bill could be mooted and passed and assent of the Governor obtained I am further of the opinion that the power given to extend the life of the Act for another year in the context of the language of section 1 (3) also amounts to an Act of Legislation and does not fall under the rule laid down in *The Queen* v *Burah* [1] The Act in a mandatory form stated that it shall be in force for one year only That being so, the power given in the proviso to re-enact it for another year is legislative power and does not amount to conditional legislation In letter and in spirit this proviso gives the impression that the Bihar Legislature for reasons best-known to iself wanted to retain the power of saying that the law shall continue for another year with such modifications as it thinks fit, but that it did not want to meet as a legislature with its necessary safeguards but wanted to do so by a resolution The Legislature in doing so acted beyond the powers conferred on it by the Act of Parliament

Reliance was placed in the High Court on certain observations made by their Lordships of the Privy Council in a number of cases, principally on the case in *The Queen* v *Burah*[1] In none of these cases, however, the power was given to modify the original statute, to the delegate and hence these cases are not authority for the decision of the present case The learned Judges of the High Court placed considerable reliance on the following observations in *The Queen* v *Burah*[1] —

> "Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may be well exercised, either absolutely or conditionally , in the latter case leaving to the discretion of some external authority the time and manner of carrying its legislation into effect, as also the area over which it is to extend ".

In that case the Governor-General in Council had determined in the due and ordinary course of legislation, to remove a particular district from the jurisdiction of the ordinary courts and offices, and to place it under new courts and offices, to be appointed by and responsible to the Lieutenant-Governor of Bengal, leaving it to the Lieutenant-Governor to say at what time that change shall take place ; and also enabling him *not to make* what laws he pleased for that or any other district, *but to apply* by public notification to that district any law, or part of a law, which either already was, or from time to time might be in force, by proper legislative authority, in the other territories subject to his Government The Legislature determined that, so far, a certain change should take place , but that it was expedient to leave the time and the manner of carrying it into effect to the discretion of the Lieutenant-Governor and also that the laws which were or might be in force in the other territories subject to the same Government were such as it might be fit and proper to apply to this district also ; but that, as it was not certain that all

1 (1878) L R 5 I.A. 178 ; I.L.R. 4 Cal 172 (P C).

those laws and every part of them could with equal convenience be so applied, it was expedient on that point also to entrust a discretion to the Lieutenant-Governor Objection was taken that the Governor-General had armed the Lieutenant-Governor with legislative authority, a new legislative power, not created or authorized by the Councils' Act of 1861 Their Lordships observed that nothing of that kind had been done or attempted in the case, that the proper Legislature had exercised its judgment as to place, person, laws, powers, and the result of that judgment had been to legislate conditionally as to all those things The conditions having been fulfilled, the legislation was absolute

These observations clearly have no application to the present case, because it was said that no power was given to the Lieutenant-Governor to make what laws he pleased, while in the present case a power has been given to the Provincial Government to say how the new statute which has to be extended for a further period of one year, would look like

The same view was expressed by their Lordships in *Russell* v *The Queen* [1] In that case the mode of bringing the second part of the Canada Temperance Act, 1878, into force was stated as follows —

" On a petition to the Governor in the Council, signed by not less than one fourth in number of the electors of any county or city in the Dominion qualified to vote at the election of a member of the House of Commons, praying that the second part of the Act should be in force and take effect in such county or city, and that the votes of all the electors be taken for or against the adoption of the petition, the Governor-General, after certain prescribed notices and evidence, may issue a proclamation, embodying such petition, with a view to a poll of the electors being taken for or against its adoption When any petition has been adopted by the electors of the county or city named in it, the Governor-General in council may, after the expiration of sixty days from the day on which the petition was adopted, by Order in Council published in the Gazette, declare that the second part of the Act shall be in force and take effect in such county or city, and the same is then to become of force and take effect accordingly Such Order in Council is not to be revoked for three years, and only on like petition and procedure "

It was contended in that case that assuming the Parliament of Canada had authority to pass a law for prohibiting and regulating the sale of intoxicating liquors, it could not delegate its powers, and that it had done so by delegating the power to bring into force the prohibitory and penal provisions of the Act (the second part of the Act) to a majority of the electors of counties and cities This contention was repelled on the ground that the Act did not delegate any legislative powers, that it contained within itself the whole legislation and that the provision that certain parts of the Act shall come into operation on the petition of a majority of electors did not confer on these persons power to legislate The rule laid down in *The Queen* v *Burah* [2] was cited as authority for the above proposition This case is also distinguishable on the same ground as *The Queen* v *Burah* [2]

Considerable reliance was placed on the decision in *King Emperor* v *Benoari Lal Sarma* [3]. In this case an Ordinance issued under section 72 of schedule IX of the Government of India Act, 1935, by the Governor-General was impugned, *inter alia*, on the ground of delegation of legislative authority The Ordinance recited that

" an emergency has arisen which makes it necessary to provide for the setting up of special criminal courts ",

the body of the Ordinance contained the necessary framework for courts of criminal jurisdiction consisting of Special Judges, Special Magistrates and Summary Courts, the provisions as to their respective limits of jurisdiction and procedure, together with restrictions on appeal, but the Ordinance did not itself set up any of these courts but provided by section 1, sub-section 3, that the Ordinance

" shall come into force in any Province only if the Provincial Government, being satisfied of the existence of an emergency arising from any disorder within the Province or from a hostile attack

1 (1882) 7 A C 829
2. (1878) L R 5 I A 178 I L R 4 Cal 172 (P C),
3 (1945) 1 M L J 76 L R 72 I A 57 : 1945 F L J. 1 (1945) F C R 161 (P C)

on India or on a country neighbouring on India or from the imminence of such an attack, by notification in the official Gazette, declares it to be in force in the Province, and shall cease to be in force when such notification is rescinded "

In view of this last provision it was contended that the Ordinance was invalid, either because the language of the section showed that the Governor-General notwithstanding the preamble, did not consider that an emergency existed but was making provision in case one should arise in future, or else because the section amounted to what was called " delegated legislation ", by which the Governor-General without legal authority sought to pass the decision whether an emergency existed to the Provincial Government instead of deciding it for himself As regards this last contention their Lordships observed as follows —

It is undoubtedly true that the Governor-General, acting under section 72 of schedule IX must himself discharge the duty of legislation there cast on him, and cannot transfer it to other authorities But the Governor-General has not delegated his legislative powers at all His powers in this respect, in cases of emergency, are as wide as the powers of the Indian Legislature which, as already pointed out, in view of the proclamation under section 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial Legislature Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's ordinance taking the form that the actual setting up of a special court under the terms of the ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned This is not delegated legislation at all It is merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute is determined by the judgment of a local administrative body as to its necessity Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of Khundkar J , on this part of the case The latter Judge appositely quotes a passage from the judgment of the Privy Council in the well known decision in *Russell* v *The Queen*[1] "

This case brings out the extent to which conditional legislation can go In the present case, however, the power conferred is much larger than that and authorises the Provincial Government to modify the Act and also to re-enact This kind of proviso does not fall under the rule of conditional legislative authority

The other points raised by the learned counsel for the appellants require no discussion in view of my decision on the principal point involved in the case The Bihar Maintenance of Public Order Act died a natural death on 16th March, 1948 and had not been validly re-enacted by the date when the appellant was arrested The result is that the Governor had no power to adopt it to Chhota Nagpur as there was nothing existing to adopt He could not exercise his powers under section 92 (1) and there was no law under which the appellant could be arrested and detained Moreover, even under section 92 (1) or (2) the Governor could not make a law enacting a proviso like the one in question in this case as that would again amount to delegated legislation The subsequent notification issued under section 92 (1) was, in my opinion, a useless attempt to cover a lost ground and does not cure the defect It is unnecessary to decide that in case the proviso was a piece of valid legislation whether the Governor could issue a notification retrospectively, making the act applicable to Chhota Nagpur. When a suitable occasion arises, the matter will be decided.

The result is that the detention of the appellant is illegal and he is directed to be set at liberty.

The other ten appeals also stand decided by my decision in the above case. A point was raised that Act V of 1949, which amended the original Act of 1947, saved these cases from the effect of this decision In my opinion, this contention is not sound Act V of 1949 enacted an amendment in the original Act of 1947 which had died a natural death on the 16th March, 1948 Unless that Act was revived, no amendment made in it could be of any effect. The only apt manner of reviving the expired Act was by enacting a fresh statute or by enacting a statute expressly saving that that Act is herewith revived The result therefore is that all these appeals are allowed and the appellants are directed to be set at liberty

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1. (1882) 7 A C. 829

Mukherjea J—I agree with my Lord the Chief Justice that these appeals should be allowed; and I would like to say a few words on the questions of constitutional law which have been raised in these cases

The substantial point that requires consideration is whether the Bihar Maintenance of Public Order Act (1947), under which orders for arrest and detention were made against the appellants in all these cases, was validly in operation in the Chhota Nagpur Division of the Province of Bihar, within which these appellants resided, at the dates when the arrests were made or the orders for detention were passed against them

The Bihar Maintenance of Public Order Act is a piece of legislation passed by the Provinvial Legislative Council of Bihar and it received the assent of the Governor-General on 15th March, 1947 The Act extends to the whole of the Province of Bihar as provided for by section 1 (2), and sub-section (3) of section 1 declares that it shall remain in force for a period of one year from its commencement Upon this sub-section there is engrafted a proviso which runs as follows

"Provided that the Provincial Government may, by notification on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications if any as may be specified in the notification"

The Chhota Nagpur Division is a partially excluded area within the meaning of Chapter V of the Government of India Act, 1935, and under section 92 (1) of the Act, no Act of the Dominion or the Provincial Legislature is applicable to such area, unless the Governor by a public notification so directs A notification was issued by the Governor of Bihar in accordance with the provisions of this sub-section and published in the official Gazette on 16th of March, 1947, extending the Bihar Maintenance of Public Order Act without any exception or modification to the Chhota Nagpur Division of the Province On the 11th of March, 1948, the Provincial Government, in exercise of its powers under the proviso to section 1 (3) of the Bihar Maintenance of Public Order Act referred to above extended the application of the Act for a further period of one year and the Act was thus made operative up to the 15th of March, 1949 The appellants with one exception were arrested in January, 1949 and the detention orders were all made in February, 1949 Applications were presented soon after on behalf of eight detained persons, including the appellants in Appeals Nos VII to XIII and one Kanailal Paul since released before the High Court at Patna under section 491 of the Criminal Procedure Code; and the applications came up for hearing before a Division Bench consisting of Agarwala, C J, and Nageswar Prasad, J A contention was raised on behalf of the applicants that the Bihar Maintenance of Public Order Act had no operation in the Division of Chhota Nagpur after the 15th of March, 1948, as no notification in terms of section 92 (1) of the Government of India Act was published by the Governor of Bihar making it applicable to Chhota Nagpur after the life of the Act was extended for a further period of one year in accordance with proviso to section 1 (3) mentioned above It appears that pending the hearing of these applications under section 491 of the Criminal Procedure Code, the Governor of Bihar published a notification on 7th of March, 1949, purporting to do so under section 92 (1) of the Government of India Act, by which it was declared that the Maintenance of Public Order Act should apply and should be deemed to have always applied to the Division of Chhota Nagpur from the 16th of March, 1948. Fresh arguments were heard by the learned Judges on this point and the judgment was delivered on the 23rd March, 1949 One of the petitioners named Kanailal Paul was released on the ground that sufficient materials were not supplied to him to which he was entitled under the Act to enable him to make effective representation against the order of detention. With regard to the other applicants, the grounds disclosed under section 4 of the Act were found to be sufficiently specific, but on a question of law the two Judges took different views Both the Judges seem to have agreed that the Bihar Maintenance of Public Order Act could not apply to Chhota Nagpur after the expiration of the Act on the 15th of March, 1948, by reason merely

of the extension made by the Provincial Government in accordance with the proviso to section 1 (3) of the Act, and that a fresh notification by the Governor under section 92 (1) of the Government of India Act was necessary The learned Judges differed, however, as regards the legal effect of the notification published by the Governor of Bihar on 7th March, 1949 According to Agarwala, C J, this notice would operate retrospectively, while Nageswar Prasad, J, was of opinion that it took effect only from the date on which it was published The result was that the point upon whch the two Judges differed was referred under section 28 of the Letters Patent to a Bench of three Judges consisting of Meredith, J, Shearer, J and Imam, J The question referred to this Bench of three Judges though not very happily framed was worded as follows :

> "Whether assuming that the provisions of section 4 (1) of the Bihar Maintenance of Public Order Act, 1947 have been complied with in these cases the detention of the petitioners is illegal in view of the notification dated the 7th of March, 1949, issued by His Excellency the Governor under section 92 (1) of the Act (Government of India Act) 1935."

It appears that another detained person named Jatindra Nath Gupta, who is appellant in Appeal No VI of 1949, filed his application under section 491 of the Criminal Procedure Code some time after the applications were presented on behalf of the eight persons mentioned above Before his case came up for hearing, the learned Judges had already referred the cases of the other seven persons to the Bench of three Judges and the case of Jatindra Nath was also sent along with this batch to be heard and disposed of by the Special Bench.

The Special Bench answered the question referred to them in the negative and all the Judges concurred in holding that no fresh notice under section 92 (1) of the Government of India Act was necessary for applying the Maintenance of Public Order Act to Chhota Nagpur after it was extended for another year by the Provincial Government in accordance with the proviso to section 1 (3) of the Act The extension, it was said, was not a fresh Act of legislation, but flowed from the provision of the Act itself which in its entirety became operative in Chhota Nagpur by the notification of the Governor dated the 16th of March, 1947 The notification of 7th of March, 1949 was, therefore, wholly unnecessary, though according to learned Judges, it could not have any retrospective effect The conclusion of the Special Bench was that the detention of the petitioners was not illegal even without the notification of 7th of March, 1949 As the view of the majority of the learned Judges was that the detentions were not illegal, the applications of the seven detained persons were dismissed on 19th of April, 1949, by Agarwala, C J and Nageswar Prasad, J. The petition of Jatindra Nath Gupta was dismissed on its merits by the Special Bench itself Certificates were granted in all these cases under section 205 (1) of the Government of India Act and on the strength of these certificates these appeals have come up before us

The main contentions put forward on behalf of the appellants are that the Bihar Maintenance of Public Order Act could not have been in force in the districts of Chhota Nagpur after the 15th of March, 1948, firstly because the extension of the Act for a further period of one year by notification of the Provincial Government in terms of the proviso to section 1 (3) of the Act was void and inoperative, the proviso itself being *ultra vires* the powers of the Provincial Legislature and the legislative authority of the Governor : and secondly because even assuming that the extension of the duration of the Act by the Provincial Government was lawful, the Act could have no application to Chhota Nagpur without a fresh notice by the Governor under section 92 (1) of the Government of India Act For a proper decision on these points, it would be necessary and convenient, to advert, first of all, to the provisions of section 92 of the Government of India Act which deals with the administration of and making of laws for excluded and partially exlcuded areas

The expressions "excluded" and "partially excluded areas" as used in Chapter V of the Government of India Act really stand for what were described

as "Scheduled districts" or "backward tracts" in earlier legislation in British India With regard to these areas, where there appears to be a substantial element of aboriginal population, the policy pursued by the Government had always been to make the general rules of law and procedure obtaining in other parts of the country inapplicable to them and to vest an authority in the Governor-General in Council or the administrative head of the Province to legislate for them in a summary manner Section 92 (1) of the Government of India Act as it now stands lays down

"The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Dominion Legislature or of the Provincial Legislature shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit"

Sub-section (2) then provides

"The Governor may make regulations for the peace and good Government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Dominion Legislature or of the Provincial Legislature, or any existing law, which is for the time being applicable to the area in question

Regulations made under this sub-section shall be submitted forthwith to the Governor-General and until assented to by him shall have no effect"

Thus sub-section (1) excludes from an excluded or partially excluded area all legislation passed by the Dominion or the Provincial Legislature and no Act can be operative within such an area unless a notification to that effect has been published by the Governor of the Province in the manner indicated in the sub-section The Governor is also empowered to lay down, when he publishes any such notification that an Act would be applied, subject to such modifications and exceptions as he considers proper. The provisions of this sub-section are very similar to those contained in sections 5 and 5-A of the Scheduled Districts Act (Act XIV of 1874), though in the earlier Act the sanction of the Governor-General in Council was necessary even for making a notification Sub-section (2) of section 92 gives a plenary power of legislation to the Governor of a Province in regard to excluded and partially excluded areas within the Province and he can make any regulation which, in his opinion, is necessary for peace and good Government, the only limitation on his authority being that the regulation must receive the assent of the Governor-General before it can be made operative

There could be no doubt that the powers exercised by a Governor under section 92 (2) of the Government of India Act are legislative power in the proper sense of the expression The Governor is expressly empowered by this sub-section to repeal or amend any Act of the Dominion Legislature or of the Provincial Legislature or any existing law which he considers necessary in the interest of peace and good Government The exercise of this power is not limited to any period of time or to any particular entry in the three lists in the Seventh Schedule of the Act The language of sub-section (1), however, is not so clear and the question was raised before the High Court and also mooted before us whether the Governor really exercises a legislative power when he makes a notification under section 92 (2) of the Government of India Act, and reference has been made in this connection to a pronouncement of this Court in *Chatturam and others* v *Commissioner of Income-tax, Bihar*[1] In that case there was a notification by the Governor of Bihar under section 92 (1) of the Government of India Act declaring that the Income-tax Amendment Acts of 1939 and 1940 and the Indian Finance Act of 1940 would be applicable to Chhota Nagpur with retrospective effect from the dates on which these Acts come into force in other parts of Bihar For the purpose of removing any doubt, a regulation was also passed by the Governor of Bihar under section 92 (2) of the Government of India Act on exactly the same terms upon which the notification was issued and the regulation received the assent of the Governor-General.

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1 (1947) 2 M L J 432 (1947) F L J 92 (1947) F C R. 116.

It was held by this Court that while the first part of section 92 (1) of the Government of India Act deals with executive authority, the latter part of the sub-section deals with the functions of a Governor which are clearly legislative

"By that part of the sub-section" so runs the judgment, "the Governor is given authority, by Notification, to direct that a certain Act either of the Federal or Provincial Legislature will apply to a particular area or a portion of that area He is further given power to direct that the same shall apply subject to such exceptions and modifications as he thinks fit By the last words mentioned above, the Governor is therefore authorised either to exclude from its operation certain sections or portions of sections of the Act of a Federal or Provincial Legislature and also he is given authority to make modifications therein The right to modify an Act of the Legislature can only be legislative power and not administrative power In making modifications, the whole aspect of an Act or a section may be changed If so, it is clearly the exercise of legislative powers"

This decision which is binding on us, states, in my opinion, the law quite correctly The function exercised by the Governor in making a notification under section 92 (1) of the Government of India Act cannot be a purely executive function, it is not that the Governor merely publishes an Act passed by a legislative body, it is the notification that gives the law which otherwise would have no operation in an excluded area, its authority and binding force The entire scheme of the Government of India Act in the matter of excluded and partially excluded areas seems to be like the previous legislation on the subject, to remove these backward areas from the purview of the general law of the land and to make the Governor of the Province the sole repository of legislative power in regard to them But though the power exercisable by the Governor under section 92 (1) of the Government of India Act is in essence legislative power, it is different from and is of a much more restricted and attenuated character than the power conferred upon the Governor by sub-section (2). Under sub-section (1), the Governor has no power to make independent legislation He can only apply to an excluded area a legislation which has already been passed by the Dominion or the Provincial Legislature. It is true that he can make modifications and exceptions but these are only for adjusting the provisions of the Act to the local circumstances The Governor cannot certainly, by notification under section 92 (1), alter the basic structure of an Act or its policy or principles.

Mr Ghosh appearing for the appellants has accepted the position that the Governor exercises not executive but legislative powers when he makes a notification under section 92 (1) of the Government of India Act. Strictly speaking, therefore, it must be held that the notification of the Governor of Bihar dated the 16th March, 1947, made the Bihar Maintenance of Public Order Act applicable to the partially excluded area of Chhota Nagpur as a legislative Act of the Governor himself, and the proviso to section 1 (3) of the Act was necessarily a part of it. The material question for our consideration that now arises is whether legislation by the Governor could validly contain a provision which is embodied in this proviso If the intention of the Parliament is that the Governor and the Governor alone could exercise legislative authority in respect to an excluded or partially excluded area, could the Governor delegate his powers to any other external authority and empower the latter to extend the duration of the Act with or without modifications as it considers proper? The learned Advocate for the appellants has contended that the proviso to section 1 (3) of the Act amounts to a delegation of the legislative powers to an outside authority and it is *ultra vires* of the Bihar Provincial Legislature also The matter, I think, may be considered generally, for if there is actually any delegation of legislative powers, the clause would be invalid whatever the legislative authority might be.

Now it is one of the settled maxims of constitutional law that the power conferred on legislative authority to make laws cannot be delegated by it to any other body or department The authority must remain where it is located and the power to which the prerogative has been entrusted cannot relieve itself from the responsibility by choosing other organs upon which it shall be devolved[1]. There are certain well-recognised exceptions, more apparent than real, which have been

1. *Vide* Cooley's Constitutional Limitations, 8th Edn, Vol 1, p 227

engrafted upon this maxim Thus the legislation itself may be conditional and not absolute and its taking effect may be made to depend upon determination of facts and conditions by an outside authority[1]. The Legislature, it is true, cannot delegate its power to make law but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to. make its own action depend[2]. The inhibition against delegation does not also preclude the Legislature from delegating any power not legislative which it could itself rightfully exercise. Thus the Legislature may authorise another to do something which does involve law-making as a matter of advantage or convenience, although if it so liked it could do that thing itself

I will now consider whether the impugned proviso comes within the mischief of the rule which prohibits delegation of legislative powers or is covered by any of the exceptions. Section 1 (3) of the Maintenance of Public Order Act definitely states that the Act shall remain in force for a period of one year from its commencement. The proviso authorises the Provincial Government to extend it by another year with or without modifications provided there is a resolution to that effect passed by the Bihar Legislative Assembly and assented to by the Bihar Legislative Council. It is pointed out to us that even in England there may be legislation by resolutions of both Houses of Parliament This argument has absolutely no force As has been said by Chalmers and Asquith in their well-known work on constitutional law, there have been rare instances of legislation by resolution of both Houses, such resolutions of course resting ultimately on statutory powers. Thus in the Emergency Powers Act, 1920, the King is enabled by proclamation to issue regulations and provision is made by the Act for prolonging the operations of these regulations beyond a period of seven days from their being laid before Parliament if both Houses pass resolutions in favour of such prolongation[3] These exceptional cases rest on express statutory provisions which the British Parliament in the supremacy of its powers can always make A resolution passed by both Houses of the Bihar Provincial Legislature has certainly not the force of law under the Government of India Act, and the Provincial Government even if it acts on the resolutions of both the Houses of Legislature acts as an outside authority which is not invested with any legislative powers at all If to such authority the Provincial Legislature has delegated the power of law-making in regard to certain matters, such Act would be clearly illegal and outside the competency of the Provincial Legislature.

In the High Court Meredith, J., took the view that in enacting the proviso the Bihar Provincial Legislature did not delegate its legislative powers to any external authority. What it did was to enact what is called a "conditional legislation," the validity of which has never been questioned and has been repeatedly affirmed in more than one pronouncements of the Judicial Committee, namely, in *Queen* v *Burah*[4], *Russell* v *Queen*[5] and *King-Emperor* v *Benoarilal*[6]

In *Queen* v. *Burah*[4], the question arose as to validity of section 9 of Act XXII of 1869 passed by the Indian Legislature Sections 4 and 5 of the Act removed the District known as Garho Hills from the operation of law prescribed by the Bengal Acts and Regulations and vested the administration of civil and criminal justice and the collection of revenue and other matters in such officers as the Lieutenant Governor might appoint Section 9 of the Act laid down

"The said Lieutenant Governor may from time to time by notification in the Calcutta Gazette extend *mutatis mutandis* all or any of the provisions contained in the other sections of this Act to the Jaintia Hills, the Naga Hills, and to such portion of the Khasi Hills as for the time being forms part of British India"

With regard to this section, the High Court, by a majority, decided that the authority given to the Lieutenant Governor of Bengal to extend the Act of 1869

1 *Vide* Cooley's Constitutional Limitations, 8th Edn, Vol 1, p 227

2 *Vide* Locke's Appeal, 13 Am Rep 716

3 *Vide* Chalmers and Asquith on Outlines of Constitutional Law, 5th Edn, p. 98

4 (1878) L R 5 I A 178 I L R 4 Cal 172 (P C)

5. (1882) 7 A C 829

6 (1945) F L J 1 (1945) 1 M L J 76 L R 72 I A 57 1945 F C.R. 161 (P C).

to the Khasi and Jaintia Hills was in excess of the legislative powers of the Governor-General in Council This decision was reversed by the Judicial Committee and their Lordships pointed out that the decision of the majority of the Judges of the Calcutta High Court rested upon a mistaken view of the powers of the Indian Legislature and indeed of the nature and principles of legislation With regard to the first, it was held by the Judicial Committee that the Indian Legislature was not a delegate of the Imperial Parliament and within the limits assigned to it, it had plenary powers of legislation as large and of the same nature as those of Parliament itself With regard to the second point, their Lordships held that it was certainly not within the power of the Indian Legislature to create a new Legislature and endow it with legislative capacity, but they pointed out that there was nothing like delegation in the present case. Here everything was decided by the Legislature itself and all that was left to the discretion of the Lieutenant Governor was to specify the time and the manner of carrying the law into effect The case, according to their Lordships, fell within the category of what was described as conditional legislation and their Lordships held that such legislation had been in vogue in India and was sanctioned both by usage and considerations of convenience.

It will be noticed that in this case all that was left to the Lieutenant Governor to determine was the time when the repealing Act passed by the Legislature would come into operation in the Khasi Hills and Jaintia Hills There was no legislative Act left to be performed by the Lieutenant Governor As their Lordships observed in the judgment

" the proper Legislature has exercised its judgment as to place, person, laws, powers and the result of that judgment has been to legislate conditionally as to all these things The conditions having been fulfilled, the legislation is now absolute "

In the present case, the position is quite different It is not a conditional statute which is to take effect on the determination of some fact or condition by an extraneous authority. The Act is to take effect at once, and what is left to the outside authority is to determine at some future date whether the Act should be extended for one year further with or without modifications

In *Russell* v *Queen*[1], the validity of the Canadian Temperance Act of 1878 was challenged on the ground that it was *ultra vires* of the powers of the Parliament Act of Canada. The Temperance Act was to be brought into force in any county or city if upon a vote of the majority of the electors of that county or city favouring such course the Governor-General by order in Council declare the relative part of the Act to be in force It was held by the Privy Council that this provision did not amount to a delegation of legislative authority to a majority of the voters in a city or county Their Lordships said

" The short answer to this objection is that the Act does not delegate any legislative powers whatever It contains within itself the whole legislation on the matters with which it deals The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons powers to legislate Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency "

In the present case the Act does not lay down the condition and everything which is to follow upon the fulfilment of the same. It provides for the determination of the duration as well as the contents of the legislation itself by some external authority at a future date.

The principle underlying the decision in *King-Emperor* v *Benoarilal*[2] is identically the same In that case the validity of an Emergency Ordinance by the Governor-General of India was challenged *inter alia* on the ground that it provided for setting up of Special Criminal Courts for trial of particular kinds of offences, but the

1 (1882) 7 A C 829 R 72 I A 57 1945 F C.R 161 (P.C).
2. (1945) F L J 1 . (1945) 1 M L.J. 76 . L.

actual setting up of the Courts was left to the Provincial Governments who were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that

> "This is not delegated legislation at all It is merely an example of the not uncommon legislative arrangement by which the local application of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity"

In my opinion, the validity of the proviso to section 1 (3) of the Bihar Maintenance of Public Order Act cannot be upheld on the ground of its being a piece of contingent legislation. It cannot also be supported on the ground that what it delegates is a mere non-legislative function. The duration of a statute is a matter for determination by the Legislature itself. From the language of sub-section (3) of section 1 and that of the proviso, it is difficult to say that the Legislature fixed the duration of the Act at two years from the date of the commencement and left it to the Provincial Government to determine at the end of one year in consultation with the two Houses of the Bihar Legislature whether the Act should be in operation for one year more If that was the real intention of the Legislature, it might have been argued that it was a piece of conditional Legislation only That this was not the intention of the Legislature is, however, clear from the fact that the Provincial Government is authorised to decide at the end of the year not merely whether the Act should be continued for another year but whether the Act itself should be modified in any way or not To modify a statute is certainly to perform a legislative act No restrictions have been laid down regarding the nature of the modifications that could be made. Mr. Mitter appearing for the respondents has conceded in a way that to authorise another body to modify a statute amounts to investing that body with legislative powers He argues, however, that the power of modification is different and severable from the power of extending its duration, and even if one portion of the proviso is held to be bad, there is no reason why the other part should be held to be invalid also It is pointed out that in this case the Provincial Government has merely extended the period of the Act without introducing any modification in its terms This contention though plausible at first sight does not appear to me to be sound The language of the proviso clearly indicates that modification and extension of the period of the statute are inter-related and are treated as integral parts of one and the same Act; the authority which is to determine whether the statute is to be extended or not is to consider at the same time whether the provisions are to be kept intact or modified Whether modification is actually made or not is perfectly immaterial and the mentioning of the two things together makes it clear that what the Legislature wanted to delegate to the Provincial Government was legislative and not administrative powers.

For these reasons, I am inclined to hold that the proviso to section 1 (3) of the Bihar Maintenance of Public Order Act must be held to be *ultra vires* the powers of the Bihar Provincial Legislature and *a fortiori* it would be *ultra vires* the legislative authority with which the Governor is invested under section 92 (1) of the Government of India Act

As the appellants are entitled to succeed on this point alone, the other contentions raised by the learned Advocate for the appellants need not be considered at all It would also be unnecessary to consider in the view that I have taken whether the notification of the Governor dated the 7th of March, 1949, could have retrospective effect If there was no lawful extension of the Act for any further period after the 15th of March, 1948, the Act could not legally be in operation in any part of the Province at any time after that date. In those circumstances, the question of its being made applicable to any excluded area by notification under section 92 (1) of the Government of India Act would not at all arise.

I may state, however, that in my opinion although the Governor in making a notification under section 92 (1) of the Government of India Act exercises legislative and not executive powers, the language of the sub-section indicates clearly that the Act notified would come into operation in the excluded area only from

the date of the notification and not earlier than that It is not necessary however to decide this question finally in the present case

Towards the close of his arguments, a point was raised by Mr Mitter that even if the Act was not validly in force when the orders for detention were passed against the appellants, yet the subsequent Act of 1949 (Act V of 1949) by amending section 1 (3) makes the Act operative from its very commencement down to 31st March, 1950, irrespective of any notification by the Provincial Government which was necessary under the old Act As the new Act is in force at the present moment, the detention orders could be supported under the provisions of the new Act and this would be a complete reply to the prayer for release of the petitioners under section 491 of the Criminal Procedure Code

On such materials as have been placed before us, it is difficult to accept the contention of the learned Advocate as sound It is certainly competent to the Legislature in exercise of its plenary powers to revive or re-enact a legislation which has already expired by lapse of time The Legislature is also competent to legislate with retrospective effect, but neither of these things seems to have been done in the present case. The Legislature proceeds on the footing that the old Act was alive at the date when the new Act was passed, and the new Act merely purports to amend one of the provisions of the old Act There could be no amendment of an enactment which is not in existence and from the fact that the Legislature purports to amend an Act, it could not be held as a matter of construction that the intention of the Legislature was to renew a dead Act or make a new enactment on the same terms as the old with retrospective effect

The result is that, in my opinion, the appeals should be allowed, the applications of the appellants under section 411 of the Criminal Procedure Code should be granted and they should be directed to be set at liberty

Cases Nos XIV, XV and XVI of 1949

Mukherjea, J—In view of our decision in the connected Appeals Nos VI to XIII of 1949, these appeals should also be allowed The applications of the appellants under section 491 of the Criminal Procedure Code are granted and they are directed to be at liberty

Fazl Ali, J—I propose to deal at some length with only one of the questions urged before us, as I do not find myself in agreement with my other colleagues in regard to it That question is whether the first proviso to section 1 (3) of the Bihar Maintenance of Public Order Act, 1947 (Bihar Act V of 1947), is void.

The first proviso to section 1 (3) of the Bihar Maintenance of Public Order Act runs as follows.

"Provided that the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly, and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification"

The arguments put to us against this proviso may be summed up as follows —

(1) That the Provincial Legislature has no power to create a subordinate legislative authority.

(2) That, consequently, the Provincial Legislature is not competent to delegate its legislative power to an external authority

(3) That the proviso to which reference has been made is void, because it amounts to a delegation of legislative power by the Provincial Legislature to the Provincial Government, in so far as the latter is empowered (i) to extend the Act for a period of one year which amounts to its re-enactment and (ii) to modify its provisions which may amount to subtracting from, adding to, or varying the existing provisions of the Act.

I will presently state my own conclusions with regard to the matters raised in these arguments, but before doing so, I will refer very briefly to *Burah's case*[1] which appears to me to have a direct bearing on the present discussion and which brings out in a very clear manner the important distinction between delegation of legislative power and conditional legislation. In that case, the Privy Council had to deal with an Act of the Governor-General which purported .

"to remove the Garo Hills from the jurisdiction of the tribunals established under the General Regulations and Acts and for other purposes".

Section 9 of the Act provided that the Lieutenant Governor of the Province may by notification extend *mutatis mutandis* all or any of the provisions contained in the other sections of the Act by notification to the Khasi and Jaintia Hills, but it was contended that section 9 of the Act was to be held void and of no effect inasmuch as "it was not legislation but it was a delegation of legislative power." The Privy Council however held that the impugned section did not amount to delegation of legislative power but was mere conditional legislation While dealing with the matter, their Lordships made the following observations

"Legislation, conditional on the use of particular powers, or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing, and, in many circumstances, it may be highly convenient The British Statute Book abounds with examples of it and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred It certainly used no words to exclude it Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case Among them are the great Codes of Civil and Criminal Procedure (Acts VIII of 1859, XXIII of 1861 and XXV of 1861)"

The question to be decided is whether the proviso which is impugned before us can be regarded as a piece of conditional legislation The proviso in question confers a two-fold power on the Provincial Government (1) to extend the Act for one year ; and (2) to make modifications while extending the Act. So far as the extension of the Act is concerned, I am not prepared to hold that it amounts to legislation or exercise of legislative power From the Act, it is clear that, though it was in the first instance to remain in force for a period of one year, the Legislature did contemplate that it might have to be extended for a further period of one year. Having decided that it might have to be extended, it left the matter of the extension to the discretion of the Provincial Government. It seems to me that the Legislature having exercised its judgment as to the period for which the Act was or might have to remain in force, there was nothing wrong in its legislating conditionally and leaving it to the discretion of the executive authority whether the Act should be extended for a further period of one year or not. It would be taking a somewhat narrow view of the decision in *Burah's case*[1] to hold that all that the Legislature can do when legislating conditionally, is to leave merely the time and the manner of carrying its legislation into effect to the discretion of the executive authority and that it cannot leave any other matter to its discretion. The extension of the Act for a further period of one year does not amount to its re-enactment. It merely amounts to a continuance of the Act for the maximum period contemplated by the Legislature when enacting it.

The matter however is not so simple when we deal with the power of modifying the Act which also is conferred by the proviso on the Provincial Government, because if the matter is viewed a little strictly it may appear at the first sight that by empowering the Provincial Government to modify the Act, the Legislature has delegated to some extent its legislative power to an external authority But it appears that in *Burah's case*[1] their Lordships of the Privy Council have among other instances of good conditional legislation referred to section 39 of Act XXIII of 1861, which reads as follows —

1. (1878) L R. 5 I A. 178. I L R. 4 Cal. 172 (P C).

"When under the provisions of section 385 of the said Act, the Act is extended to any part of the territories not subject to the General Regulations of Bengal, Madras and Bombay, it shall be lawful for the Government to which the territory is subordinate to declare that the Act shall take effect therein subject to any restriction, limitation or proviso which it may think proper. In such case the restriction, limitation or proviso shall be inserted in the declaration or notification of such extension When the Act is extended by the Local Government to any territory subordinate to such Government, and such extension is made subject to any restriction, limitation or proviso, the previous sanction of the Governor-General of India in Council shall be requisite"

This section must be read with section 385 of Act VIII of 1859 which is referred to therein and which runs as follows .—

"This Act shall not take effect in any part of the territories not subject to the general Regulations of Bengal, Madras and Bombay, until the same shall be extended thereto by the Governor-General of India in Council or by the Local Government to which such territory is subordinate, and notified in the 'Gazette'"

It seems to me that if the provision empowering an executive authority to subject an Act to any restriction, limitation or proviso which it may think proper while declaring that that Act was to take effect, is an instance of valid conditional legislation, it would be difficult to hold that the proviso with which we are concerned is not an equally good piece of conditional legislation. I do not however wish to pursue the matter further, because, in my opinion, the power to extend the Act and the power to modify it are two separate powers, and, assuming that the Act may not be valid in so far as it confers the latter power, it can be held to be valid in so far as it confers the former power I have already stated my reasons for holding that the proviso cannot be impugned in so far as it confers upon the Provincial Government the power to extend the Act for a further period of one year. The mere fact that the power to extend is coupled verbally with the power to modify the Act will not make the entire proviso invalid. If the provision as to modification is not valid, we can ignore it and read the proviso as if that provision was not there In my opinion, the two powers mentioned in the proviso are separable and are not so intertwined that the proviso must stand or fall as a whole. In the present case, the Provincial Government merely extended the Act and did not modify it I am certainly not prepared to hold that the modification extending the Act was void and of no legal effect.

Another point raised before us was as to the effect of the Bihar Act V of 1949, which is a short Act and which, after reciting that

"it was expedient to amend the previous Act in the manner hereinafter appearing",

provides in section 2 as follows :—

"In sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, for the words 'for a period of one year from the date of its commencement', the words and figures 'till the 31st March, 1950' shall be substituted"

If we substitute the words "till 31st March, 1950" in the Act of 1947, then the third clause to section 1 of the Act will read as follows .

"It shall remain in force till the 31st March, 1950, from the date of its commencement."

It is contended on behalf of the appellants that if the notification issued on the 11th March, 1948, by the Bihar Government under the first proviso to sub-section (3) of section 1 of the Act of 1947 is held to be invalid, then the Act was dead on the 16th March, 1948, and it could not be revived by the amending Act. On the other hand, it is contended on behalf of the Provincial Government that in substance the amending Act provides that Act V of 1947 shall be deemed to be a live Act from the date of its commencement till the 31st of March, 1950. What is urged is firstly that there is no doubt that the Provincial Government could legislate retrospectively and secondly that the Act as it now reads cannot but have retrospective operation It is pointed out that the words "It shall remain in force till the 31st March, 1950, from the date of its commencement" fully support this construction It does not seem to me to be necessary to deal with these arguments, because, for the reasons stated by me while dealing with the first point, I am of the opinion that the notification of the 11th March, 1948, is valid.

Several other constitutional points were raised in this case on behalf of the appellants, but it seems to me to be unnecessary to deal with them, as I am in complete agreement with the opinion expressed by the learned Judges of the Special Bench in regard to them.

In my opinion, these appeals should be dismissed.

By the Court.—In accordance with the opinion of the majority, all the eleven appeals are allowed; and the cases are remitted to the High Court of Judicature at Patna with the declaration that the others made by the High Court shall be vacated and in their place there shall be substituted orders directing that the appellants be set at liberty.

V. S. ——— *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL AND MR. JUSTICE RAGHAVA RAO.

T. S. Sivaprakasa Mudaliar and another .. *Appellants**

v.

K. M. Samarapuri and others .. *Respondents.*

Company—Appointment of receiver to manage affairs of—Powers of Court—Receiver, if can be appointed for a company carrying on managing agency business of another company

It cannot be said that the Court has no jurisdiction to appoint a receiver in a going concern like a company, which is carrying on the managing agency business of another company There is no provision in the Company's Act which excludes the jurisdiction of a Court to appoint a receiver; though since the Company's Act makes provision for dealing with circumstances in which a company is mismanaged, it should not be necessary in the vast majority of cases to appoint a receiver

Though it cannot be said that it is in all cases improper to appoint a receiver for a company which is carrying on the managing agency business of another company, it may not be proper to appoint a receiver in cases where the managing agency agreement shows that the appointment was due to any peculiar confidence reposed in the company. But, when the receiver is appointed, he is not substituted for the company He is only the manager of that company and as such he would be entitled to perform all the duties of that company including the managing agency of the other company. His powers would of course be only co-terminous with the powers of the company of which he is appointed receiver

Appeal against the order of the District Court, Chingleput, dated 4th February, 1949, in I A. No. 54 of 1949 in C M A. No 90 of 1948 (I.A No. 939 of 1948 in O.S. No. 395 of 1948, District Munsif Court, Poonamalle), etc.

C. M. A. No. 52 *of* 1949.

C Narasimhachariar and *M E. Rajagopalachari* for Appellant.

Messrs. Rao and Ram and *K. Sankara Sastri* for Respondents

C. R. P. No. 92 *of* 1949.

C. Narasimhachariar and *P. Jayachandra Nayudu* for Petitioner.

Messrs. Rao and Ram and *M E. Rajagopalachari* for Respondents

The Judgment of the Court was delivered by

Horwill, J.—In February, 1948, two persons to whom we will refer as respondents 1 and 3, brought into existence two companies. One was the Thirunageswaram Weavers' Welfare and Benefit Company, the shareholders of whom are weavers working in Thirunageswaram. The other was Ramaswami and Company, Ltd., a private company consisting of only two shareholders, the first and third respondents themselves. These two persons were presumably responsible for the drawing up of the constitution of the two companies; and it was agreed upon at the same time that a managing agency agreement should be executed, whereby the powers of management in the Thirunageswaram Weavers' Welfare and Benefit Co., Ltd., should be exercised by Ramaswami and Co, Ltd, for a term of 20 years, with a further extension of 20 years upon the resolution of the company, at an ordinary general meeting. Unfortunately, these two respondents fell out, and so made it difficult for them to conduct either their own business of Ramaswami & Co, Ltd., or that of Thirunageswaram Weavers' Welfare and Benefit Co, Ltd.,

* A. A. O. No. 52 of 1949 & C. R. P. No 92 of 1949. 31st March, 1949

of which these two respondents are the two leading directors The Weavers' Welfare and Benefit Company became divided into two factions, the larger, controlling 240 to 305 shares out of a total of 403, supporting the third respondent, and the other, controlling anything upto 163 shares ; following the leadership of the first respondent. It would appear, if the allegations of the first respondent are true, that the third respondent, as the controller of the larger number of shareholders, succeeded in depriving the first respondent of all share in the management, with the result that the first respondent filed O.S. No 395 of 1948, on the file of the District Munsif of Poonamallee for a declaration that he was equally entitled with the third rsepondent to manage the affairs of Ramaswami and Company, of which the main concern was the conducting of the Weavers' Welfare and Benefit Company, and praying for an injunction to restrain the third defendant from unlawfully ousting him from the joint managership of the companies. At the same time, he filed I A. No. 939 of 1948 for a temporary injunction. A temporary injunction was passed on 3rd November, 1948 ; but as the first respondent was not satisfied with the extent of the temporary injunction passed, he filed C M A No. 90 of 1948 in the Court of the District Judge of Chingleput against the order in I A. No. 939 of 1948. On 10th November, 1948, on an application for the appointment of a receiver one Devaraja Mudaliar was appointed as receiver on the 4th December, 1948. The third respondent attempted to circumvent this order in favour of the first respondent by getting two men of his faction to file I A No. 54 of 1949 in C.M.A. No. 90 of 1948, to restrain the receiver from interfering with the affairs of the management of the Thirunageswaram Weavers' Welfare and Benefit Company. By that time there were proceedings pending in the High Court also and so the learned District Judge dismissed that application C M A No 52 of 1949 has been filed against the order of the District Judge dismissing I A No. 54 of 1949, while in C R P No 92 of 1949, the third respondent prays this Court to revise and set aside the order of the District Judge appointing a receiver We may add that Devaraja Mudaliar refused to accept the office of receiver, with the result that the learned District Judge was unable to secure the unanimous approval of all interested parties with regard to the person to be appointed as receiver Various names were submitted to him by the rival factions, and he appointed one Janab M. A. Sandhamiyan Sahib, whom he considered to be the most fitted for that office.

Very many points have been argued on behalf of the third respondent and the two members of his faction who filed I A No 54 of 1949 The first is that the Court had no jurisdiction to appoint a receiver in a going concern like Ramaswami and Company. Their learned advocate seeks as authority for that contention a brief dictum to be found at the conclusion of the judgment of Greaves, J , in *Kailashchandra Dutt* v *Sadar Munsif, Silchar*[1]. There, the learned Judge said without giving any reasons,

> " . there is no jurisdiction in a Court to appoint a receiver of a company. If it is necessary to protect the assets of a company other means must be sought which are provided by the provisions of the Companies Act "

We find no provision in the Companies Act which excludes the jurisdiction of a Court to appoint a receiver ; though since the Companies Act makes provision for dealing with circumstances in which a company is mismanaged, it should not be necessary in the vast majority of cases to appoint a receiver It might even be improper to do so in certain circumstances Our attention has been drawn to a number of instances in which Receivers have been appointed ; and although the particular case that we are here considering does not fall within one of the categories of cases in which receivers have been appointed by courts, we think this is a case in which, if the allegations are accepted, the appointment of a receiver would be the most satisfactory way of dealing with the temporary difficulty that exists during the pendency of the suit If the allegations of the first respondent be true, he is kept out of possession and management by the third respondent and seeks

1. (1924) I L R. 52 Cal 513 at 521.

in his suit to have it declared that he is entitled to participate equally with the third respondent in the management of Ramaswami & Co , Ltd.

It was next argued that even though it be unobjectionable to appoint a receiver for Ramaswami and Company with regard to its own business, it would be improper to appoint a receiver for that part of the business of Ramaswami and Company which deals with its managing agency on behalf of the Weavers' Welfare and Benefit Company It has been argued that since the contract of agency was between the Weavers' Welfare and Benefit Company on the one hand and Ramaswami and Company on the other, a receiver cannot be substituted for Ramaswami and Company. If Ramaswami and Company is not to manage the affairs of the Weavers' Welfare and Benefit Company, then it is argued, it is for the company to decide who shall manage it The receiver is however only the manager of the business of Ramaswami and Company and was not substituted for Ramaswami and Company. The business of Ramaswami and Company was not taken away from it. That company continues to exist and to be the managing agents of the Weavers' Welfare and Benefit Company As the manager of that company, the receiver is entitled to perform all the duties of that company, including the managing agency of the Weavers' Welfare and Benefit Company.

In arguing against the appointment of a receiver for the management of the Weavers' Welfare and Benefit Company in the place of Ramaswami and Company, it is contended that Ramaswami and Company was appointed because of the peculiar confidence which the Weavers' Welfare and Benefit Company had in Ramaswami and Company If from the managing agency agreement it appeared that that was so, there would be considerable force in the argument, and it would then not be proper on the part of a Court to appoint somebody in whom the Weavers' Welfare and Benefit Company had no confidence, in the place of persons whom they selected because of the confidence that they had reposed in them. We have already pointed out that Ramaswami and Company was not appointed as agents by a company already in existence. The Directors of Ramaswami and Company were responsible for bringing the Thirunageswaram Weavers' Welfare and Benefit Company into existence The agreement makes it clear in very many places that Ramaswami and Company, Ltd , is entitled to assign or transfer its interests, and that the company, by whatever name it may be known or whoever may be the assignees or transferees, is entitled as of right to manage the affairs of the Weavers' Welfare and Benefit Company for the period of the contract. We therefore find nothing in the terms of the agreement which affords any ground for concluding that the continued right of Ramaswami and Company to manage the affairs of the Weavers' Welfare and Benefit Company was dependant upon the peculiar confidence reposed in the directors of the one by the shareholders of the other.

A fourth argument is that I.A No. 54 of 1949 should not have been dismissed *in limine*, and that the learned Judge should have considered the arguments put forward on behalf of the Weavers' Welfare and Benefit Company and passed a reasonable order after considering their objections. That argument is akin to another point that has been made in the Appeal and the Revision Petition, *i e*, that even apart from the application, I A. No 54 of 1949, the learned Judge should have consulted the Weavers' Welfare and Benefit Company before appointing a receiver, because it was their interests and were primarily affected by the order of appointment In principle, we agree that it would have been advisable to consult members of the company and that the learned Judge should have given fuller reason for dismissing I.A No 54 of 1949 ; but in this connection one has to remember that consulting the members of the Weavers' Welfare and Benefit Company is tantamount to consulting the first and third respondents again, for they are the leaders and spokesmen of their respective factions amongst the weavers.

Another argument by the learned advocate for the two petitioners in I.A. No. 54 of 1949 is that the services of Ramaswami and Company, Ltd , were legally dispensed with for misconduct, and that since Ramaswami and Company, Ltd.,

is no longer entitled in law to manage the affairs of the Weavers' Welfare and Benefit Company, the receiver, whose powers are not greater than those of Ramaswami and Company would also be precluded from interfering with the affairs of the Weavers' Welfare and Benefit Company. We have been taken through the various affidavits and statements made on behalf of the third respondent and the faction that he leads, and it is not at all clear that any definite allegation has been made—still less proved—that the agency of Ramaswami and Company has been legally determined In some affidavits reference is made to a determination of the agency as early as May, 1948 ; but there appears to have been another meeting on 15th November, 1948, on which the learned advocate for the third respondent and his faction chief relies in the proceedings before this Court. As to what happened on that date we may well refer to the third respondent's reply affidavit in C M.P. No 1049 of 1949, paragraph 3, in which he said:

"As the notice for the statutory meeting was too short, the statutory meeting was adjourned to 15th November, 1948 On 14th October, 1948, notice of an extraordinary general body meeting to be held on the same day, *i e*, 15th November, 1948, to remove the said directors including the first respondent herein was issued to all the shareholders On 15th November, 1948, after the statutory meeting was over, the general body meeting was held in which Ramaswami and Company as well as the six directors who colluded with the first respondent were removed"

So it would appear that the extraordinary general body meeting was for the removal of the first respondent and others from the directorship of the Weavers' Welfare and Benefit Company No material has been put before us or before the lower Court to show the nature of the summons that was issued in that case, that it was received by the first respondent and others, that the meeting was regularly held, and that the requisite statutory majority was obtained in support of the resolution terminating the agency of Ramaswami and Company.

Lastly, it is said that the receiver appointed was not a man of substance The learned District Judge has given reasons which seem to us sufficient for selecting the person whom he appointed, as being a man outside the factions and of considerable experience in the business carried on by or on behalf of the Weavers' Welfare and Benefit Company It is of course clear that the powers of the receiver are co-terminous with the powers of Ramaswami and Company It should not be necessary for us to say that the appointment of a receiver does not prevent the Weavers' Welfare and Benefit Company from holding meetings and conducting business other than that covered by the agency agreement with Ramaswami and Company, Limited.

C M.A. No 52 of 1949 and C R.P No. 92 of 1949 are dismissed with the costs of the contesting first respondent, one set

V S. *Appeal and Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN.

Medisetti Benniah and another . *Petitioners.**

Madras Kerosene Control Order (1945), rule 12—Essential Supplies (Temporary Powers) Act (XXIV of 1946), sections 2 and 7—' Retail dealer '—Sale of kerosene to consumers in villages—Licence not obtained—Sale at excess prices—Punishable offences

The petitioner was charged with offences and convicted for having (1) sold kerosene in retail without a retail dealer's licence in contravention of rule 12 of the Madras Kerosene Control Order and thereby committed an offence punishable under section 7 of the Essential Supplies (Temporary Powers) Act (XXIV of 1946) and for having (2) sold kerosene at rates in excess of those prescribed by the Collector of the place in his notification under the Defence of India Rules, rule 81 (2).

Held : (1) that kerosene is a petroleum product and so, though section 2 of Act XXIV of 1946 does not specify it, it still comes within the scope of the definition of ' essential commodity ' in section 2.

(2) That the distribution by the accused to the consumers in the villages for price of the kerosene made him a ' retail dealer ' within the meaning of the Madras Kerosene Control Order and hence

*Cr. R C Nos 146 and 147 of 1948. 19th November, 1948.

his selling without having obtained a licence and got himself registered would make him punishable under section 7 of the Act XXIV of 1946

(3) That the sale by the accused in contravention of the order of the Collector by selling at excess rates was also punishable under the Defence of India Rules

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of Vizagapatam in C A Nos 72 and 73 of 1947 (C C Nos 25 to 27 of 1947 and 28 of 1947 respectively on the file of the Additional First Class Magistrate, Vizagapatam)

E Venkatesam for Petitioners.

The Public Prosecutor (*V L Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —The same question arises for consideration in both these petitions. The petitioner was the village munsif of Pakalapadu He was certainly not granted any licence , nor was he registered as a retail dealer of kerosene within the meaning of rule 12 of the Madras Kerosene Control Order, 1945 C W. 1 was the registered dealer for the supply of kerosene to the residents of the village of which the petitioner was the village munsif. The facts proved were that it was the practice in the villages to which C W. 1 was expected to supply kerosene, for C W 1 to issue kerosene to the village munsifs ; and the village munsifs paid for the kerosene they took from C W. 1 The village munsifs then distributed the kerosene to the individual villagers On 18th December, 1946, C W 1 handed over to the petitioner seven tins of white kerosene and one tin of yellow kerosene. Under the orders promulgated by the District Magistrate, originally under section 81 (2) of the Defence of India Rules, he fixed the retail price of a bottle of kerosene at 2 annas 9 pies for superior kerosene and 2 annas six pies for inferior kerosene. On 31st January, 1947, the petitioner sold kerosene at 4 annas a bottle

The charge against the petitioner was that he sold kerosene in retail without a retail dealer's licence in contravention of rule 12 of the Madras Kerosene Control Order and thereby committed an offence punishable under section 7 of the Essential Supplies (Temporary Powers) Act (XXIV of 1946). The other charge was that he sold kerosene at rates in excess of those prescribed by the Collector in his notification issued under the Defence of India Rules, rule 81 (2). The petitioner was convicted of these charges

In the definition of " essential commodity " in section 2 of Act XXIV of 1946 kerosene as such was not included but petroleum and petroleum products were included. One of the contentions of the learned advocate for the petitioner was that kerosene could not be included within petroleum and petroleum products specified in section 2 of the Act. Kerosene itself has not been defined nor mentioned in the Act, and in the absence of any statutory definition its ordinary meaning in English language will have to be taken The Concise Oxford Dictionary gives the meaning of kerosene " lamp-oil obtained by distillation of petroleum and from coal and bituminous shale, paraffin " Even apart from that, it should be obvious that kerosene is a petroleum product, and so it comes within the scope of the definition of " essential commodity " in section 2 of Act XXIV of 1946.

The main controversy centered on the question whether the petitioner was a retail dealer The Madras Kerosene Control Order, 1945, defined " dealer " to mean " a person dealing in the purchase, sale or distribution of kerosene ". " Retail dealer " was defined to mean " a dealer who sells kerosene to consumers ". The contention of the learned advocate for the petitioner was that at the worst a village munsif who helped C W. 1, the registered retail dealer, to distribute kerosene to the villagers in accordance with the quota fixed for the villages would be an agent, but in no case would the petitioner be a retail dealer within the meaning of the Madras Kerosene Control Order. C W. 1 deposed :

" Till January, 1947, the accused who is the village munsif of the village, used to take the village quota of kerosene for distribution in his village In February, 1947 and March, 1947, I sold kerosene

myself in Pakalapadu village I cannot say what the accused used to do with the kerosene he was taking Exhibit C is the account of sales of my shop "

Then C W. 1 referred to the entry, Exhibit C-1 and stated .

" On 18th December, 1946, the accused took 7 white and 1 yellow kerosene tins and in token of receipt he signed in my account "

When cross-examined by the accused C W. 1 stated .

" The village munsifs used to pay their cost So also the accused paid me "

The learned advocate for the petitioner contended that there was no real evidence in this case that the transaction which resulted in the transference of kerosene tins from C.W 1 to the petitioner was a sale The evidence of C W 1 gives all the necessary ingredients to prove that each time there was a delivery of tins with payment of price therefor there was a transfer, and that transfer constituted a sale It was in the account of sales, Exhibit C, that these transactions were entered. There was nothing in the evidence to show that apart from the cost of the kerosene C W. 1 was entitled to any more Though there was no specific evidence when exactly the cost of the tins was paid by the village munsif to C W 1, there was still nothing in the evidence to indicate that after parting with the tins C W 1 retained any dominion over them But it seems to me even without proof that the transference of the tins to the village munsif by C W 1 constituted a sale, a sale to consumers by the village munsif would still make him a retail dealer within the meaning of the Madras Kerosene Control Order A dealer means a person dealing in the sale or distribution of kerosene Quite obviously the distribution to villagers by the village munsif was for a price. It was certainly a sale A retail dealer only means a dealer who sells kerosene to consumers

One of the contentions of the learned advocate for the petitioner was that it was not the regular business of the village munsif and that from the evidence on record it could not be said that he carried on business as a retail dealer within the meaning of rule 12 (*a*) of the Madras Kerosene Control Order. In re *Narayanaswami Mudali*[1], on which the learned advocate for the petitioner relied can have no application to the facts of this case. It was not an instance of a single transaction. Exhibit C showed that the petitioner normally and on several occasions obtained tins of kerosene ; and, as I have already pointed out, each transaction was a sale by C.W 1 to the petitioner, who sold kerosene in retail to the villagers On the evidence on record it can certainly be found that the accused carried on business as a retail dealer , and he was not registered The conviction under section 7 for contravention of an order under rule 12 (*a*) of the Madras Kerosene Control Order was right and is confirmed

That the petitioner sold in contravention of the orders of the Collector cannot be denied. Rules 1 and 2 prohibit the sale by any person . even assuming that the expression " person " as used in rules 1 and 2 of the notification of the Collector must be interpreted as " dealer " which was the expression used in rule 3, in view of my finding that the petitioner was a retail dealer within the meaning of the Madras Kerosene Control Order, the contravention of the rules promulgated by the Collector was fully proved. The conviction on that count also was right.

The petitions are dismissed.

K C. *Petition dismissed.*

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1. (1947) 1 M.L.J. 364.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAJAGOPALAN

S. M. Abdul Kareem . *Petitioner.**

Criminal Procedure Code (V of 1898), section 435—Direction by District Magistrate to Public Prosecutor to withdraw under section 494, Criminal Procedure Code, a prosecution launched—Nature of order—If revisable

Where a District Magistrate gives a direction to the Public Prosecutor to withdraw under section 494, Criminal Procedure Code, a prosecution which had been launched against a head constable and a constable, there is no judicial order to consider in revision at that stage It must be viewed merely as an order of administrative instructions to the Public Prosecutor There is nothing in this order which could in any legal manner affect the exercise of discretion of the Magistrate before whom the case was pending to allow the withdrawal

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the District Magistrate, Tanjore, dated 26th November, 1947, in P.R C No. 1 of 1947 (P.R.C. No 5 of 1947, Sub-Divisional Magistrate, Tanjore)

V. Ramaswami Ayyar and *V Meenakshisundaram* for Petitioner.

The Public Prosecutor (*V. L Ethiraj*) for the Crown

The Court made the following

ORDER.—The order which the petitioner seeks to set aside in revision purports to be a direction given by the District Magistrate to the Public Prosecutor of Tanjore to withdraw under section 494, Criminal Procedure Code, the prosecution launched against a head constable and a constable. On the motion of the brother of petitioner and after an enquiry by two Magistrates, the case against the accused, that is, the head constable and constable, was taken on file by the District Magistrate himself and the case was transferred to the file of the Sub-Divisional Magistrate, Tanjore, for a preliminary enquiry. Subsequently, on the intervention of the District Superintendent of Police, the official superior of the two accused, the learned District Magistrate purported to pass the order he did on 26th November, 1947, directing the withdrawal of the charges

The preliminary objection of the learned Public Prosecutor, that there was no judicial order to consider at this stage in revision must prevail. Though the case was originally on the file of the learned District Magistrate before it was transferred to the file of the Sub-Divisional Magistrate, the moment the case was transferred, the District Magistrate ceased to have any jurisdiction to continue the enquiry The order dated 26th November, 1947, must be viewed merely as an order of administrative instructions to the Public Prosecutor. It was open only to the Public Prosecutor to move the Court under section 494, Criminal Procedure Code. What should happen to the Public Prosecutor should he ignore the instructions given to him by the District Magistrate and should the Public Prosecutor refuse to withdraw the prosecution I am not called upon either to contemplate or discuss At any rate one thing is clear It was wholly within the discretion, a discretion to be exercised in a judicial manner, of the Sub-Divisional Magistrate to permit the withdrawal or refuse such permission should the Public Prosecutor prefer an application under section 494, Criminal Procedure Code. There is nothing in the order of the District Magistrate dated 26th November, 1947, which could in any legal manner affect the exercise of that discretion It is unfortunate the learned District Magistrate exceeded the limits of discretion in discussing as he did the evidence in the case diary and the possible evidence that might be forthcoming in the trial The Sub-Divisional Magistrate would be well advised in ignoring the contents of this letter should this letter be placed before him at any stage. It must, however, be said in fairness to the Public Prosecutor, Tanjore, that he himself could have merely applied for the withdrawal of the charges without

*Cr. R C No 299 of 1948. 24th November, 1948.
(Cr. R P. No 270 of 1948.)

indicating at that stage the reasons that prompted the District Magistrate to issue instructions to the Public Prosecutor.

To reiterate, the order complained of is only an administrative order, and it is still open to the District Magistrate or his successor in office to revoke that order and allow the enquiry to proceed

The petition is dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE RAJAGOPALAN

Sappa Appalaswamy *Petitioner* *

Essential Supplies (Temporary Powers) Act (XXIV of 1946), *section* 7—*Consignment by owner of goods to carrier for transport out of a district—If a contravention of notification under the Defence of India Rules prohibiting transport of goods from one district to another without permit*

When a person consigns bags of charcoal to a carrier intending them to be taken from one place to another, he does "transport" the charcoal within the meaning of the notification issued by the Government under the powers vested in them by the Defence of India Rules which is punishable under section 7 of the Essential Supplies (Temporary Powers) Act, though the physical act of carrying is done by the carrier Though the expression "transport" is not defined either in the notification or in the Defence of India Rules or anywhere in Act XXIV of 1946, it is clear from the notification in question that what was intended was prohibition of movement of charcoal from one district to another without the requisite permits The ban was not intended to be imposed only on the person who actually carried the charcoal It cannot be said that the term "transport" in the notification excludes "consignment for transport"

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Session of East Godavari division at Rajahmundry, dated 12th November, 1947, and passed in C A No 145 of 1947 preferred against the judgment of the Court of the Additional First Class Magistrate, Rajahmundry, dated 20th August, 1947, in C C No. 58 of 1946

G. Chandrasekhara Sastry for Petitioner.

The Public Prosecutor (*V. L Ethiraj*) for the Crown

The Court made the following

ORDER —The petitioner, a dealer in charcoal in Rajahmundry, was convicted of having transported without permits 150 bags of charcoal on two occasions to P W 1 at Bhimavaram in contravention of the notification issued by the Government under the powers vested in them by the Defence of India Rules The offence was punishable under section 7 of Act XXIV of 1946

The evidence on record could leave one in no doubt on the question of fact, whether it was the appellant that consigned for transport these 150 bags of charcoal to be delivered to P W. 1 at Bhimavaram, though the actual transport was to be by a public carrier, in a boat

Virtually the only point raised in this petition by the learned advocate for the petitioner was that it was not the petitioner that actually "transported" the charcoal from Rajahmundry to Bhimavaram and that the consignment for transport which was all that was proved against the petitioner could not bring him within the scope of the prohibition issued in the notification and section 7 of Act XXIV of 1946. The expression "transport" was not defined either in the notification or in the Defence of India Rules or anywhere in Act XXIV of 1946. Though expressions in a penal statute have to be construed strictly, it should be clear from the terms of the notification that what was intended was prohibition of movements of charcoal from one district to another without the requisite permits The ban was not intended to be imposed only on the person who actually carried the charcoal Very often it would only be a public carrier that would be entrusted

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* Cr R C No 196 of 1948 24th November, 1948.
(Cr R P No 187 of 1948.)

with the actual conveyance of goods from one place to another I am unable to hold that a construction of the term " transport " in the notification should exclude " consignment for transport ". The petitioner who consigned the goods intending them to be taken from Rajahmundry to Bhimavaram did transport the goods within the meaning of the notification, though the physical act of carrying was done in a boat propelled by the boatman

On the evidence on record the petitioner was rightly convicted The sentence is by no means excessive The offence complained of was committed a number of months after the issue of the notification which should have been well within the knowledge of the petitioner as a regular dealer in charcoal.

The petition is dismissed

V S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE GOVINDA MENON.

Chunduru Kanniah Gupta and another . *Appellants* *

v

Pallamparthi Subbarami Reddi .. *Respondent.*

Sale of land—Agreement for sale by members of joint family—One of them not signing agreement—Effect—Contract if incomplete or inoperative.

If a document is drawn up in the name of several persons and it is the intention of the parties that all should execute it, it will become incomplete and inoperative till all have done so, but it is a question of fact in each case as to what was the intention of the parties

Case-law reviewed

Appeal against the decree of the Court of the Subordinate Judge of Nellore in A S No 69 of 1945, preferred against the decree of the Court of the District Munsif of Nellore in O.S No. 359 of 1942.

K. Umamaheswaram and *B. Srinivasamurthi* for Appellants

M. Seshachalapathi for Respondent.

The Court delivered the following

JUDGMENT.—Defendants 1 and 3 are the appellants in this second appeal. The plaintiff's suit was for specific performance of a contract, Exhibit P-2, dated 27th April, 1942, for sale of certain piece of land belonging to the joint family of defendants 1 and 2. This agreement though it was intended to be executed by both the defendants, was, in fact, signed only by the first defendant The second defendant is alleged to have later entered into another agreement with the plaintiff, Exhibit P-1, dated 25th May, 1942, but the finding of the lower courts is that this is not a document which could be enforced as it has not been proved to be genuine. On the 6th August, 1942, defendants 1 and 2 sold the same property to the third defendant under Exhibit D-5 and the present suit for specific performance of the contract, Exhibit P-2, was filed, making the purchaser under Exhibit D-5 also a party.

The trial court found that the entire document, Exhibit P-2, is unenforceable because, according to the learned District Munsif, certain decisions of this Court are to the effect that the document cannot be enforced even as against the first executant. On that ground the suit was dismissed even though there were findings that the third defendant was not a person who can claim protection according to the provisions of section 27 of the Specific Relief Act.

On appeal by the plaintiff, the learned Subordinate Judge, Nellore, agreed with the trial Court as regards the applicability of section 27 of the Specific Relief Act and also as regards the unenforceable nature of Exhibit P-1 but came to the

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* S.A No. 723 of 1946 15th February, 1949.

conclusion that Exhibit P-2 can be enforced against the first executant and therefore granted a decree for specific performance of the first defendant's share of the suit property, on the plaintiff fulfilling the necessary conditions regarding the payment of the balance of purchase money and other matters

Three points have been raised by the learned advocate for the appellants, the first of them being that Exhibit P-2 was only an inchoate agreement and not a completed transaction and as such unenforceable even as against the first defendant. The second point was that in the lawyer's notice Exhibit P-3, dated 19th May, 1942, the plaintiff had agreed to resort only to his remedy, in the event of the first defendant not executing the conveyance as agreed to under the document, to have the liquidated damages mentioned in that document in addition to the return of the advance payment made under the agreement. The contention is that the relief regarding the specific performance must be deemed to have been impliedly relinquished by not specifically being asked for in this registered notice. As a subsidiary contention to this point Mr K Umamaheswaram raised a further argument that since the third defendant purchased the property after Exhibit P-3 was received by the first defendant it should be deemed that the plaintiff is estopped from saying that the remedy by way of specific performance was still existing; and lastly he argued that the direction by the lower appellate Court that the plaintiff should pay the second defendant his costs is unjustifiable, for the person who is really to get the costs is the third defendant and not the second defendant.

I shall deal with these points seriatim To justify his contention that the agreement cannot be enforced even as regards the first defendant, well-known decision of this Court beginning with *Sivaswami Chetty* v *Sevugan Chetti*[1] have been brought to my notice In that case Bashyam Ayyangar, J., held that where a document which was intended to be signed by more than one person was signed only by some of them, the others having refused to execute the deed when asked to do so, and the defence was that no suit could be brought on the document inasmuch as it was not completed as the younger of the brothers who had agreed to sign had not signed it, it constituted merely a proposed agreement which had never been perfected It was further held that if the parties intended that all the persons intended to execute the document should execute it, the document could not take effect even against the persons who have executed it for the reason that the person who had alone executed it happened to be the managing member. The learned Judge relied on certain English cases and came to that conclusion At page 393 it is mentioned as follows —

> " If the parties intended that all the members of the family should execute the document it cannot take effect by reason that the person who alone executed the document happens to be the managing member and that the debt is recited to have been incurred for the benefit of the family "

In another passage the learned Judge holds

> " If one intends to be a joint and several obligee or only a joint obligee with others there is a right of contribution against his co-obligees, if his intention be carried out, but if he becomes a mere several obligee, he has no right of contribution "

This decision was subsequently followed in *Amirtham Pillai* v *Nanja Goundan*[2], where Sadasiva Ayyar, J , held that where it was intended that two persons should jointly execute a promissory note and should become jointly liable and one of them alone executes it, the note is not enforceable even as against the other The decision of the Calcutta High Court reported in *Ram Saran Roy* v *Shoshi Bushan Ghose*[3], also to the same effect, was brought to my notice The learned Judges Chatterjee and Panton, JJ , held as is seen from the head-note thus

> " In a suit for specific performance of a contract alleged to have been entered into by defendants 1 and 2 to sell certain property, it was found that it was agreed between the plaintiff and first defendant that the latter and the second defendant would sell the property to the plaintiff
>
> *Held*, that as the agreement proposed was between the plaintiff on the one hand and defendants 1 and 2 on the other and as the second defendant had not agreed there was no completed contract which could be specifically enforced even as regards the first defendant "

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1. (1902) 12 M L J 17 · I.L R 25 Mad 389 3 (1921) 65 I C 594
2. (1914) 26 M L J. 257.

Now, these cases proceed on the basis that if the original intention was that more than one person should execute the document but only one of them actually executed it, the document cannot be enforced even as against the actual executant

The principle so broadly stated came up for criticism and consideration in later decisions of this Court Coutts-Trotter, J (as he then was) in *Nethini Menon* v. *Gopalan Nair*[1], had to deal with a similar case and, there, the Bench consisting of Spencer and Coutts-Trotter, JJ, held that if a document is drawn up in the name of several persons and it is the intention of the parties that all should execute it, it will become incomplete and inoperative till all have done so, but it is a question of fact in each case as to what was the intention of the parties During the course of the discussion, a distinction was pointed out and it was held that if the person who actually executed the document did so on the understanding that it would become operative only if the others has signed it, then, it would become inoperative if the others did not put in their signature, and as it is held that the question of intention in each case is a question of fact it was not a matter for interference in second appeal unless the finding of the lower appellate Court is not justified by the evidence on record To the same effect are the earlier cases in *Krishnamachariar* v *Narasimhachariar*[2], and *Sethuram Sahib* v *Vasantha Rao*[3] In *Bangarswami Ayyangar* v *Somasundaram Chettiar*[4], Sadasiva Ayyar and Tyabji, JJ, held that where a document recites that it was executed by A, B and C but only A and B executed it, actually, the question whether A and B agreed to be liable only if C also joined is a question of fact to be decided according to the circumstances of each case and cannot be the subject of a second appeal unless there is no evidence to justify the finding of the Court below The learned Judges considered the cases in *Sivaswami Chetti* v *Sevugan Chetti*[5] and *Krishnamachariar* v. *Narasimhachariar*[2] A clear exposition of the principle of law applicable to such cases can be found in *Umar Baksh* v. *Mul Raj*[6], where Dalip Singh, J, put the point in the following way :

> "If the intention of the parties to an agreement to sell is that nobody would agree to sell his share, unless all the others also agreed to sell their shares, it cannot be held that where one of them had failed to sign the document it was a complete document On the other hand if the sales are not interdependent in the sense that each vendor might well have sold his share of the property without reference to the sale by others and what really should have been a number of separate sales are rolled into one because of convenience then the fact that in the agreement to sell one of the vendors had not joined would not affect its validity as between the vendee and the vendor who had signed the agreement to sell The question of intention has to be settled by reference to the terms of the document and to the circumstances of the case "

I am in perfect agreement with the proposition of law stated there It is also useful in this connection to refer to a recent pronouncement of the House of Lords in *Lady Naas* v *Westminster Bank, Ltd*[7], where all the noble Lords who took part in that decision were of opinion that the statement of Sir George Jessel, M R, in *Luke* v. *South Kensington Hotel Co.*[8] that

> " It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute "

is expressed far too widely. At page 389 Lord Russel of Killowen discusses this aspect of the case and in the same tenor discussion is found in the speeches of the other noble Lords as well especially that of Viscount Maugham, the presiding noble Lord. In view of the repeated pronouncements of this Court explaining the principle, it is unnecessary to deal at great length with this House of Lords pronouncement ; but since the earlier cases in India had been based to some extent upon the dictum of Sir George Jessel, M.R, I think it is advisable to show how that dictum has been later on criticised and considered by the House of Lords

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1 (1915) 29 M L J 291 I L R 39 Mad 597.
2 (1908) I L R 31 Mad 114.
3 (1910) I L R 34 Mad 314.
4. (1914) 27 M L J 176.
5 (1902) I L R 25 Mad. 389
6 A I R 1942 Lah 86.
7 (1940) A C 366.
8 (1879) 11 Ch D 121.

Applying the principles of law as stated above, we have to ascertain whether in the case under consideration, it was the intention of the first defendant to sign the document and make it effective only if the second defendant had also executed the same. The learned Subordinate Judge after discussing the evidence of the witnesses was of the view that the first defendant was quite prepared to execute the agreement by himself alone but that it was only by way of abundant caution that the plaintiff wanted that the second defendant's signature also should be got to Exhibit P-2 by the elder brother. We have also the evidence of the first defendant examined as D W 1 and he stated that P W 2 agreed that he would get the signature of the second defendant without assistance of the first defendant. The first defendant further stated that he never undertook that he would get the sale deed executed on behalf of his brother also, whether he agreed with it or not there was no reference whatsoever to that fact in case the brother did not agree to sign Exhibit P-2. In cross-examination also he made certain statements but the purport of the whole thing is that that the first defendant did not make it a condition of the validity and the enforceability of the document unless the second defendant had also signed it Such being the case, I agree with the learned Subordinate Judge that the document can be enforced as regards the share of the first defendant

On the second question whether there was election on the part of the plaintiff and whether the plaintiff is estopped I do not find any difficulty whatsoever Exhibit P-3 simply mentions that if the document is not executed, then recourse to the remedy by way of damages which had been liquidated in the deed would be taken. I do not think that this is either an express election or an election can be implied and abandonment of the remedy of specific performance can be inferred from this lawyer's notice In order that a legal remedy which a party is entitled to enforce should be deemed to have been waived or abandoned by him there must be an express mention of the circumstances by the party either by word or by deed or there should be clear indication by his conduct from which it can be implied that there has been such a waiver or abandonment. Moreover, the question has not been so clearly put forward as an issue in the trial Court and considered in that light. I do not think I need say more on this subject as I am of opinion that it is impossible to infer from Exhibit P-3 that there has been an abandonment, much less is there any estoppel because it is nowhere stated that the third defendant was induced to purchase this property as a result of the statement contained in Exhibit P-3. We do not find any plea put forward by the third defendant that he purchased the property after knowing that the plaintiff had sent the registered notice, Exhibit P-3 On the other hand, the third defendant's case throughout has been that he was a *bona fide* purchaser of this property for proper and valuable consideration without knowledge of the previous agreement between the first defendant and the plaintiff and therefore he is protected under the provisions of section 27 of the Specific Relief Act In these circumstances I find it difficult to accede to the contention of Mr. Umamaheswaram that the question of estoppel can be raised in this case.

With regard to the last contention I am of opinion that the learned advocate is entitled to succeed The second defendant's conduct has been criticised in severe terms by the lower Court as unscrupulous and such being the case I do not see any reason why the second defendant should be entitled to get the costs from the plaintiff. In substitution of the lower Court's order directing the plaintiff to pay the second defendant's costs, I would direct that the plaintiff should pay the costs of the third defendant instead of the second defendant; but the plaintiff should get his own costs from the first defendant throughout The third defendant is entitled to stand in the shoes of the second defendant as regards costs The second appeal therefore fails subject to the small modification mentioned above and is dismissed with costs.

Leave is refused.

K S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SUBBA RAO AND MR. JUSTICE SOMASUNDARAM.

Ganapathi Subramania Ayyar (minor) and another .. *Appellants* *

v.

Alloor Gopalaswami Naidu and others .. *Respondents.*

Madras Agriculturists' Relief Act (IV of 1938), *section* 8 (4)—*Scope—Not confined to excess payments made prior to 1st October,* 1937.

Sub-section (4) of section 8 of the Madras Agriculturists' Relief Act saves excess payments from the operation of sub-sections (1), (2) and (3) of section 8. Under this sub-section, the creditor is enabled to retain any excess payments paid to him. The terms of this sub-section are clear and unambiguous and the language is couched in general terms. The operation of this sub-section is not limited expressly or by necessary implication to excess payments made before 1st October, 1937.

Ankanna v. *Punnayya,* (1945) 1 M.L.J. 386, dissented from.

Appeal against the order of the Court of the Subordinate Judge, Ramnad, at Mathurai, in I.A. No. 44 of 1946 in O.S. No. 45 of 1934, dated 18th November, 1946.

G. R. Jagadisan for *S. Ramaswami Aiyar* for Appellants.

S. Venkatesan for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J.—This appeal raises an interesting point of law under the Madras Agriculturists' Relief Act, namely, whether a debtor could get a refund of the excess amounts paid by him to the creditor subsequent to 1st October, 1937. The facts are fully and accurately stated in the judgment of the lower Court and it is not necessary to restate them except to the extent necessary for appreciating the point of law raised in the appeal.

Gopalaswami Naidu (the first defendant) executed a mortgage dated 1st October, 1918, for a sum of Rs. 1,900 in favour of Muthia and Subramania. The plaintiffs 1 and 2 are the sons of Muthiah. Plaintiffs 3 to 6 are the sons of Subramania. They instituted O.S. No. 45 of 1934 on the file of the Court of the Subordinate Judge of Ramnad at Madura to enforce the said mortgage along with another mortgage with which we are now not concerned and obtained a preliminary decree on 25th January, 1936. The final decree was passed on 31st March, 1937. The decree-holders brought some of the mortgaged properties to sale in execution of the said decree in E.P. No. 60 of 1940. Some of the items of the mortgaged property were sold on 19th January, 1942, and a sum of Rs. 2565 was realised. The sale was confirmed on 20th February, 1942, and part satisfaction of the decree was entered for a sum of Rs. 2,421-9-0. On 22nd January 1944, the third plaintiff received a further sum of Rs. 300. On 27th December, 1945, the defendants filed I.A. No. 44 of 1946 under section 19 of Madras Act IV of 1938 for scaling down the decree debt. The learned Subordinate Judge found that a sum of Rs. 1,782-4-1 was the amount due under the mortgage decree, but the defendants paid a sum of Rs. 2,721-9-0 towards the decree. He therefore held that the defendants paid an excess amount of Rs. 939-4-11. The plaintiffs preferred the above appeal against the said order of the learned Subordiante Judge.

The learned counsel for the appellants contended that the judgment-debtors are not entitled to a refund of the excess amount paid by them and relied upon the provisions of section 8 (4) of Madras Act IV of 1938 in support of their contention, whereas the learned counsel for the respondents argued that sub-section (4) of section 8 is confined in its operation only to excess payments made prior to 1st October, 1937. To appreciate the contention of the learned counsel it is necessary to consider in detail the scope of the relevant provisions of the Act. The relevant provisions of the Act read as follows :

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* A. A. O. No. 138 of 1947. 7th July, 1949.

"7 Notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this Chapter

No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him, nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter

8 Debts incurred before the 1st October, 1932, shall be scaled down in the manner mentioned hereunder, namely —

(1) All interest outstanding on the 1st October, 1937, in favour of any creditor of an agriculturist whether the same be payable under law, custom, or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date.

(2) Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged.

(3) Where the sums repaid by way of principal or interest or both fall short of twice the amount of the principal, such amount only as would make up this shortage, or the principal amount or such portion of the principal amount as is outstanding, whichever is smaller, shall be repayable.

(4) Subject to the provisions of sections 22 to 25, nothing contained in sub-sections (1), (2) and (3) shall be deemed to require the creditor to refund any sum which has been paid to him, or to increase the liability of a debtor to pay any sum in excess of the amount which would have been payable by him if this Act had not been passed"

Section 7 gives the category of debts liable to be scaled down. Under that section only debts payable by an agriculturist at the commencement of the Act could be scaled down under Chapter II. It does not purport to lay down that for the purpose of scaling down, the extent of the liability existing on that date can only be taken into consideration. Section 8 prescribes the manner of the scaling down of the debt Sub-sections (2) and (3) make it clear that the state of account obtaining between the parties at the time of the scaling down is the basis on which the debt should be scaled down Under sub-section (2) if an agriculturist has paid to the creditor twice the amount of the principal the entire debt shall be deemed to be wholly discharged For the purpose of this sub-section, it is obvious that amounts paid by the debtor towards principal or interest either before 1st October, 1937 or subsequently must be taken into consideration Sub-section (3) provides another method of scaling down. If the amount paid by an agriculturit falls short of twice the amount of the principal, such amount only as would make up the shortage is liable to be recovered For the application of this sub-section also, the state of account on the date of scaling down, must necessarily be considered Sub-section (4) saves excess payments from the operation of sub-sections (1), (2) and (3) Under this sub-section, the creditor is enabled to retain any excess payments paid to him The terms of this sub-section are clear and unambiguous and the language is couched in general terms The operation of this sub-section is not limited expressly or by necessary implication to excess payments made before 1st October, 1937 This sub-section is subject to the provisions of sections 22 to 25 of the Act Under section 22 if moveable property has been sold after 1st October, 1937, the judgment-debtor is entitled to have the debt scaled down under the provisions of the Act and also to refund any sums paid by him on or after 1st October, 1937, in excess of the amount due by him The refund of the excess amount provided by this section is therefore of the amounts paid after 1st October, 1937 Sections 23 and 24 provide for setting aside a sale of immoveable property on or after 1st October, 1937, and the excess amounts refundable by the sale being set aside may, therefore, also include amounts realised after 1st October, 1937 As sections 22 to 25 are really exceptions to sub-section (4) of section 8 and when the said sections deal with refund of amounts paid after 1st October, 1937, it will be illogical to confine the scope of sub-section (4) to excess payments made prior to 1st October, 1937 Further, to accept the argument of the learned counsel for the respondents is to read into sub-section (4) words which are not there. If the intention of the Legislature was that the excess payments made only prior to 1st October, 1937, are not liable to be refunded, it would have

said so expressly in plain terms. The words as they stand are general and the context in which the sub-section appears does not in any way compel us to put a limited construction on the words used in the sub-section. Even on principle there cannot be a distinction between excess payments made prior to 1st October, 1937 and those made subsequently. If at all, there is a better reason why the excess payments made after 1st October, 1937, should not be refunded When a debtor paid amounts prior to 1st October, 1937, he did so without any knowledge of the impending legislation, whereas when he paid the amounts after the Act came into force, he paid the excess amounts voluntarily and presumably with knowledge of the provisions of the Act It is far more inequitable to compel refund of the amounts paid voluntarily than amounts paid in ignorance of the impending legislation The learned counsel for the respondents mainly relied upon the decision of Patanjali Sastri, J., in *Ankanna* v *Punnayya*[1]. That decision certainly supports the argument of the learned counsel The following passage in the judgment clearly sums up the argument advanced by the learned counsel for the respondents

> "It is next contended that section 8 (4) of the Madras Agriculturists' Relief Act entitles the appellant to retain the sum recovered in excess of the amount found payable to him under the Act. I am unable to agree As the debts falling under section 8 of the Act have to be scaled down as on the 1st October, 1937, sub-section (4) must be taken to refer to sums which were duly collected from the debtor before that date but which turn out to be excessive as a result of applying the provisions of the Act, and the provisions cannot be understood as justifying the retention of sums recovered in excess of what was legally due at the time of the recovery"

With great respect to the learned Judge, we cannot agree with his construction of section 8 (4) Though under section 8 (1) of Madras Act IV of 1938, the debt would have to be scaled down as on 1st October, 1937, the alternative methods of scaling down provided by sub-sections (2) and (3) of section 8 clearly show that the state of account at the time of scaling down and the amounts paid before and after 1st October, 1937, should be taken into consideration in scaling down the debt The learned counsel for the appellants referred us to a decision in *Lakshmi Venkayamma v Venkatapathiraju*[2]. That decision turns upon the construction of section 9 of Madras Act IV of 1938 and the excess payment made thereunder was one that is made on 15th March, 1938, *i e*, before the Act came into force. Though that decision cannot be a direct authority on the question argued before us, the principle behind the section is stated in clear terms by Wadsworth, J, at page 27 which equally applies to the construction of section 8 (4) of the Act. The learned Judge says:

> "It results in the conclusion that if the payments made towards interest are in excess of the amount of interest as scaled down, that excess amount will be retained by the creditor and will not be adjusted in reduction of the principal; but there is nothing contrary to general principles in allowing a creditor to retain that which has been willingly paid to him"

For the aforesaid reasons we hold that the appellants are entitled to retain the excess amount paid to them after 1st October, 1937.

The appeal is allowed to this extent but in the circumstances without costs.

V. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE BALAKRISHNA AIYAR.

S. A Seshadri Aiyangar .. *Appellant* *

v

Narayana Nair .. *Respondent.*

Madras House Rent Control Order (1945)—*Petition to Government before 30th September,* 1946, *when it was replaced by Madras Buildings* (*Lease and Rent Control*) *Act* (*XV of* 1946)—*Order passed by Government after that date—Effect*

A tenant who was unsuccessful before the House Rent Controller and the Collector presented a petition to the Government on 2nd August, 1946, when Madras House Rent Control Order, 1945,

1 (1945) 1 M L J 386 2. (1941) 1 M L J. 25.

*A A. O No 570 of 1947. 20th April, 1949.

was in force and its place had not been taken by Madras Act XV of 1946 to revise the order of the Collector. The Government, in May 1947, that is after the Madras House Rent Control Order, 1945, cease to be in force, and Madras Act XV of 1946 had taken its place, allowed the petition of the tenant Thereupon the City Civil Court dismissed the execution petition of the landlord pending before it On an appeal against the order of dismissal,

Held —(i) The order was right as a revision did lie to the Government at the time the petition was presented and the Government had then jurisdiction to entertain and dispose of it

(ii) What is to happen in a case where a temporary act expires by efflux of time must depend upon the intention of the Legislature and where clear words are not used the intention must be inferred from the relevant circumstances Where a right has become vested in a person and the authority through whom that right can be enforced continues to exist the inference would be justified that there was no intention to deprive that person of that right,

(iii) The insertion of section 18 of Madras Act XV of 1946 indicates that the intention of the Legislature was that so far as possible all pending proceedings are to be continued Regard being had to the facts that the right which the tenant had was a vested right, that the authority before whom proceedings could be taken to enforce that right continued to exist and section 18 of Madras Act XV of 1946 suggests that the intention of the Legislature was that all pending proceedings should as far as possible be saved, it must be found that the decision of the Court below was right

Appeal against the order of the City Civil Court, Madras, dated 24th April, 1947, in E P No 1109 of 1946 in L Dis No. 1420 of 1946 House Rent Controller, Madras.

G Ramalinga Reddi for Appellant.

K S Narayana Aiyangar for Respondent.

The Court delivered the following

JUDGMENT —This is an appeal from the order of the Principal Judge, City Civil Court, Madras, dismissing an execution petition, E P. No. 1109 of 1946 on the file of his Court

The relevant facts are these ·

The property which forms the subject-matter of this controversy is a non-residential building in Besant Road, Triplicane. On 29th May, 1946, the landlord obtained from the House Rent Controller appointed under the Madras House Rent Control Order of 1945, an order for the eviction of the tenant who was then in occupation of the premises The tenant preferred an appeal to the Collector of Madras which was dismissed on 15th July, 1946 On 2nd August, 1946, the landlord applied to the City Civil Court for execution of the order of eviction that had been made in his favour On the very same day, namely, 2nd August, 1946, the tenant presented a revision petition to the Government which he was entitled to do under the Madras House Rent Control Order. This order ceased to be in force on 30th September, 1946, and its place was taken by the Madras Act XV of 1946 On 13th March, 1947, that is to say, after the Madras House Rent Control Order of 1945 had ceased to be in force and the Madras Act XV of 1946 had taken its place the Provincial Government allowed the revision petition of the tenant When this fact was brought to his notice the learned Judge in the City Civil Court dismissed the execution petition. Against that order the landlord now appeals

The principal argument put forward on behalf of the landlord is that on 13th March, 1947, when the Government passed the order allowing the revision petition of the tenant they had no power to do so since the Madras House Rent Control Order of 1945 which alone conferred on them the requisite power was no longer in force In substance the argument was that the source from which the Government derived their power had dried up, and that, therefore, their order was incompetent In this connection reference was made to certain passages in Craies "Statute Law," 4th edition at page 347, where the learned author says,

"As a general rule, and unless it contains some special provision to the contrary, after a temporary Act has expired no proceedings can be taken upon it, and it ceases to have any further effect

. . . . . In *Spencer* v *Hooton*[1], Roche, J, held that he had no jurisdiction to hear appeals from Munitions Tribunals in proceedings taken under the Wages (Temporary Regulations) Acts by reason of the Act giving him jurisdiction having expired before the appeals came on for hearing. There is a difference between the effect of expiration of a temporary Act and the repeal of a perpetual Act"

In support of his contentions the learned advocate for the appellant also relied on the decision in *Canada Cement Co* v *East Montreal (Town of)*[2] That was a case in which a Tribunal to which appeals previously lay was abolished and another constituted in its place. The Privy Council held that an appeal did not lie to the new Tribunal. Their Lordships observed,

"This appeal had not been brought when the statute was passed, although the proceedings before the circuit Court had been instituted Consequently, the Statutes giving whatever right of appeal may have existed were replaced by sections which gave none"

For the other side it was contended that by 30th September, 1946, when the Madras House Rent Control Order of 1945 ceased to be in force the tenant had already acquired a vested right to move the Government in revision and that there is nothing in the language of Act XV of 1946 taking away that right. The decisions in *Narayanaswami Naidu* v. *Inspector of Police, Mayavaram*[3] and *Colonial Sugar Refining Co.* v. *Irving*[4] were also relied on In the former case the question was whether a person who had been ordered to be detained undr Madras Act I of 1947 and who had preferred an application to the High Court under section 491, Criminal Procedure Code, before Madras Ordinance II of 1948 had been promulgated, had a right to have his petition disposed of by the High Court or whether that right of his was taken away by the Ordinance It was ruled that the right of a detained person to apply to the High Court under section 491, Criminal Procedure Code, cannot be treated as a matter of procedure; but it is a substantive right and a very valuable right and that the ordinance would not apply to pending proceedings under section 491, Criminal Procedure Code, but only to petitions filed after the date of the promulgation of the ordinance On the analogy of this decision it was contended that the right of the tenant to move the Government in revision under the Madras Rent Control Order of 1945 was a substantive right which had accrued to him before the expiration of the order and that it had not been taken away by Act XV of 1946 In the case *Colonial Sugar Refining Co.* v. *Irving*[4], their Lordships observed that

"to deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure"

When what is called a permanent Act, that is to say, an Act which is of indefinite duration is repealed, section 8 of the General Clauses Act, 1891 (Madras) provides that unless a different intention appears the repeal shall not affect any right, privilege, obligation or liability, acquired, accrued or incurred under any enactment so repealed or affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment, as aforesaid and any such investigation, legal proceeding or remedy may be instituted or continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or regulation had not been passed The provision of this section will not directly apply when a temporary Act expires by efflux of time. What is to happen to pending proceedings in such a case must depend upon the intention of the Legislature; and where clear words are not used the intention must be inferred from the relevant circumstance Thus, where a temporary Act sets up a special Tribunal and as the result of the expiration of Act, the special Tribunal ceases to exist and no clear provision is made for continuing pending proceedings it will be reasonable to infer that the intention of the Legislature is that such proceeding shall not be continued The decision in *Spencer* v. *Hooton*[1] is not available but from the passage in Craies on Statute law which refers to it, it is to be inferred that the decision of Roche, J, proceeded on this.

1. (1920) 4 Munitions Appeals 67.
2. (1922) 1 A.C. 249
3. (1949) 1 M.L.J 1 (F.B).
4. (1905) A.C 369

principle In *Canada Cement Co* v *East Montreal (Town of)*[1], their Lordships very definitely found on the construction of the relevant sections of the statute before them that the matter had otherwise been provided for Where a right has become vested in a person and the authority through whom that right can be enforced continues to exist the inference would be justified that there was no intention to deprive the person of that right In the present case a revision did lie to the Government at the time the petition was presented, the Government had then jurisdiction to entertain and dispose of it, and it did dispose of it In this connection reference may also be made to the decision in *Keshoram Poddar* v *Nundo Lal Mallick*[2]. The facts of that case were the Calcutta Rent Act, 1920, enabled a landlord or tenant of premises in Calcutta to obtain from the Controller of Rents a certificate of the standard rent of the premises A right to apply for revision of his order to the President of the Calcutta Improvement Tribunal was also provided for. By section 1, sub-section (4) it was provided that the Act was to be in force for a period of three years In 1923, the Act was amended and the life of the Act extended upto the end of March, 1924 In 1924 the Act was further amended and its life was extended upto 1927 When the life of the Act was extended in 1924 its scope was reduced by the insertion of a proviso with the result that the Act ceased to apply to any premises the rent of which exceeded Rs 250 a month The tenant applied for the fixation of the standard rent and on 23rd October, 1922, the Controller fixed the rent at Rs 4,500 per month On the 25th November, 1922, the tenant appealed to the President of the Improvement Committee to review that decision The President who was fully occupied in hearing other appeals was able to take up the case only on 3rd August, 1924 He then dismissed it on the ground that he had no jurisdiction to determine the matter This he did because of the two amending Acts which had been passed while the case was waiting and because of the amendment to the original Act which rendered it inapplicable to premises the rent of which exceeded Rs 250 per mensem The Privy Council overruled this view which was concurred in by the High Court. Their Lordships observed that the Act was a living Act at the moment the application was made to the President and that the proviso had to be read just as if the words had been inserted in the original Act and that the President had jurisdiction to dispose of the revision petition It is possible to argue that the decision turns on the construction of the Act and is not therefore directly applicable, but it does suggest that the solution to the problem lies in ascertaining the intention of the Legislature. The insertion of section 18 of Madras Act XV of 1946 indicates that the intention of the Legislature was that so far as possible all pending proceedings are to be continued Regard being had to the facts that the right which the tenant had was a vested right, that the authority before whom proceedings could be taken to enforce that right continued to exist and section 18 of Madras Act XV of 1946 suggests that the intention of the Legislature was that all pending proceedings should as far as possible be saved, it must be found that the decision of the Court below was right The appeal is therefore dismissed with costs.

V P.S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE RAGHAVA RAO

Korath Illath Vallappil Mammali Haji's son Kunheethu .. *Appellant**

v.

Vayyavinat Manakunnath Tavazhi Vasunni *Respondent*

Malabar Tenancy Act (XIV of 1930), section 20 (5)—Suit laid under—Plaintiff not making out allegations in the plaint with reference to section 20 (5)—Duty of Court—Plaintiff if can ask for suit being dealt with under section 20 (3) of the Act

Where in a suit laid under section 20 (5) of the Malabar Tenancy Act, the plaintiff fails to make out his right to evict on the allegations in the plaint made with reference to clause (5) of section

1 (1922) 1 A C 249

2 (1927) 52 M.L J 655 L R. 54 I A. 152 I L R. 54 Cal. 508 (P C)

* S A No. 1210 of 1946. 19th July, 1949.

20 of the Act, the only course open for the Court to adopt is to dismiss the suit It will not in such a case be open to the plaintiff who has failed to make out the foundation for the suit with reference to the requirements of clause (5) of section 20, to fall back upon the consideration that two of the three requirements of clause (5) which are the requirements of clause (3), stand made out and that the suit must be dealt with as a suit under clause (3) of section 20

Puthenveettil Thalasseri Veettil Ammu Amma v *Chelakuttiyil Kunnapadi Kalan, Karnavan and Manager of his Tavazhi*, (1946) 1 M L J 94, followed

Second appeal against the decree of the Court of the Subordinate Judge, Calicut, in A S No 123 of 1945 preferred against the decree of the Court of the District Munsiff, Tirur, in O S No 1162 of 1943

M Chinnappan Nair and *M Narayanan Unni* for Appellant

D H Nambudiripad for Respondent

The Court delivered the following

Judgment. On a careful scrutiny of the plaint, I am perfectly clear that the suit out of which this second appeal arises was one laid under section 20, clause (5) of the Malabar Tenancy Act If on the finding of the Courts below, the plaintiff failed to make out his right to evict on the allegations in the plaint made with reference to clause (5) of section 20 of the Act, the only course for the Court to adopt seems to be as conceded by Mr Nambudiripad for the respondent to dismiss the suit It will not, in such a case, be open to the plaintiff who has failed to make out the foundation for the suit with reference to the requirements of clause (5) of section 20, to fall back upon the consideration that two of the three requirements of clause (5), which are the requirements of clause (3), stand made out and that the suit must be dealt with as a suit under clause (3) of section 20 of the Act So much has been ruled in this Court by the decision in *Puthenveettil Thalasseri Veettil Ammu Amma and others* v *Chelakuttiyil Kunnapadi Kalan, Karnavan and Manager of his Tavazhi and another*[1] and I am prepared to follow that decision as sound, although it occurred to me strange, before I had the object and policy of the two particular clauses expounded by counsel before me, that a suit which failed on the allegations in clause (5) of section 20 of the Act should not be allowed to be considered with reference to the requirements of clause (3) of section 20 of the Act which are the same as two out of the three requirements of clause (5)

In the result the decrees of the Courts below are set aside and the plaintiff's suit is dismissed The second appeal is allowed with costs here and in the Courts below (Leave to appeal is refused)

V S ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE RAGHAVA RAO.

Balekkala Subiaya Bhatta *Appellant**

v

Nuliyal Govinda Bhat .. *Respondent*

Provincial Small Cause Courts Act (IX of 1887), Schedule II, article 2 and Civil Procedure Code (V of 1908), section 102—Acts contemplated by article 2 of Schedule II—Suit to recover back amount of court-fee paid to Government under a decree in a pauper suit which was later superseded—Second appeal—Competency, when value does not exceed Rs 500

Article 2 of Schedule II of the Provincial Small Cause Courts Act refers to acts done by persons not acting as suitors in pursuance of a judgment or order which gives permission so to act, but as ministerial officers or otherwise obeying the order of the Court

Where the essence of an action relates to the recovery of the amount paid by the plaintiff himself as a mere suitor, *i e*, as the defendant in a former pauper suit of a certain sum representing the court-fee payable to Government under a decree later superseded, the suit is not outside the jurisdiction of the Court of the Small Causes and where its value does not exceed Rs 500, a second appeal is incompetent

1. (1946) 1 M L J 94.

*S A No 528 of 1947 22nd July, 1949

Second appeal against the decree of the District Court, South Kanara, in A S No 343 of 1945, preferred against the decree of the Court of the District Munsiff, Puttur, in O S No 148 of 1944

K Srinivasa Rao for Appellant

K Y Adiga and *K P Adiga* for Respondent

The Court delivered the following

JUDGMENT —The suit out of which this second appeal arises was dismissed by the trial Court but decreed on appeal

The first defendant is the appellant He is the assignee from one Gowaramma of her rights under a certain maintenance decree obtained by her in a pauper suit filed by her The present plaintiff was the first defendant and the present defendants 2 and 3 were also defendants 2 and 3 in that suit In and by the final event and result of that litigation evidenced by Ex P-3 dated 18th August, 1941, the present plaintiff was completely exonerated from the suit and the suit dismissed as against him Gowaramma was directed to pay half the court-fee due to Government and defendants 2 and 3 the other half " if not already recovered by the Government in terms of the prior decrees passed in this suit." Plaintiff in the present case is seeking to recover back the amount paid by him to Government under a decree passed in the course of the former litigation (Ex P-1) on 9th March, 1940, which became superseded by a later decree (Ex P-3) on 18th August, 1941, passed pursuant to the order of remand made on appeal in Ex P-2 on 19th February, 1941.

To this second appeal objection is taken *in limine* that section 102 of the Civil Procedure Code bars it The appellant in reply contends that the suit out of which this second appeal arises is not of the nature cognizable by a Court of Small Causes, because it is excepted from the cognizance of such a Court as a suit falling within Article 2 of the Second Schedule of the Provincial Small Cause Courts Act which relates to a suit concerning an act purporting to be done by any person in pursuance of a judgment or order of a Court or of a judicial officer acting in the execution of his office The question is whether this suit concerns an act purporting to be done by any person in pursuance of a judgment or order of a Court Mr Srinivasa Rao insists that it is, because it concerns the act of payment of court-fee done by the plaintiff in pursuance of a judgment later reversed The language of the article by its apparent generality does no doubt lend some support to this contention of the appellant But as the decision of a Bench of the High Court of Calcutta in *Prasanna Kumar Khan* v *Umar Charan Hazra*[1], to which my attention has been drawn by Mr K P Adiga for the respondent points out in terms which accurately expresses my own first impression of the scope and intention of the Article .

> " having regard to the position of Article 2, and also to the fact that there are many other articles dealing with suits against persons in regard to actions taken by them under the authority of judgments or orders which they have obtained as suitors, Article 2 refers to acts done by persons not acting as suitors in pursuance of a judgment or order which gives permission so to act, but as ministerial officer or otherwise obeying the order of the Court "

Mr. Srinivasa Rao in answer to this criticism referred to a decision of Ramesam, J , in *Kuthala Mudaliar* v *Venkata Reddiar*[2], in which it was held that a suit by an auction purchaser at a sale of the ryot's holding for arrears of rent held under the Madras Estates Land Act for refund of the purchase money paid on the ground of dispossession from the property under the orders of the Collector is outside the cognizance of the Court of Small Causes There was no act in that case done by a suitor under the order of the Collector to which the suit related The act with which the Court in that case was concerned was the order of the Collector setting aside the sale which was made without notice to the auction purchaser Here the essence of the action relates to the payment by the plaintiff himself as a mere suitor, *i e* , as the defendant in the former suit of a certain sum of money to Government under

1 (1896) 1 C.W N 140 2 A I R. 1927 Mad. 253.

a decree later superseded The suit in the present case is not, in my opinion, outside the jurisdiction of a Court of Small Causes and its value does not exceed Rs 500

The preliminary objection accordingly prevails and I dismiss the second appeal with costs No leave

V S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE MACK

Kadiyala Peravadhannulu .. *Petitioner**

v.

Kadiyala Peravadhannulu minor by mother and guardian Subbamma .. *Respondent.*

Court-Fees Act (VII of 1870), Schedule I, article 1—Suit for partition by a member of a joint family—Defendant directed to pay specific sum to plaintiff on an account being taken of outstandings due—Appeal by defendant —Court-fee payable

For fiscal purposes the liability of a manager of a Hindu joint family business to account to other members of the joint family cannot be differentiated from an ordinary suit for account as between partners The principle of valuation is contained in Article 1, Schedule I of the Court-Fees Act. In a plaint or memorandum of appeal, court-fee is payable on the amount or value of the subject-matter in dispute

Where a defendant in a joint family partition suit is directed to pay the plaintiff a specific sum on an account being taken of the outstandings due, and the defendant appeals, the subject-matter in dispute has been ascertained and so *ad valorem* court-fee on the relief which he wished to avoid should be paid

Dhanukodi Nayakar, In re, (1938) 1 M L J 628. I L R 1938 Mad 598 (F B), applied

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court, East Godavari, in unregistered appeal. S. R No 5346 of 1947 (O. S No 23 of 1937, Sub-Court, Amalapuram)

P Somasundaram for Petitioner.

The Government Pleader (*K Kuttikrishna Menon*) for Respondent

The Court delivered the following

JUDGMENT —This petition raises a simple question of court-fee

Petitioner is the defendant who in a joint family partition suit against him brought by his grandson was directed to pay a sum of over Rs 20,000 on an account being taken of outstandings due In an appeal to the District Court, he sought to value it under Article 17-B of Schedule II of the Court-Fees Act at Rs 3,100+100 adopting the plaint valuation The learned District Judge held on the strength of the Full Bench decision of this Court in *Dhanukodi Nayakar*, In re[1], that he should pay *ad valorem* court-fee on the relief that he wished to avoid In that decision the learned Full Bench overruled the decision in *Nukala Venkatanandam*, In re[2], and held that in a final decree in an account suit, a defendant knew exactly the value of his relief and must pay court-fee accordingly

Mr Somasundaram has sought to differentiate between an ordinary suit for accounts and a partition suit in which he urges that liability under the final decree arises out of discovery of concealed assets, and also possibly fraudulent conduct on the part of the managing member I am unable to see how for fiscal purposes the liability of a manager of a Hindu joint family business to account to other members of the joint family can be differentiated from an ordinary suit for account as between partners The simple principle of valuation is contained in Article 1, Schedule I of the Court-Fees Act In a plaint or memorandum of appeal court-fee is payable on the amount or value of the subject-matter in dispute In this case

* C R. P No 20 of 1948 25th July, 1949

1. (1938) 1 M.L J 628 I L R 1938 Mad 598 (F.B). 2 (1932) 64 M L J 122 I L R 56 Mad. 705.

the subject-matter in dispute has been clearly determined, namely, a specific amount of over Rs 20,000 which has to be paid by the petitioner to the plaintiff The learned District Judge has, in my opinion, rightly applied the principle laid down in *Dhanukodi Nayakar, In re*[1], to the present case on which *ad valorem* court-fee must be paid on the amount decreed The petition is dismissed with costs of the Government Pleader. Time for payment of court-fee, six weeks from this date

V S —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE MACK.

The Melarkode Bank, Ltd and others .. *Petitioners**

v.

Damodaraswami Naidu and another .. *Respondents*

Civil Procedure Code (V of 1908), section 73—Receipt of assets—Crucial date.

Where in pursuance of an order passed by a superior Court, assets realized in execution of a decree of a subordinate Court are transferred to the superior Court, the assets are deemed to be received within the meaning of section 73, Civil Procedure Code, by the transferee superior Court when they are actually received by that Court

Godavaribai v Deekappa, A I R 1927 Bom 247, relied on

Petitions under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Coimbatore, in E A Nos 736 and 737 and 734 of 1946, respectively in E P No 282 of 1946 in O S No 65 of 1945, District Munsiff Court, Tiruppur

N R Sesha Aiyar for Petitioners.

V Ramaswami Aiyar and *P. Chandra Reddi* for Respondents.

The Court delivered the following

JUDGMENT —The petitioners are decree-holders in the Sub-Court, Coimbatore. These petitions raise an interesting point of rateable distribution There were five decrees against the same judgment-debtor, two obtained in the Tiruppur District Munsiff's Court, and three in the Sub-Court The decree-holder in the Tiruppur District Munsiff's Court in O S No 494 of 1944, who is the second respondent, first got some immoveable property sold and Rs 4,915 which was realised was brought into the District Munsiff's Court The other decree-holder in the District Munsiff's Court got his decree in O S No 65 of 1945, transferred to the Sub-Court for execution, for what reason it is neither disclosed nor material, and attached the same immoveable property It was then disclosed that it had already been sold by the District Munsiff The Sub-Court acting under section 63, Civil Procedure Code, sent for the amount which was received by it on 7th September, 1946 Prior to the receipt of this money in the Sub-Court, the three decree-holders there filed execution petitions The learned Subordinate Judge held that they are not entitled to rateable distribution on the ground that they did not file their execution petitions prior to the receipt of the sale proceeds in the District Munsiff's Court The Sub-Court decree-holders now seek in revision to revise this order and to establish their claims to rateable distribution These petitions resolve themselves therefore into a contest between three Sub-Court decree-holders who have been deprived of rateable distribution and two decree-holders in the District Munsiff's Court who have been held entitled to rateable distribution

Section 73 (1) in this matter appears to me to be perfectly clear It reads .

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation ,shall be rateably distributed among all such persons "

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1 (1938) 1 M L J. 638 I L R 1938 Mad 598 (F B).

* C R P Nos 1325 and 1326 of 1946 and 254 of 1947 7th July, 1949.

The first point to be decided is, what is the Court holding the assets? There can be no doubt that it is the Sub-Court which as the Court of highest grade under section 63 (1) has cast upon it the responsibility of deciding all claims and effecting rateable distribution The next simple point to be determined in this section is, when the assets were received by the Sub-Court On this point also, there is no doubt and no dispute The money was received in the Sub-Court on 7th September, 1946 It then follows on a simple reading of section 73 (1) that any decree-holder who had made an application to the Sub-Court before this date is entitled to rateable distribution The learned Subordinate Judge was guided or rather misguided himself by a decision of Madhavan Nair, J, reported in *Thanmull* v. *Krishnaswami*[1] and in my view wrongly applied a proposition he enunciated in a case in which the factual background was completely different That was a case in which the District Munsiff's Court attached and sold some property and in which a creditor in the Sub-Court also attached the same property When the Subordinate Judge called upon the District Munsiff to send up the sale proceeds, the latter was unable to do so as he had permitted the decree-holder to enter a set off The result was that the Sub-Court decree-holder had to file a suit under section 73 (2), Civil Procedure Code and the judgments of the two lower courts giving him a decree were substantially confirmed by Madhavan Nair, J, in second appeal In the course of his judgment he set out certain conclusions and referred to a category of cases under section 63, Civil Procedure Code, in which the receipt of assets by one of the courts contemplated in that section amounted to a constructive receipt of assets by each of such courts That decision had as its objective a liberal one, namely, the extension of the right to rateable distribution to a decree-holder who had been deprived of it in somewhat unusual circumstances. I have carefully perused that decision and can find in it no support for the view taken by the learned Subordinate Judge that it was binding on him in his decision on these rateable distribution applications

A perfectly clear decision of a Bench of the Bombay High Court reported in *Godavaribai* v *Deekappa*[2] was placed before me in which Shaw and Fawcett, JJ., held that where in pursuance of an order passed by a superior Court, assets realised in execution of a decree of a Subordinate Court are transferred to the superior Court, the assets are deemed to be received within section 73 by the transferee Court when they are actually received by that Court I am wholly unable to see anything in this Bench decision which is really in conflict with the reasoning of Madhavan Nair, J, in *Thanmull* v *Krishnaswami*[1]. It is really not necessary to go beyond the very simple language of section 73 for a determination of the rights of these decree-holders to rateable distribution Mr V Ramaswami Aiyar argued that section 73 read with section 63 contemplated only one receipt of assets into Court and that in the present case the criterion date must be the date on which the sale proceeds were received by the District Munsiff's Court To adopt this view would be to do considerable violence to the simple language of section 73 (1) which, as I have indicated *supra*, appears to permit of no doubt

A final argument has been advanced that these petitions do not lie as petitioners have their right of suit The learned Subordinate Judge however appears to have committed an obvious error of law in misapplying a decision There appears to be no necessity to drive these decree-holders entitled to rateable distribution to a suit in the circumstances I consider that these revision petitions are sustainable They are allowed and the petitioners will be admitted to rateable distribution

The learned advocate says that the third Sub-Court decree-holder has also filed a revision petition (C R P. No 254 of 1947), which is still pending service of notice after several infructuous attempts on the second respondent for whom Mr. Chandra Reddi appeared in these two revision petitions It is unfortunate that he did not bring this to my notice while Mr Chandra Reddi was in Court

1. A I R 1935 Mad 988 2 A I R 1927 Bom 247

and did so, after he had completed his argument and left the Court, and after I had dictated this judgment There is obviously no necessity for any further notice to be issued to the second respondent on that petition to revise this identical order, the second respondent having made an appearance on these two petitions and his case having been exhaustively argued by Mr Chandra Reddi on his behalf and by Mr Ramaswami Aiyar for the first respondent who, I understand, has been served on this third petition This order will therefore be a common order in the three petitions and the petitioner in C R P No 254 of 1947 will also be admitted to rateable distribution Petitioners will receive their costs with one advocate's fee

V S *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE PANCHAPAKESA AYYAR

The Public Prosecutor .. *Appellant**

v

B. Nagamma *Respondent.*

Madras Prevention of Adulteration Act (III of 1918), *sections* 3, 5 (1) (d) *and* 18—*Executive Officer unde Public Health Act delegating powers to Panchayat Board Executive Officer—Initiation of prosecution by tha Officer under Madras Prevention of Adulteration Act—Legality*

Where the District Health Officer has delegated his powers and duties under the Madras Prevention of Adulteration Act (III of 1918) to the Executive Officer of a Panchayat Board who initiates a prosecution against an accused for adulteration of milk with water, it cannot be said that the prosecution had not been instituted by the "local Executive Officer" so as to justify an acquittal of the accused on that ground

Judgment of Govinda Menon, J , in C A No 341 of 1947, followed

Appeal under section 417, Criminal Procedure Code, 1898, against the acquittal of the aforesaid respondent (accused) by the Sub-Divisional Magistrate, Jammalmadugu in C A No 128 of 1948 on his file (C C No 890 of 1947, Stationary Sub-Magistrate, Jammalmadugu)

The Appellant in person

A Bhujanga Rao for Respondent

The Court delivered the following.

JUDGMENT —The respondent was the accused in C C No 890 of 1947 on the file of the Stationary Sub-Magistrate, Jammalmadugu, a case under section 5 (1) (*d*) of the Madras Food Adulteration Act, for sale of milk adulterated with water to an extent of 57 per cent The Sub-Magistrate convicted the respondent and fined her Rs 150 The Sub-Divisional Magistrate, Jammalmadugu, on appeal, held that the prosecution had not been instituted by the "local Executive Officer" but by the Executive Officer, Jammalmadugu Panchayat Board, and acquitted her The Government have filed an appeal against the acquittal

The learned Public Prosecutor urged that under section 16 of the Public Health Act, a District Health Officer must be deemed to be the local Executive Officer, and, under section 3 of Madras Act III of 1918 (the Madras Prevention of Adulteration Act), the District Health Officer, as local Executive Officer, can delegate his powers and duties under the Act (including his powers under section 18) to such persons as might be prescribed, and had delegated his powers under section 18 to the Executive Officer, Jammalmadugu Panchayat Board, who had initiated the prosecution I agree Govinda Menon, J , has also, in his judgment dated 30th October, 1947, in C A No 341 of 1947, come to the very same conclusion, and has upset an acquittal, on identical facts I set aside the acquittal of the respondent There is no need to order a retrial as the facts are clear, and the milk was more than half water But in view of the fact that the learned counsel appearing

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* Crl. Appeal No 608 of 1948 20th July, 1949

for Government have not raised the point before the Sub-Divisional Magistrate and relied on the judgment of Govinda Menon, J (which was unfortunately not reported and so did not act as a deterrent to such pleas), I let the respondent off with a fine of five rupees, or five days simple imprisonment in default, while convicting her under section 5 (1) (*d*) of the Act

K C *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE GOVINDA MENON

Venkataswami Naidu and another *Appellants**

v

Muniappa Mudaliar and others . *Respondents.*

Equitable estoppel—Purchase for the benefit of one in the name of another who had advanced the money—Construction of buildings on that land by the person intended to be benefited—Acquiescence and standing by of the nominal owner—Rights of parties

The first defendant sought the help of the plaintiffs' vendor, one *D*, to pay the price of land purchased for him and agreed that the sale may be in the name of *D* He was always under the *bona fide* belief that the property belonged to him and that the only obligation he had was to pay the price of the land paid by *D* with interest thereon from the date of the sale deed and that he could enjoy the property, on the fulfilment of such a condition, as his own Further, he was encouraged in the belief by the acquiescence and conduct of *D* When he later on built upon the land a substantial structure, *D* kept quiet and did not assert any title or right

On the question whether the defendant had no legal title to the property in the circumstances,

Held, that applying the well-known dicta contained in various English cases, the principle of equitable estoppel applied and therefore the plaintiffs' vendor could not say that the defendant had no legal title, and if he could not say so, his alienees could have no higher claim, particularly when they were not *bona fide* transferees for value without notice

Held further (1) that there was no implied contract that the plaintiffs should pay the defendant the value of the structure on the defendant surrendering the property The utmost the plaintiffs were entitled to was that the defendant should pay the costs of the site with interest accruing uptodate.

(2) That if the defendant did not pay the same, the value of the structure has to be assessed and on payment of the amount so assessed by the plaintiffs into Court, the defendant should surrender the land with the building upon it

Case-law discussed

Appeal against the order of the District Court, Salem, dated 21st April, 1945, in A. S No 395 of 1943 (O S No 3 of 1942, District Munsiff's Court, Sankaridrug).

K S Desikan for Appellants.

N. C Vijayaraghavachari and *N. C Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT —The learned Additional District Judge of Salem, disagreeing with the decision of the District Munsiff of Sankaridrug at Salem, held in A S No. 395 of 1943 out of which this second appeal arises, that Ex P-1, dated 26th December, 1931, related to the purchase of the suit property in the name of the plaintiffs' vendor not as benami for the first defendant but in order to enure for the benefit of the plaintiffs' vendor himself Ex P-1 was a sale deed for a consideration of Rs 800 executed by one Muthuswami Konar in favour of one Duraiswami Naidu, by which the property mentioned therein was sold with absolute rights to the latter. On 7th June, 1941, Duraiswami Naidu sold the property purchased under Ex P-1 to the plaintiffs for a sum of Rs 1,500. On the strength of this purchase under Ex P-12, the plaintiffs brought the suit for a declaration of their title to the suit house and possession of the same with damages for past use and occupation from the defendants The first defendant who was the brother of defendants 2 and 3 contested the plaintiffs' claim on the ground that the purchase under Ex. P-1 was for his own benefit and that he paid the consideration for it though the document was taken in the name of Duraiswami Naidu as a benamidar It was further

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*A A O No 629 of 1945 18th April, 1949.

contended that the thatched house which was standing on the property at the time of the purchase was destroyed by fire and the first defendant built a new house with his own funds

The trial Court found that the sale deed Ex P-1 was taken by the first defendant for his own benefit in Duraiswami Naidu's name as benamidar. It was also held that the first defendant was not a lessee of Duraiswami Naidu There was a further decision that the tiled house built on the property was constructed by the first defendant with his own funds and that the plaintiffs were not *bona fide* purchasers for value of the house without notice of the first defendant's title The learned District Munsiff discussed the entire oral and documentary evidence at great length before he arrived at the findings adverted to by me above. The result of these findings was that the suit was dismissed. On appeal, the learned Additional District Judge came to a somewhat different conclusion on some of the points in controversy The result of the learned Judge's conclusion was that the house was built by the first defendant with his own funds but that Ex P-1 was a sale deed in favour of Duraiswami Naidu effected with Duraiswami Naidu's own funds and with the intention that the title should vest in Duraiswami Naidu alone The learned Judge found that the first defendant's case that he paid Rs 500 of the purchase price and that Duraiswami Naidu (P W 1) advanced only the balance of Rs 300 was false At the end of paragraph 4 of his judgment the learned District Judge observes that Duraiswami Naidu P W. 1, purchased the property at the instance of the first defendant and for the purpose of providing him with a residence It was the first defendant who negotiated the transaction and it was he who actually paid the money into the hands of D W 1, the vendor under Ex P-1 The effect of his finding is that Duraiswami Naidu wanted to provide a residence for the first defendant and with that object, and at the instance and request of the first defendant, he purchased the property in question with monies belonging to himself The learned Judge thereafter discussed the evidence in relation to the construction of the existing house on the property and agreed with the District Munsiff that it was the first defendant who put up a building spending his own monies and all the while Duraiswami Naidu, P W 1, kept quite like disinterested spectator and did not step in to claim his rights At the end of paragraph 6 the learned Judge observes as follows

" The lower Court has discussed the matter at considerable length and I am in complete agreement with it when it says that the first defendant effected the improvement at his own cost The improvements were considerable, although as to their precise value, there is no reliable evidence "

Thereafter in paragraph 7 the learned District Judge discussed the question as to what the attitude of the parties, *viz*., the first defendant and Duraiswami Naidu, was at the time of the construction of the house In discussing that, he was of the view that no precise terms and conditions governing the transaction between them were either discussed or formulated but the whole matter was to a large extent based on mutual trust and confidence I think it is well and useful to set out in the learned Judge's own words what he considered to be the state of things at that time ·

" The first defendant was badly in need of a house But he had no money with which to buy one P W 1 who was rich was prepared to advance the money on condition that he was to be the owner until the advance was repaid Or, in other words, P W 1 was prepared to buy the house himself, so as to enable the first defendant in course of time to save enough money to buy it off him. Meanwhile the first defendant was to occupy the house, legally in the position of a tenant, but *actually in his capacity as the ultimate owner*, although of course, his ownership was contingent on his repaying the purchase price No rent was to be actually collected from the first defendant since he was going to repay P W 1's money with interest The first defendant could do what he liked with the property, and effect whatever improvements he considered necessary without any specific provision being made in respect of it, since the improvements were ultimately to enure to his own benefit It was taken for granted that the first defendant would pay up the purchase price and secure the property for himself, the possibility of his failing to do this was perhaps not contemplated "

It is also found by the lower appellate Court that the plaintiffs knew the fact that the property was purchased for the benefit of the first defendant and they cannot

claim the rights of a *bona fide* transferee under issue 4 What then is the legal effect of the transaction? I do not agree with the learned District Judge with his discussion or the conclusion arrived at in paragraph 7 of his judgment Though the title at the time of Ex P-1 was to vest in P W. 1, still the parties agreed that the first defendant could do what he liked with the property and effect whatever improvements he considered necessary on the property. The only burden on the first defendant was to pay back the purchase price to P W 1 with interest as contemplated at the time of the purchase. In deciding the relative legal rights of the parties, we have to bear in mind the intention with which the first defendant built the house and also how P W 1, Duraiswami Naidu, behaved when the house was being built It is common ground that the old thatched house was destroyed by fire and the finding now is that the present structure was put up by the first defendant with his own funds. The conclusion of the lower appellate Court is also to the effect that all the time the first defendant was building the house, P W 1 was looking on and tacitly acquiesced in the first defendant putting up the building. Not only was there no overt act of P.W. 1 signifying his opposition to the building scheme of the first defendant, but there was passive acquiescence by P W 1 in the first defendant's action The first defendant was building the house on the *bona fide* belief that the land was his and the only act of his to complete the title was to pay the purchase money to P W 1 with interest thereon It is in circumstances like this that we have to apply the principle of equitable estoppel laid down in the well-known English case of *Ramsden* v *Dyson*[1] The rule of equitable estoppel enunciated in the above case will be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such person is under the mistaken belief that the land is his own property, purposely abstains from interference with a view of claiming the building later on when it is erected. P.W 1 knew that the first defendant was building upon the land in the belief that the property was his but that he should only pay the purchase price to him. In spite of that P W 1 did not raise his little finger to prevent the building from being constructed In order to bring in the principle of equitable estoppel, it is sufficient to show that the conduct of the owner, whether consisting in passive abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that he had, by implication, contracted that the ownership of the land should be transferred to the first defendant here. In *Narasayya* v. *Raja of Venkatagiri*[2], Abdur Rahim, J, discusses the question how far equitable estoppel enunciated in *Ramsden* v *Dyson*[1] can be applied to cases where a tenant built upon the land with the passive connivance of the landlord in the following words

"If they had acted under such belief they would have been entitled to insist that they should not be ejected at all or that if ejected compensation should be paid to them for the improvements which they had effected under such belief provided they proved that they made the improvements in circumstances which would induce a Court of Equity to imply a contract between them and the landlord that the landlord would not eject them or in case he ejected them that he would pay them the value of the improvements The Court would infer such a contract if the landlord, by his conduct, encouraged or raised an expectation in the tenant spending money in making improvements that the latter would not be evicted at all or at least not without being compensated for the value of such improvements and the improvements were in fact made under such expectations Such a contract is inferred in order to relieve the tenant from the fraud of the landlord"

In the well-known case of *Willmott* v *Barber*[3], Fry, L J, enunciates the rule of estoppel applicable to cases of this nature and lays down that to constitute acquiescence in such cases the following essentials must co-exist

"(1) The first defendant must have made a mistake as to his legal rights,

(2) He must have expended some money or must have done some act on the faith of his mistaken belief,

(3) The plaintiffs, the possessors of the legal right, must know of the existence of their legal right which is inconsistent with the right claimed by the first defendant,

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1. (1866) L R 1 H L 129
2. (1910) I L R 37 Mad. 1, at page 15.
3. (1880) 15 Ch D 96.

(4) The plaintiffs the possessors of the legal right, must know of the first defendant's mistaken belief of his rights, and

(5) The plaintiffs must have encouraged the first defendant in his expenditure of money or in other acts which he has done either directly or by abstaining from asserting his legal right "

These principles are of such well-known application and have been followed in numerous cases in this country that it is unnecessary for me to enumerate the Indian cases in which they have been followed In *De Bussche* v *Alt*[1], Thesiger, L J, observed that if a person having a right and seeing another about to commit, or in the course of committing, an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed, he cannot afterwards be heard to complain of the act To the same effect are the observations of Lord Cottenham in *Duke of Leeds* v *Earl of Amherst*[2] In *Cairncross* v *Lorimer*[3], Lord Campbell enunciated the principle of acquiescence in these words

" . Generally speaking, if a party having an interest to prevent an action being done, has full notice of its having been done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerety, he has no more right to challenge the act to their prejudice, than he would have had if it had been done by his previous licence "

In *Hari Bhusan* v *Sheikh Abdul*[4], the rule of estoppel is stated as follows :

" Where a person in *bona fide* belief that a certain property belongs to him spends money upon it and the true owner stands by and allows him to spend money and make improvements upon his land, the true owner is estopped from asserting his title to the land as against the person making improvements in such *bona fide* belief "

It seems to me that the statement of law outlined above applies directly to the present case According to the finding of the learned District Judge, the first defendant was under the *bona fide* belief thay the property belonged to him and that the only obligation he had to meet was to pay the price paid by Duraiswami Naidu with interest thereon to the latter If that is done, the property could be enjoyed by the first defendant as his own property without any let or hindrance by Duraiswami Naidu or others claiming under him That Duraiswami Naidu encouraged the first defendant to be under that belief, is also what the learned Judge opines Could it be said that in a situation like this, having allowed the first defendant to expend the money and build a substantial structure on the property in the *bona fide* belief that the land would become his on the fulfilment of certain conditions, Duraiswami Naidu can turn round and say that the first defendant has no legal title and that the property should be surrendered to him or to his alienee ? Following the well-known dicta contained in the various cases mentioned by me above, the only answer that could be given to it is that Duraiswami Naidu could not , and if he could not, the plaintiffs, who are not even *bona fide* purchasers, are prevented from claiming any higher rights.

The learned District Judge was not alive to the position thus created to the fullest extent, and in his opinion it was a case of implied contract to pay the value of the structure by Duraiswami Naidu to the first defendant I do not think that his findings justify that legal conception There was no contract to pay the value of the structure but what was impliedly understood was that if the first defendant paid the cost price of the land with interest thereon to Duraiswami Naidu the land would become the first defendant's own property Therefore, the learned Judge's view that the plaintiffs, as successors to the rights of Duraiswami Naidu, should pay the first defendant the value of the structure on the latter surrendering the property with the house thereon cannot be justified It seems to me that in a state of things like this the plaintiffs are not entitled to possession at all. The utmost they are entitled to is that the first defendant should pay the cost of the site which Duraiswami Naidu had to pay to the vendor under Ex. P-1, with interest thereon

1 (1878) 8 Ch D 286
2 (1846) 2 Ph 117 41 E R 886
3 (1860) 3 L T 130.
4 A I R 1927 Cal 54.

What is the amount that will have to be paid by the first defendant is the next question for consideration. The contest in the trial Court was that out of the amount of Rs 800 a sum of Rs 500 was paid by the first defendant himself. The District Munsiff was inclined to agree with this contention, but the learned Additional District Judge came to a contrary conclusion and found that even this sum of Rs 500 was paid by Duraiswami Naidu. Therefore Duraiswami Naidu and his assignees the plaintiffs, are entitled to get this sum of Rs 500 with interest thereon at the rate of six per cent. per annum from the date of Ex P-1, *i e*, from 26th December, 1931, till the 15th July, 1949 In Ex D-2 it is stated that the interest on the sum of Rs 300 advanced by Duraiswami Naidu would be 15 per cent per annum The first defendant will therefore be bound to pay a sum of Rs 300 with interest thereon at 15 per cent. from the date of Ex P-1 till the 15th July, 1949 If the first defendant pays the plaintiffs the purchase price of Rs. 800 with interest on Rs 500 at 6 per cent. per annum from the date of Ex. P-1 till 15th July, 1949, and on Rs 300 at 15 per cent per annum from the date of Ex. P-1 till 15th July, 1949, then, the suit will stand dismissed If, on the other hand, the first defendant does not pay this amount, the trial Court will, after sending out a commission to assess the value of the building erected by the first defendant, pass a decree that on the plaintiffs depositing the value of the house so ascertained to be paid over to first defendant within a time to be fixed by it, the first defendant would surrender the land, with the building thereon to the plaintiffs With these modifications, the appeal and memorandum of objections are dismissed. Each party will bear his or their own costs throughout

Leave to appeal is refused

K C. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE GOVINDA MENON

Bavaji *alias* Abdul Muhammad . *Petitioner*.*

Criminal Law—Attempt to commit an offence—Essential ingredients—Entrustment of paddy by owner who had no transport permit to cartmen for transport outside district—If a contravention of Madras Government Notification prohibiting such transport without permit

In order to constitute an attempt to commit an offence, there must first of all be an intention to commit the crime, a commencement of the commission, and an act towards the commission. Neither the mere forming of the intention to commit the crime nor the mere preparation for an offence is punishable The dividing line between a mere preparation and an attempt to commit a crime may be thin in some cases and the question whether there has been an attempt or only a preparation to commit is to be decided on the facts of each particular case. One important consideration in such cases is whether there was a *locus penitentiae.*

Where all that is alleged against the owner of paddy who had no transport permit is that he entrusted bags of paddy to cartmen to transport them outside the district and that the cart with the paddy was found unyoked at a place still within the district, it cannot be said that the owner of the paddy was actually transporting the paddy within the meaning of the Madras Government Notification, No 2060-A/45 (C S) The act of the owner could at the most amount to an abetment of the transport of paddy from one district to another Where the cartmen are held not to have contravened the notification prohibiting such transport and that they did not even attempt to commit the offence then the person who is alleged to have abetted the act which did not amount to an attempt cannot be held to have committed the offence

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Sessions, West Tanjore in C A No 3 of 1949 (C C No 146 of 1948, Additional First Class Magistrate, Kumbakonam)

V Rajagopalachari and *G Gopalaswami* for Petitioner

The Assistant Public Prosecutor (*A S. Sivakaminathan*) for the Crown

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*Cr R C No 297 of 1949. 4th July, 1949
(Cr R P No 250 of 1949)

The Court made the following

ORDER.—The petitioner who was the first accused in C C No 146 of 1948 on the file of the Court of the Additional First Class Magistrate of Kumbakonam was convicted for the contravention of an order promulgated by the Provincial Government No. 2660, A/1945 (C S), published at pages 581 and 582 to Part II of *Fort St George Gazette*, dated 4th September, 1945, which had been continued as an offence by section 7 (1) of Central Act XXIV of 1946 and sentenced to rigorous imprisonment for one year The said conviction and sentence were confirmed on appeal by the Court of Session, West Tanjore and the present revision is to set aside the aforesaid confirmation of the conviction and sentence

P W 1 was the Grain Purchase Tahsildar of Tanjore in October, 1947, and P W 2 was the Inspector of Police, C I D X Branch, Tanjore, at the same time. On 3rd October, 1947, at about 10-30 P M both P Ws 1 and 2 proceeded along the flood bank shown in the plan Exhibit D-5 and found four cart loads of paddy at the place marked 46/5 on the said flood bank According to the witnesses, the double bullock carts had gone down the bank in a northern direction into the padugai lands which intervene between the Coleroon river in the north and the flood bank in the south To the north of the Coleroon river is the Ramanoor Island which formed part of the Trichinopoly district By the time P.Ws 1 and 2 reached the place in question, the bullocks had been unyoked and the second and the third accused who had been acquitted by the learned Sessions Judge were near the cart On being questioned accused 2 and 3 told P W 1 that the paddy belonged to the first accused Little later, the petitioner came on the scene and admitted that the paddy was his He was asked to produce the transport permit, because, according to the witnesses, the carts were proceeding towards Trichinopoly district. He did not produce any such permit, but said that the paddy was being taken to Kumbakonam Since the first accused did not produce the A A permit on demand and after P Ws 1 and 2 waited for an hour, the paddy was seized under the Mahazar, Exhibit P-1, and the witnesses arranged that the paddy should be taken to Kumbakonam to be produced in Court On this evidence, the lower courts have held that the first accused was attempting to transport paddy in contravention of the Government Order abovementioned Exhibit P-4, clause 1 of which is in the following terms

"No person shall with effect from the date of this order transport paddy . from any place within the limits of any of the districts specified in column (1) of Schedule 1 . . . to any place within the limits of any other district in the Province of Madras except under and in accordance with the terms and conditions of a permit issued by the Commissioner of Civil Supplies . . ."

It is not disputed that there was no permit for the transport of paddy from the Tanjore district to the Trichinopoly district, which lies to the north of the Coleroon river at a distance of six furlongs from the flood bank Half the river belongs to the Tanjore district and the other half on the northern side belongs to the Trichinopoly district on the principle of *ad medium filum* The learned Sessions Judge found that the act of the second and third accused did not constitute an attempt to transport paddy ; but that the first accused committed the offence in question The learned Judge found that the carts had a considerable distance to go before they crossed the boundary of the district and it was certainly possible for the drivers to repent of their intention to take the carts to Trichinopoly district and give up the attempt It was further found that when the carts were seized, they were not even moving Following the decision in *Queen Empress* v *Ramakka*[1], the learned Judge was of opinion that the action of accused 2 and accused 3 would not amount to an attempt In paragraph 19 of his judgment, the learned Sessions Judge finds on evidence that if the first accused had delivered the grain to the carters obviously with instructions to take it into another district and if there had been no interference, the petitioner would not have seen the carts again According to the learned Judge, he had therefore done everything that lay with him and set in train a series

1 (1884) I.L.R 8 Mad 5.

of actions that, if they had not been interrupted, would have led to the commission of the offence He then applies the analogy of a person who books goods by railway transport to a destination to which it is an offence to send the goods and holds that such an act would amount to an attempt to commit the crime On the above reasoning, the learned Judge was of opinion that the petitioner must have instructed the cartmen (second and third accused) to transport the paddy from Tanjore district to Trichinopoly district

I find it difficult to follow the learned Judge's reasoning A strict construction of paragraph 1 of the Government Order extracted above would show that the offender is the person who transports the goods It cannot be said that even if the prosecution evidence is true that the petitioner who delivered the bags of paddy to the cartmen (second and third accused) to be taken to the Trichinopoly district would be actually transporting paddy If the petitioner had done an act like this, it could at the utmost amount only to an abetment of the transport of paddy from Tanjore to Trichinopoly district The drivers would be the persons who would transport the goods and the person who directs them to do so would be the abettor of the offence The learned Judge has found that the second and third accused did not commit the crime He also has found that they did not even attempt to commit the crime In such circumstances, it is difficult to hold that if the acutal participants did not even commit the offence of the attempt to transport, then the person who is alleged to have abetted the act which did not amount to an attempt has committed any offence at all On this short ground, in my view, the offence has not been brought home to the petitioner

On the merits also, I am unable to agree with the lower courts that any offence has been committed. There is no evidence whatever that the petitioner directed the second and third accused to take the paddy from the Tanjore district to the Trichinopoly district P W 1 says that when accused 2 and 3 were questioned as to whose the paddy bags were, they replied that the paddy belonged to the first accused, but they did not give any reply to the other question as to where it was being taken. P W 2 also gives evidence to the same effect Therefore, there is absolutely no material on which the Court could come to the conclusion that the paddy was being taken to Trichinopoly On the other hand, it is clear from the evidence that the first accused had been directed to deliver 1,500 kalams of kuruvai paddy on the 6th October, 1947, to the Government licensed merchant in Tanjore district Exhibit D-11 shows that towards that quantity 12 carts containing 177 bags had already been delivered, and if the contents of the four carts has also been delivered to a Government licensed merchant, that would fulfil the obligation imposed upon the first accused, regarding the delivery of the 1,500 kalams of kuruvai paddy Exhibit D-2 the A A permit is for 16 carts of paddy to be delivered between 26th September, 1947, and 5th October, 1947 In these circumstances, in my opinion, the lower courts were not justified in concluding that even if the carts had taken a detour little to the north of the flood bank into the padugai lands and that at the time P Ws 1 and 2 observed the carts the bulls had been unyoked, the only possible inference is that the carts were being taken to the Trichinopoly district. P W 1 himself admits in cross-examination that when he first sighted the bandies some were in the flood bank while others were on the cart track on the north, and as they neared, the carts on the flood bank went towards the north on the cart track The evidence of D W 13, a retired District Board Engineer, is to the effect that along the flood bank there are a number of vents between various distances and that there are sidings also. Granting that the evidence of P Ws 1 and 2 is acceptable—and I do not see any reason to disbelieve the evidence of these respectable witnesses—it cannot be predicated with absolute certainty that the carts were proceeding to Trichinopoly district at all.

The learned Judge's view that it " must have been " in obedience to the instructions of the petitioner that the carts set out to cross the river is not based on any evidence at all, and in a criminal case, unless there is some evidence, no Court is justified in concluding that a person has given instructions which would amount

to a crime. There is also the evidence of D W. 2 that all the 16 carts which included the four carts in question reached the Kumbakonam chowki practically at the same time at 7-30 on the morning of the next day. If the petitioner has sent 12 carts with paddy for the purpose of delivering them to the licenced grain purchaser, the quantity contained in the four carts now in dispute would make up the requisite quantity which he had to deliver There is a reasonable conclusion to draw that the petitioner would have sent the carts not to Trichinopoly district but to Kumbakonam to be delivered to the licensed dealer The discussion by the learned Judge in paragraph 8 of his judgment is sufficient justification for drawing the inference that the four carts also should have formed part of the 16 carts containing the requisite quantity of paddy to be delivered

In order to constitute an attempt to commit an offence, there must first of all be an intention to commit the crime, a commencement of the commission, and an act done towards the commission Neither the mere forming of the intention to commit the crime nor the mere preparation for an offence is punishable. The dividing lines between a mere preparation and an attempt to commit a crime may be rather thin in some cases and the question whether there has been an attempt or only a preparation to commit it is to be decided on the facts of each particular case One important consideration in such cases is whether there was a *locus penitentiae* (See *Narayanaswami Pillai*, In re[1]) Applying the above principles, it seems to me that on the evidence let in, it cannot be conclusively inferred that there has been an attempt to transport the paddy to Trichinopoly district.

The criminal revision case is therefore allowed and the petitioner is acquitted.

V P S ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE HORWILL AND MR JUSTICE RAGHAVA RAO

Nagamma Shedthi . *Appellant* *

v.

Korathu Hengsu and others . *Respondents.*

Aliyasanthana Law—Decree against the karnavan of a Malabar tarwad or the kartha of an aliyasanthana family—Gross neglect or breach of duty on the part of the kartha—If a ground for holding that the decree is not binding on the junior members—Civil Procedure Code (V of 1908), section 11, Explanation VI—Applicability of principle of

A decree obtained against the karnavan of a Malabar tarwad or the kartha of an aliyasanthana family cannot be held to be not binding on the junior members merely on ground of gross negligence or breach of duty on the part of the karnavan or kartha as such neglect or breach of duty cannot be treated as tantamount to fraud on the power of representation vested in him. The principle governing the situation is to be found in Explanation VI to section 11 of the Code

A person must be deemed to have litigated in good faith or *bona fide* within the meaning of Explanation VI of section 11, Civil Procedure Code, if he did litigate honestly, whether he did so negligently or not The onus of proving want of *bona fides* in respect of the previous litigation is on the party seeking to avoid the previous decision and proof of negligence is not sufficient to establish such want of *bona fides*

Where negligence is the complaint there is no distinction between a case where the manager remains *ex parte* and a case where he appears but does not put forward a good available defence.

Case Law discussed

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, dated 24th August, 1945, in O S No 25 of 1943.

T Krishna Rao for *B Lakkappa Rai* for Appellant.

K Y Adiga, K P Adiga, B Venkatakrishnayya and *Santosh* for Respondents.

The Judgment of the Court was delivered by

Raghava Rao, J—The suit out of which this appeal arises was instituted by respondents 1 to 6 before us in the Court of the Subordinate Judge of South Kanara

1. (1932) 36 L W 127

* Appeal No. 42 of 1946. 23rd March, 1949.

for a declaration that the decree obtained by the appellant against the family of themselves and respondents 7 to 9 and 19 in O S No 387 of 1936 on the file of the Court of the District Munsif of Mangalore did not bind them That was a suit filed by the appellant as releasee of the suit properties from the auction purchaser thereof in execution of the decree in O S No 39 of 1928, Sub-Court, South Kanara at Mangalore, which had been obtained on the basis of a mortgage effected by the present fifth defendant, by the father of the present defendants 6 to 9 and by the father of the present defendants 10 to 12, who together with their sons and the 13th defendant, their step-brother were the *mulgars* of the suit properties The defendants in O S No 387 of 1936 who contested it by filing a written statement were the mulgeni tenants, *i e*, the present defendants 2 to 4 who were the heads of the three branches of the undivided Aliyasanthana family of which the plaintiffs of the present suit are the junior members. The appellant filed the suit (O S No 387 of 1936, District Munsif Court, Mangalore) for arrears of rent and possession of the properties comprised in the present plaint A and B schedules asserting, as is said by the present plaintiffs, falsely and fraudulently that she was entitled to the entire *mulgeni* rental, although a portion thereof had been dedicated to *Devata Viniyogas* at the partition in the family of the Bulgars, that the present plaint B schedule properties in addition to the present plaint A schedule properties formed part and parcel of the *mulgeni* holdings and that the *mulgeni* lease had become forfeited for non-payment of the rent due It is also alleged by the present plaintiffs in their plaint that the appellant fraudulently managed to secure the collusion of defendants 2 to 4 and 14 and obtained a decree *ex parte* Although defendants 2 to 4 had filed their written statements in answer to the action, their vakil, Mr G Somasekhara Rao reported no instructions, when the cause came on for hearing Defendants 2 to 4 were set *ex parte*, and a decree was passed, which is the subject-matter of challenge in the present suit, which is, as may be expected, resisted by the first defendant on the ground that there was no fraud or collusion about the former decree obtained against the heads of the family The Additional Subordinate Judge who tried the cause in the Court below granted a decree to the plaintiffs against which the first defendant has preferred this appeal

It falls to be observed at the outset that there are no details of fraud or collusion given in the plaint and that the decree passed by the learned Subordinate Judge is not based on any finding of fraud or collusion as alleged in the plaint however, vaguely, so much as in a finding of gross negligence on the part of defendants 2 to 4 in remaining *ex parte* at the time of trial of O S No 387 of 1936, District Munsif Court, Mangalore, after and although they had raised various defences in their written statement. The learned Subordinate Judge has in a very exhaustive judgment scrutinised in detail the merits of all the pleas raised in the written statement in the former suit in the light of the evidence now adduced and has upheld them all as valid pleas in fact which should have resulted in a non-suit of the plaintiff in the former action but for the gross negligence of defendants 2 to 4 The *raison d'etre* of the decision of the learned Subordinate Judge is contained in three short paragraphs of his long judgment paragraphs 37, 41 and 42 which may be here reproduced :

"By reason of the conduct of defendants 2 to 4 in the prior suit the family of the parties have been gravely prejudiced A decree was allowed to be passed for amounts which were not due to the first defendant. The first defendant was entitled to acquire possession of the B schedule properties to which she had no title She was enabled to acquire possession of the properties in the A schedule which alone were the subject-matter of the *mulgeni* grant, even though there was no valid notice to quit and the lease had not been forfeited according to law .

A consideration of the evidence establishes beyond doubt that the defendants 2 to 4 were grossly negligent in remaining *ex parte* at the time of trial even though various defences had been raised in the written statement. The plaintiffs are entitled to have the decree set aside . . . .

On behalf of the first defendant it has been contended that it is nowhere alleged in the plaint, that the defendants 2 to 4 were guilty of gross negligence, that the plaint proceeds on the footing that the decree was obtained fraudulently and collusively, and that in the absence of specific mention of the fact that defendants 2 to 4 were guilty of gross negligence the decree cannot be set aside on that ground It is argued that the plea of gross negligence is a recent development at the trial There

is no force in this plea Gross negligence that has been proved in this suit amounts to fraud on the rights of the family The mere fact that the words 'gross negligence' are not expressly used in the plaint cannot take away the right of plaintiffs to avoid the decree In Malabar and Aliyasanthana Law by P R Sundara Ayyar at page 90 it is stated as follows 'In cases where the action is brought to enforce obligations incurred by the karnavan or to enforce the consequences of a default of his, the dividing line between fraud and failure to plead would generally be hard to delineate'

It is clear that a decree against a karnavan is binding on the tarwad because of the representative character of the karnavan He is the head and representative of the family, but when gross breach of duty is proved as in this case, that amounts to fraud on the family and must be treated as fraud upon his power The decree in O S No 387 of 1936 was obtained fraudulently The defendants 2 to 4 failed to utilise the means of proof at their disposal and have lost the tarwad properties, as a result of their negligence In *Durgamma* v *Kechamayya*[1] gross negligence was held to amount to fraud The above argument on behalf of the first defendant is not entitled to force"

Mr T Krishna Rao, the learned advocate for the appellant, has attacked the soundness of the law which found favour with the learned Subordinate Judge by the citation of a long list of decisions with the more important of which we shall presently deal Mr K Y Adiga for the respondent has with his usual frankness agreed that, if the view of law adopted by the learned Subordinate Judge is rejected by us, the appeal must be allowed without any need for us to go into the evidence about the pleas raised by defendants 2 to 4 in their written statements in the former suit but not attempted to be proved by them at the trial of that suit

The question for determination, therefore, is whether a decree obtained against the karnavan of a Malabar tarwad or the kartha of an Aliyasanthana family can be held not binding on the junior members in the absence of any fraud or collusion as such on the ground of gross neglect or breach of duty on the part of the karnavan or the kartha which must be treated as tantamount to fraud on the power of representation vested in him Judging the matter from the standpoint of principle as well as from the standpoint of binding precedents, we have arrived at the conclusion that the view of law adopted by the lower Court is erroneous

The principle governing the situation is, in our opinion, to be found in Explanation VI to section 11 of the Civil Procedure Code which, so far as material for the present purpose, provides that,

"Where persons litigate *bona fide* in respect of . a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating"

The explanation attracts the doctrine of *res judicata* to all cases falling within its terms, subject of course to the fulfilment of the other requirements of the section. As may be seen from the language of the explanation, the test prescribed by it is that the former party must have litigated the common private right *bona fide* *Bona fide* means in good faith and that raises the question whether good faith could be predicated or postulated in respect of a situation characterised by want of due diligence or by gross negligence For the purpose of the Indian Limitation Act, we have in section 2 thereof the definition of good faith which enacts that, unless there is anything repugnant in the subject or context, nothing shall be deemed to be done in good faith which is not done with due care and attention Similarly, the Madras General Clauses Act I of 1891 provides in and by section 3, clause 11 thereof that in this Act (Madras General Clauses Act I of 1891) and in every Madras Act made after the commencement of this Act (Madras General Clauses Act I of 1891), unless there be something repugnant in the subject or context, nothing is said to be done or believed in "good faith" which is done or believed without due care and attention But barring all cases governed by special enactments of the kind just referred to, we have for all other cases generally the definition in section 3, clause 20 of the Indian General Clauses Act X of 1897 which provides that,

"In this Act (Indian General Clauses Act X of 1897) and in all Central Acts and Regulations made after the commencement of this Act (Indian General Clauses Act X of 1897) unless there is anything repugnant in the subject or context—

1 (1924) 48 M.L J 351

A thing shall be deemed to be done in 'good faith' where it is in fact done honestly, whether it is done negligently or not"

The effect of the last mentioned provision, which is the material provision for the present discussion, is that a person must be deemed to have litigated in good faith or *bona fide* within the meaning of Explanation VI to section 11, Civil Procedure Code, if he did litigate honestly, whether he did so negligently or not The onus of proving want of *bona fides* in respect of the previous litigation is on the party seeking to avoid the previous decision and proof of negligence is not sufficient to establish such want of *bona fides* For, as ruled by the Privy Council in *Venkataseshayya* v *Kotiswara Rao*[1] :

"the provisions of section 11 of the Civil Procedure Code are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of section 44 of the Indian Evidence Act which defines with precision the grounds of such avoidance as fraud or collusion, or by showing a want of *bona fides* in the prosecution of the former suit It is not for the Court to treat negligence or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts"

Cases of infants of course do stand apart, as ruled by our High Court (differing from the view of the Bombay High Court to the contrary) in the case reported in *Egappa* v. *Ramanatha*[2] apparently because the protection of minors against the negligent actings of their guardians is, as observed by the self same Privy Council decision in *Venkataseshayya* v *Kotiswara Rao*[1], a special class of case It may also be borne in mind in this connection that gross negligence, is the same thing as negligence with the addition of a vituperative epithet, to use the language of Rolfe, B , in *Wilson* v. *Brett*[3] Even if there is a distinction between negligence and gross negligence it is, at any rate, elusive as Lord Thankerton describes it in delivering the judgment of the Privy Council in the case reported in *Venkataseshayya* v *Kotiswara Rao*[1] just mentioned.

It follows from the foregoing that as a matter of principle there is no reason why the gross negligence of a karnavan in conducting or defending a suit should, when not amounting to fraud or collusion, be a ground for setting aside a decree to which he was a party as representing the tarwad And yet, we find the contrary laid down in the earliest Bench ruling of our High Court reported in *Thenju* v. *Chimmu*[4], in the terms that, when breach or neglect of duty on the part of a karnavan is established, the decree is not binding on the junior members The basis of the view is indicated in that decision to be this that the karnavan's position in relation to the members of the tarwad being fiduciary, and his powers being qualified by his position, any breach or neglect of duty on his part must be regarded as a fraud on his power which is only a qualified power. This was assumed to be the law by all the three learned Judges who heard the case reported in *Moidin Kutti* v *Krishnan*[5] (of whom one by the way, Muthuswami Aiyar, J , had been a party to the earlier decision), after a difference of opinion between two of them, Kernan and Brandt, JJ , on another point at the original hearing of the second appeal, on which it was that the decision of the case eventually rested, Muthuswami Aiyar and Brandt, JJ., taking one view on the point and Kernan, J , taking a contrary view In our opinion, the law laid down or assumed in these two decisions in *Thenju* v *Chimmu*[4] and *Moidin Kutti* v *Krishnan*[5] stands overruled by the decision of a Full Bench of four Judges reported in *Vasudevan* v. *Sankaran*[6] which answered in the affirmative the question referred to them which was in these terms :

"Whether the decree made in a suit in which the karnavan of a Nambudiri illom or a Marumakkattayam tarwad is, in his representative capacity, joined as a defendant and which he honestly defends is binding on the other members of the family not actually made parties"

1 (1937) 1 M L J 113 : L R 64 I A 17 : I L R 1937 Mad 263 (P C.)
2 (1942) 1 M L J 155 I L R 1942 Mad 526.
3 (1846) 11 M and W 113 at 116, 152 E R 737
4 (1884) I L R 7 Mad 413
5 (1887) I L R 10 Mad 322
6 (1897) 7 M L J 102 : I L R. 20 Mad 129 (F B).

We need only further observe with reference to the Full Bench decision that, while all the learned Judges who participated therein, relied upon the representative capacity and character of the karnavan in support of their conclusion, two of the learned Judges, Shephard and Subramania Ayyar, JJ —one at the bottom of page 139 of the report and the other at the bottom of page 142,—referred in terms to Explanation V to section 13, Civil Procedure Code, then in force, which corresponds to Explanation VI to section 11 of the present Code Further, Collins, C J, remarks at the bottom of page 132

> " I take it that the word ' honestly ' means that the karnavan acted in good faith and in what he believed to be the interest of the tarwad "

Even as Davis, J, remarks at page 144 ·

> " the only litigation that would be possible upon the judicial recognition of his i e, the karnavan's representative character would be confined to actions founded on fraud on his part "

Similarly Subramania Aiyar, J, observes at page 143 of the report.

> " unless there is shown in the words of Jessel, M R, ' fraud or collusion or anything of that sort or that the Court was cheated into believing that the case was fairly fought or fairly represented when in point of fact it was not ' (*Commissioners of Sewers of the City of London* v *Gellatly*[1]), a decision in a suit, defended by a karnavan in his representative capacity, must be held to be binding upon all those represented by him "

On a careful study of the judgments delivered in *Vasudevan* v *Sankaran*[2] we have no doubt left in our minds but that the rulings in *Thenju* v *Chimmu*[3] and *Moidin Kutti* v *Krishnan*[4] with reference to the point under consideration, of which it is true that the former is referred to in the judgment of Shephard, J, only on the Full Bench and the latter is not referred to at all in the judgment of any Judge on the Full Bench, ceased to be good law after the Full Bench ruling by which they stood virtually, if not in terms, overruled The legal principle applicable to the situation with which we are concerned is even more definitely and categorically stated by the learned Judges Benson and Bhashyam, Aiyangar, JJ, with reference to Explanation V to section 13 of the Civil Procedure Code then in force in the case in *Madhavayya* v *Keralavarma*[5]; where the question which fell to be decided and which was answered in the affirmative was whether the decree of dismissal of a suit by the karnavan in a representative capacity made as a result of his failure to file certain material documents which would have assisted the case would or would not be binding on the junior members in the absence of fraud or collusion in the conduct of the suit.

All these decisions were considered by Venkataramana Rao, J, in the case reported in *Narayani* v *Sankunni Mannadiar*[6] where it was held by the learned Judge that the cases in *Thenju* v *Chimmu*[3] and *Moidin Kutti* v *Krishnan*[4] had not been referred to at all or at any rate much in and could not therefore be treated as overruled by *Vasudevan* v *Sankaran*[2] We consider that the learned Judge erred in holding as he did He grounds himself for his conclusion on the observation of Mr P R. Sundara Aiyar in his book on Malabar and Aliyasanthana Law at page 98, namely, that a minor is not precluded from bringing a suit to set aside a decree on the ground of the gross negligence of the guardian either by section 11 or by Order 9, rule 9, Civil Procedure Code and that the same reasoning would apply to the case of junior members of a Marumakkattayam or Aliyasanthana family Referring to *Thenju* v *Chimmu*[3], Mr Sundara Aiyar made the observation earlier in his book at page 92, as noticed by Venkataramana Rao, J, himself that it is not clear

> " how much of this is good law after the Full Bench decision i e, *Vasudevan* v. *Sankaran*[2]."

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1 (1876) 3 Ch D 610 at 616
2 (1897) 7 M L J 102 I L R 20 Mad, 129 (F B)
3 (1884) I L R 7 Mad 413
4 (1887) I L R. 10 Mad 322
5 (1902) 13 M L J. 68
6 (1936) 71 M L J 545

In our opinion, the doubt expressed by the learned author at page 92 is well founded, and for reasons already stated by us *Thenju* v *Chimmu*[1], cannot be accepted and acted upon as correct law in view of the Full Bench decision The analogy of cases of minors relied on by the learned author in support of his view expressed at page 98 of the book is, in our judgment, misconceived, for as observed by the Privy Council in *Venkataseshayya* v *Kotiswara Rao*[2], the protection of minors against the negligent actings of their guardians is a special class of case which cannot be extended in disregard of the provisions of section 44, Indian Evidence Act and Explanation VI to section 11 of the Civil Procedure Code Such analogy was relied upon by counsel but repelled by Court in *Krishnamurthi* v *Chidambaram Chettiar*[3] in which it was held that where a Hindu father sues as the manager of a joint family, the junior members of the family are bound by the decree in the suit, and that the principle that a minor can sue to set aside a decree passed against him owing to gross negligence on the part of his guardian recognised by *Egappa* v *Ramanathan*[4], on the ground of *stare decisis* only applies to a case which concerns property held by the minor in his own right and in which a decree is passed against the minor and cannot be extended so as to cover the case of a decree against a father as manager of the joint family in respect of a family property in which the minor is interested as a coparcener Although there is not such discussion of principle in it, the ruling in *Krishnamurthi* v *Chidambaram Chettiar*[3] is binding upon us, and even if it were not, we would still agree with that decision as well warranted by principle, as we have expounded it in this judgment It only remains for us to add, in conclusion of our discussion of the case-law relevant to the point in controversy in this appeal, that in the case reported in *Abbakka Shedthi* v *Palli Vittal Hegda*[5], which we consider to have been rightly decided, Chandrasekhara Aiyar, J , sitting singly, held that the principle that a decree passed against the manager of a joint family cannot be set aside on the ground of negligence or gross negligence, as it can be set aside in the case of a suit brought on behalf of a minor in respect of his separate property, applies to the case of a manager of an Aliyasanthana family In so holding, the learned Judge points out that where negligence is the complaint, there is no distinction between a case where the manager remains *ex parte* and a case where the manager appears but does not put forward a good available defence In the words of the learned Judge,

"Where the manager is *ex parte*, notwithstanding that fact, the decree would still be one against the family and if what is alleged is only negligence or gross negligence, the decree is unassailable by the junior members of the family whatever form the negligence may have taken, so long as it does not amount to fraud or collusion"

We have no hesitation in endorsing this view of the learned Judge as sound in principle and consonant to authority

We have examined the case in *Durgamma* v *Kechamayya*[6], relied upon by the Court below in the present case in paragraph 42 of its judgment In that decision of a single Judge, Ramesam, J , there is no doubt an observation to be found at page 352 suggesting that the failure of the manager of the family to raise an obvious plea in answer to the former action is conduct showing gross negligence equivalent to fraud and collusion We are not, with all respect to the learned Judge, able to agree that such failure is necessarily tantamount to gross negligence or that gross negligence is necessarily equivalent to fraud and collusion We cannot agree with the former part of the proposition, because there is no knowing in many a case what is an obvious plea and what is not. It does not seem to us that the latter part of the proposition is correct either, for, fraud or collusion necessarily partakes of *mala fides*, whereas, even gross negligence may well be *bona fide* Nor does the case in *Yusuf Sahib* v *Durgi*[7] referred to by the learned Judge as an example of conduct

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1 (1884) I L R 7 Mad 413
2 (1937) 1 M L J 113 L R 64 I A 17 I L R 1937 Mad 263 (P C).
3 (1946) 1 M L J 58
4 (1942) 1 M.L J 155 · I L R 1942 Mad 526
5 (1947) 2 M L J 177
6 (1924) 48 M L J 351
7 (1907) 17 M L J 260 I L R 30 Mad. 447

showing gross negligence equivalent to fraud and collusion support, when closely looked into, the supposition made by the learned Judge. The judgment of the learned Subordinate Judge in the present case does not contain sufficient to show necessarily that fraud or collusion is, to use the words of Lord Thankerton in his judgment in *Venkataseshayya* v. *Kotiswara Rao*[1], the proper inference from the facts. Nor is the theory invoked by the learned Subordinate Judge that a breach of duty on the part of a karnavan amounts to a fraud on his power a live doctrine which we can seriously take notice of in view of the whole catena of decisions of this Court since *Vasudevan* v. *Sankaran*[2] which all speak in one voice with the solitary exception of *Narayani* v. *Sankunni Mannadiar*[3].

In these circumstances the appeal is allowed and the suit dismissed with costs of the appellant here and in the Court below.

V.P.S. *Appeol allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE GOVINDA MENON.

Saraswathi Madthi ... *Appellant*.*

v.

Rama Shetty and others ... *Respondents.*

Transfer of Property Act (IV of 1882), section 100—Payment of revenue to Government—Property not owned by person paying but patta standing in his name—No right to claim contribution or charge.

Where a person in whose name the patta stood pays the Government revenue for an item of property which in fact belonged to another and claims contribution for such payment and a charge on the property, it cannot be said that he is entitled to such a lien or charge.

Shivrao v. *Pundlik*, (1902) I.L.R. 26 Bom. 437, followed.

Rajah of Vizianagaram v. *Rajah Somasekararaj*, (1900) 13 M.L.J. 83 : I.L.R. 26 Mad. 686 (F.B.), distinguished.

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A.S. No. 252 of 1945 preferred against the decree of the Court of the District Munsif, Karkal, in O.S. No. 280 of 1942.

T. Krishna Rao for Appellant.

K. Srinivasa Rao for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff who is the appellant in this second appeal questions the correctness of the decisions of the lower courts on the ground that he is entitled to recover possession of the properties from the defendant's family because there have been a number of chalgeni chits executed by defendants 1 and 2 who are the *ejaman* and the senior *anandravan* in the family and as such the defendant's family had admitted that they were in possession of the property under the plaintiff's family. Whatever might be the original title which the plaintiff's family had, we find that ever since 1809 the property was not in its possession. The learned Subordinate Judge has found that the chalgeni chits executed by defendants 1 and 2 were collusive, nominal and champertous transactions and did not intend to create any leasehold right so far as the property is concerned. In more than one place the learned Judge finds that the documents on which the plaintiff relied as showing the admissions by the defendants' family of their possession under the plaintiffs were got up for the purpose of the kudthala proceedings and as such cannot bind the family. In such circumstances it is difficult for me to dislodge

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1. (1937) 1 M.L.J. 113 : I.L.R. 1937 Mad. 263.
2. (1897) 7 M.L.J. 102 : I.L.R. 20 Mad. 129 (F.B.).
3. (1936) 71 M.L.J. 545.

* S.A. No. 1080 of 1946. 8th July, 1949.

that finding unless it is not based on any evidence The learned Judge has marshalled the entire evidence for and against the contention put forward by the plaintiff and came to the conclusion that the plaintiff was not in possession of the property within the statutory period, nor has it been shown that the defendants' possession was as lessees under the plaintiff's tarwad These are findings of fact which cannot be agitated in second appeal Such being the case, I agree with the lower courts that the plaintiff has neither proved title nor possession within the statutory period

The next question is whether the plaintiff is entitled to recover from the defendants the Government revenue paid by the plaintiff for the suit land from 1st July, 1931, onwards The learned Judge has given her a decree only for what she has paid for six years prior to the suit and not for any previous period Mr T. Krishna Rao for the appellant contends that either on the principle of a salvage lien or on the basis that the plaintiff and the defendants, being co-owners of this property, plaintiff is entitled to get a charge under Article 132 of the Limitation Act It is admitted—and there can be no question about it—that during the time the plaintiff paid the revenue, the property in question was included in her patta On the finding that the plaintiff did not have any title to the property, at the time the revenue was paid, plaintiff was paying revenue for land included in her patta but which she did not own In such circumstances the question is whether she is entitled to a charge under section 100 of the Transfer of Property Act and Article 132 of the Limitation Act In *Rajah of Vizianagaram* v *Raja Somasekararaj*[1], a Full Bench of this Court has held that where one of two or more co-sharers owning an estate subject to the payment of revenue to the Government pays the whole revenue in order to save, and so does save, the estate from liability to be sold by Government for realising the arrears of revenue, he is by operation of law entitled to a charge upon the share of each of his co-sharers for the realisations of the latter's share of the revenue, as between the co-sharers On that principle what was decided there was that the co-sharer who paid Government revenue was entitled to recover the share from the other co-sharer for a period of 12 years prior to the date of the suit But can it be said that in this case the position occupied by the plaintiff is that of a co-sharer with the defendants' family It is admitted that to this specific item of property—if the finding given on the above question is true—the plaintiff has no title at all It is not as if the plaintiff is the owner of an undivided share, either half, or any other fraction along with the defendants If that were so, the decision in *Rajah of Vizianagaram* v *Raja Somasekararaj*[1] would be directly applicable But in a case like this, it is difficult to hold that the plaintiff and defendants are co-owners A direct authority in favour of the respondents' contention is contained in *Shivarao* v *Pundlik*[2], where Sir Lawrence Jenkins, C J and Crowe, J, have held that where a person in whose name the patta stood paid the Government revenue for an item of property which in fact belonged to another and claimed contribution for payment and a charge on the property, it cannot be said that he is entitled to such a lien The learned Judges discussed the English law on the point and finally came to the conclusion that in India also such a charge cannot be allowed The learned advocate for the appellant has not been able to distinguish this case from the facts of the present case His contention is that the present case must be viewed as akin to the decision in *Rajah of Vizianagaram* v *Rajah Somasekararaj*[1] and not as being similar to the decision in *Shivarao* v *Pundlik*[2] I am unable to agree with that contention Since the decision in *Shivarao* v *Pundlik*[2] is directly applicable to the facts of this case, I am of opinion that the decision of the lower appellate Court on this point is also correct

The second appeal therefore fails and is dismissed with costs.

No Leave.

V P S. *Appeal dismissed.*

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1 (1900) 13 M L J 83 · 26 Mad 686 (F B) 2 (1902) I L R 26 Bom 437

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE KRISHNASWAMI NAYUDU

Bhagavatula Gopalakrishnamurthi and others . *Petitioners**

v

Dhulipalla Sreedhara Rao and another *Respondents*

Civil Procedure Code (V of 1908), *Order* 6, *rule* 17—*Facts alleged in the proposed amendment available even at the time of filing of plaint—Amendment making out a new case on these facts—If can be allowed*

Where certain facts are alleged in a proposed amendment of the plaint which facts were available to the plaintiffs and which they had not chosen to mention in the original plaint, it would not be open to the Courts to permit such an amendment where it would result in a new case being made out on facts which were available but were not pleaded

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Subordinate Judge, Tenali, dated 24th August, 1948, in I A No 1047 of 1948 in O S No 59 of 1945

P V Chelapathi Rao for Petitioners

V Suryanarayana for Respondents

The Court delivered the following

JUDGMENT —Petitioners are defendants 14 and 22 in O S No 59 of 1945 on the file of the Court of the Subordinate Judge, Tenali. The suit was for partition and for possession after setting aside certain alienations The defendant is the father of the plaintiffs He was adjudicated insolvent and the Official Receiver was made a party to the suit The suit relates to the setting aside of alienations not only made by the father but also by the Official Receiver and paragraph 5 of the plaint states

" There was no proper vesting order passed in favour of the Official Receiver Neither the half share of the first plaintiff nor the father's power to sell the same was or could be vested in the Official Receiver in I P No 33 of 1930 The latter could if at all deal with the first defendant's half share The Official Receiver sold the insolvent's right, title and interest in the properties mentioned as items 6 to 17 of Schedule B without covenanting for the existence or extent of the title of the insolvent These defendants did not acquire title to any more than the half share of the first defendant "

During the pendency of the suit, the Provincial Insolvency Act was amended by the addition of section 28-A and by reason of the amendment the Official Receiver, who was in possession of the estate of the insolvent became entitled to sell the son's share as well and that the Amending Act was declared to have retrospective effect The plaintiff filed I A No 1047 of 1948 for amendment of the plaint by seeking to introduce the following paragraph as paragraph 5-A

" The plaintiffs submit that under Act XXV of 1948 the Official Receiver is in exactly the same position as the father in the matter of alienation of joint family properties to pay the father's debts and has no higher or different powers than the father would have had, if he was selling the property himself for his own debts Plaintiffs submit that the sales by the Official Receiver of items 6 to 17 of the plaint B schedule were for grossly inadequate price Plaintiffs also learn that the sales were rushed through in undue haste and that the prices realised were miserably low The sales are not therefore binding upon the plaintiff's half share "

The learned Subordinate Judge granted the amendment The question is whether the order of the learned Judge is correct In paragraph 5 of the original plaint, except that the plaintiffs relied on the position of law, they did not choose to make any statement as regards the nature of the sale, consideration therefor and its invalidity otherwise than under the provisions of the Provincial Insolvency Act before the enactment of section 28-A of the Act But they have now chosen to give certain facts and want to plead those facts in order to entitle them to have the sale set aside. It is argued on behalf of the petitioner that the Court was not entitled to allow such an amendment as a new case was set up on fresh facts, which facts were available even when the plaint was originally filed but no mention was made in paragraph 5

* C R P. No. 1459 of 1948 25th July, 1949

of the plaint In the counter-affidavit it is also stated that this is clearly an afterthought In the affidavit in support of the application it is stated that by reason of the amendment of the Provincial Insolvency Act by Act XXV of 1948 it became necessary to examine the question from this new standpoint and therefore the plaintiff prayed that the amendment might be allowed The learned counsel for the respondents cited *Bhimudu* v *Pitchayya*[1], *Venkataratnam* v *Venkamma*[2] and *Chella Sakkaraja* v *Muthuswami Moopan*[3], in support of his contention that by reason of subsequent events occurring after the filing of the plaint it was open to the court to grant amendment. But on examining those decisions I find that if by reason of the subsequent events certain rights accrued to the plaintiff, the plaintiff would be entitled to claim reliefs under those rights But in this case certain facts are alleged which facts were available to the plaintiffs and which the plaintiffs have not chosen to mention in the original plaint and I do not think it would be open to courts to permit such an amendment as it would, in the words of their Lordships of the Privy Council in the case reported in *Ma Shwe Mya* v *Maung*[4], permit a new case to be made on facts which were available but were not pleaded I think that the result of allowing the amendment would be to introduce a new element which was absent in the original plaint and that the plaintiffs are not entitled to any such amendment I hold that the learned Subordinate Judge was in error in granting the amendment The petition is allowed with costs.

V S *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE KRISHNASWAMI NAYUDU

Kallampudi Narayanappa *Petitioner**

v

Kaligotla Suryanarayana and others *Respondents*

Civil Procedure Code (V of 1908), *Order* 8, *rule* 1—*Substitution* in toto *of one written statement for another already filed—Power of Court*

There is no provision in the Civil Procedure Code to enable the Court to permit the substitution *in toto* of one written statement for another already filed A Court has no jurisdiction to pass an order directing such substitution

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Yellamanchilli, in I.A No 7 of 1949 in O S No. 85 of 1948

E Venkatesam for Petitioner

C. Rama Rao for Respondents

The Court delivered the following

JUDGMENT —The petitioner in this revision petition is the first defendant in O S No 85 of 1948 on the file of the District Munsif's Court, Yellamanchilli, instituted for redemption of two usufructuary mortgages executed by the second defendant in favour of the first defendant The plaintiff claimed to be the purchaser of the properties subject to two mortgages having purchased the same from the second defendant The second defendant, mortgagor filed a written statement in person on 7th July, 1948 The first defendant s contention is that in pursuance of an agreement of sale executed by the second defendant in his favour agreeing to sell the property he came into possession of the property and that by virtue of section 53-A of the Transfer of Property Act his title to the property had been perfected and that the plaintiff is not entitled to redeem the properties The second defendant in his statement filed on 7th July, 1948, which was filed in person had stated that he had executed on 25th December, 1945, an agreement to sell on a stamped paper and had taken Rs 212 cash from the first defendant to make up the

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1 (1946) 1 M L J 462
2. (1926) 23 L W 618
3 (1936) 71 M L J 166
4 (1921) L R 48 I A 214 I L R 48 Cal. 832 (P C).

* C R P No 153 of 1949 27th July, 1949

purchase amount. Though the properties were previously in the possession of the first defendant the second defendant had delivered possession again as per the agreement to sell and also made an arrangement to take the agreement to sell as a sale deed till he executed a registered sale deed on a properly stamped paper He also pleaded that even though the second defendant informed the plaintiff about the agreement to sell in favour of the first defendant the plaintiff had encouraged him by saying that he would give the surplus money and persuaded him to execute the sale deed in favour of the plaintiff On 3rd January, 1949, the second defendant filed I A No 7 of 1949 praying to permit him to substitute another written statement which was then prepared under legal advice in the place of the one already filed on 7th July, 1948 and in support of this application he filed an affidavit to the effect that the first written statement was obtained by the first defendant under fraud and misrepresentation and that, therefore, he should be given leave to substitute the new statement filed along with the interlocutory application in the place of the one filed already The learned District Munsiff directed that the writen statement filed along with the interlocutory application should be substituted in the place of the written statement filed by him in person on 7th July, 1948. The interlocutory application was sought to be filed under Order 8, rule 1 and section 151, Civil Procedure Code Order 8, rule 1 relates to the filing of written statements The written statement that had already been filed was one under Order 8, rule 1, Civil Procedure Code It cannot be said that Order 8, rule 1 would apply for the substitution of a fresh written statement in the place of the one filed already under Order 8, rule 1, Civil Procedure Code It is unnecessary to consider whether the written statement could have been filed under Order 6, rule 17, Civil Procedure Code, as it relates to the amendment of pleadings by which the pleadings may be altered or amended under the circumstances mentioned in the rule There is however no provision in the Civil Procedure Code to enable the Court to permit the substitution *in toto* of one written statement for another already filed I am of opinion that the learned District Munsiff had no jurisdiction to pass an order directing the substitution of the new written statement filed along with the interlocutory application in the place of the one filed already under Order 8, rule 1, Civil Procedure Code The original statement filed in the first instance on 7th July, 1948, will remain on the file It is always open to the second defendant at the time of the trial of the suit to state the circumstances which he now alleges under which the first written statement which he filed in person was presented The revision petition is allowed with costs

V.S — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR P. V RAJAMANNAR, *Chief Justice* AND MR JUSTICE MACK

K Devarajulu Naidu . *Petitioner**

v

C Ethirajavalli Thayaramma, by power-of-attorney agent C Ranganayakalu Chetty and others *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7 (2) (ii) (a)—Original tenancy in favour of three persons who were partners in a firm—Dissolution of firm—One partner allowed to wind up affairs and subsequently use premises for his sole business—If amounts to transfer or sub-letting of premises

Where the original tenancy was in favour of three persons who were partners in a firm, and after its dissolution one of the partners is allowed to wind up the affairs of the partnership and thereafter is allowed to use the premises for his sole business, such act of the two partners other than the one carrying on the business cannot amount to a transfer or sub-letting of the premises to that partner by the others Hence, where the appellate tribunal under the Madras Buildings (Lease and Rent Control) Act, holds under such circumstances that the landlord is entitled to eviction on the ground that there is a subletting, the order is vitiated by an error of law apparent on the face of the record and has to be quashed.

*C M P No 1450 of 1949. 12th July, 1949.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H R A No 879 of 1947, Small Cause Court, Madras, and quash the order therein as one without jurisdiction and manifestly outside the scope of Act XV of 1946

V Ramaswami Aiyar and *M Natesan* for Petitioner

V C Gopalaratnam for Respondents.

The Order of the Court was made by

The Chief Justice—This application for the issue of a writ of *certiorari* arises out of a petition filed by the first respondent before the Rent Controller, Madras, for eviction of three persons, of whon the petitioner before us is one The first respondent is the owner of house No 210, Govindappa Naicken Street, George Town, Madras It is common ground that this house was let by the first respondent to a firm called "Devarajulu Naidu & Co" which consisted of these three persons as partners This partnership firm was dissolved sometime in 1943 and thereafter no fresh business was done, but the affairs of the partnership were wound up. By 14th November, 1946, the winding up was completed and accounts were finally settled Meanwhile on 15th March, 1944, the first respondent purported to terminate the tenancy by notice to quit and followed up the notice with a suit for eviction in the Court of Small Causes (Suit No 252 of 1944) That suit was dismissed on 16th August, 1944 and the first respondent was directed to obtain relief from the Rent Controller On 9th December, 1946, after the Madras Buildings (Lease and Control) Act of 1946 came into force, an application was filed by the first respondent against the three erstwhile partners for eviction The main grounds on which eviction was sought were (i) that the three tenants had sub-let the premises to another firm which consisted of the petitioner before us and two others, not parties to the application and (ii) that the premises were being used for a purpose other than that for which they were leased

The Rent Controller dismissed the application He held that it had not been conclusively proved that the petitioner before us was carrying on a new business with other partners and even so, such business commenced long before 1st October, 1946, when the present Act came into force On appeal the Third Judge of the Court of Small Cause reversed the decision of the Rent Controller and directed eviction of all the three persons against whom the application had been filed So far as we can gather from his order, the learned Judge's findings are that after the termination of the tenancy by the first respondent the three partners should be deemed to have continued as tenants both individually and collectively and the firm must be deemed to have continued till 14th November, 1946, when it was finally wound up, that between 1943 and November 1946 the petitioner before us was in sole charge of the dissolution of the firm and that simultaneously he started a business on the said premises in his own name on 9th Decenber, 1945. On these findings of fact he arrived at the conclusion that in law it must be held that the three partners sub-let the premises to the petitioner before us in his individual capacity for his separate business ; to use his own words

'the petitioner (landlord) was therefore justified in treating the respondents as collectively the tenant of the property and the first respondent (petitioner here) as a sub-tenant from and after 14th November, 1946"

In our opinion the learned Judge fell into an obvious error of law in arriving at this conclusion The position was shortly this The original tenancy was in favour of three persons who were partners in a firm After the dissolution of the firm, one of the partners was allowed to wind up the affairs of the partnership and thereafter was allowed to use the premises for his sole business. This act on the part of the two partners other than the petitioner cannot amount to a transfer or sub-letting of the premises to the petitioner It is true that the Courts in England have taken up an extreme view that even when one of two partners after the dissolution of the partnership assigns to the other partner the interest of the partnership

in premises which had been taken on lease by the partnership, it would amount to a breach of the covenant prohibiting an assignment of the lease without the consent of the lessor (See *Varley* v *Coppard*[1]) But this Court was not inclined to apply this doctrine to Indian conditions In *Koragalva* v *Jakn Beary*[2], Devadoss, J, held that the transfer by a co-lessee in favour of another lessee of his right in the lease would not be a breach of a covenant against assignment without the consent of the landlord. The learned Judge was of the definite opinion that we should not introduce into our Indian system the rigour of the English law as regards the relation of landlord and tenant The appellate tribunal in this case was therefore in error in holding that the landlord was entitled to eviction on this ground The other finding as regards the user of the house for a different purpose, it is clear, was treated as a corollary to the main finding which we have held was erróneous

The order therefore as it stands is vitiated by an error of law apparent on the face of the record and must therefore be quashed

The order is defective also in another material respect and that is that the appellate tribunal did not deal with and give a finding on the really important question which arose on the landlord's application, namely, that the three original tenants sub-let the premises to a different firm which consisted of one of them and two other strangers That was the specific case set up in the landlord's application This question has not been properly dealt with by the appellate tribunal The appellate tribunal shall therefore hear the appeal afresh after giving the parties an opportunity of being heard, and, if necessary, after making such further enquiry, as it thinks fit either personally or through the controller, and shall decide the appeal in the light of the observation which we have made

There will be no costs in this application

V S — *Order quashed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE PANCHAPAKESA AYYAR

The Official Réceiver, West Tanjore, Tanjore and another *Appellants**

v

Sakkuwar Bai Ammal *Respondent*

Madras Estates Land Act (I of 1908)—Landlord obtaining decree against a tenant afterwards ceasing to be his landlord —If can execute the decree in a Revenue Court and realise his arrears in a revenue sale

A landlord who had obtained a decree against a tenant, under the Madras Estates Land Act, but has afterwards ceased to be his landholder, and the relationship between the landholder and tenant has ceased to exist, cannot execute the decree in a *Revenue* Court and realise his arrears in a revenue sale (which will be free of all encumbrances) and should execute it in *Civil* Court

Sundaram Aiyar v *Kulathu Aiyar*, (1915) 29 M L J 505 I L R 39 Mad 1018, *Venkata Lakshmamma* v *Seethayya*, (1920) 39 M L J 30 · I L R 43 Mad 786, *Vyraperumal* v *Alagappa*, (1931) 62 M L J 468 I L R 55 Mad 468 and *Suryanarayana* v *Ramachandrudu*, (1932) 37 L W 655, relied on

Observations of Sadasiva Aiyar, J, in *Venkata Lakshmamma Garu* v *Achi Reddi*, (1921) 40 M L J. 319 I L R 44 Mad 433 (F B), treated as *obiter* and not followed

The policy of the Madras Estates Land Act is to give the landholder who is the present landholder in respect of the holding and ryot preference regarding the recovery of his rent free from all encumbrances and charges for arrears

The amendments of sections 125 and 127 of the Madras Estates Land Act have not affected the position

Appeal against the order of the District Court of West Tanjore at Tanjore, dated 9th July, 1945, and made in A S No 46 of 1945 (E P No. 363 of 1944 in S S No 340 of 1941 on the file of the Deputy Collector, Tanjore).

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1 (1872) L R 7 Common Pleas 505

2. (1926) 52 M L J 8.

*A A A O No 288 of 1945 18th March, 1949

T. K Subramanya Pillai for Appellants.

G R. Jagadeesa Aiyar for Respondent.

The Court delivered the following

JUDGMENT —The only point for determination in this second appeal is whethe the lower Courts went wrong in holding that a landholder who had obtained a decree against a tenant, under the Madras Estates Land Act, but has afterwards ceased to be his landholder, and the relationship between the landholder and tenant has ceased to exist, cannot execute the decree in a *Revenue* Court and realise his arrears in a revenue sale and should execute it in a *Civil* Court The lower Courts relied on the rulings in *Sundaram Ayyar* v *Kulathu Ayyar*[1] and *Suramma* v. *Suriyanarayana Jagapathiraju*[2]. In *Sundaram Ayyar* v *Kulathu Ayyar*[1], it has been held by a Bench of this Court that the provisions of the Madras Estates Land Act do not empower a person who was a lessee of an estate, to take proceedings *after the expiry of his lease* to sell the tenant's holding for arrears of rent due for a fasli covered by the period of his lease, though it was held also that a person to whom arrears are due is a land-holder notwithstanding the fact that his estate has terminated, but that the law does not give him a first charge on the holding or the crops thereon, and he can merely distrain the moveable property or the trees in the holding of the defaulter and that he is not entitled to attach the holding In the course of his judgment, Seshagiri Ayyar, J , relied on the ruling of the Privy Council in *Forbes* v *Maharaj Bahadur Singh*[3] and said that the Judicial Committee had clearly and emphatically laid down that a holding can be sold only by a landholder who had a subsisting interest in the estate. In *Suramma* v. *Suriyanarayana Jagapathirazu*[2] Phillips and Kumaraswami Sastri,J , have held that a sale in a Revenue Court passes the property to the purchaser free of encumbrances except those specified in section 125 of the Madras Estates Land Act. Therefore, it is apparent that if the appellant is allowed to bring the holding to sale in a *Revenue* Court, he will get an undoubted advantage and priority over the present landholder (the appellant has ceased to be a landholder after 1940) regarding his rent for all the years from 1940 till now, which I do not consider the Estates Land Act intends to give to a person regarding whom the relationship between landholder and tenant has ceased. In *Krishnapada Chatterjee* v *Manada Sundari Ghosh*[4], seven judges of the Calcutta High Court have held, following the Privy Council ruling in *Forbes* v. *Maharaj Bahadur Singh*[3], that only a landlord who has not parted with his interest, and regarding whom the relationship of landlord and tenant subsists, can bring the holding to sale in a *Revenue* Court They specifically held that the person seeking to execute a decree by sale of the tenure or holding must have the landlord's interest vested in him and that the right to bring the tenure or holding to sale exists only so long as the relationship of landlord and tenant exists ; and that it is the existing landlord alone who can execute the decree in a *Revenue* Court In *Suryanarayana* v *Ramachandrudu*[5], Anantakrishna Ayyar, J , relied on the above ruling of the seven Judges of the Calcutta High Court and held that only so long as the relationship of landlord and tenant existed could a decree for rent be executed in a *Revenue* Court by bringing the holding to sale He remarked further·

> " It should also be kept in mind that such decrees for rent could also be executed by the ordinary *civil* courts in which case, it has been held, that the sales would not be free of encumbrances . The relationship of ' landholder and ryot ' should also (it has been held) continue till actual sale by the Revenue Court "

In *Vyraperumal* v *Alagappa*[6], Waller and Krishnan Pandalai, JJ , have held that a landholder can bring a holding to sale only so long as the relationship of landholder and ryot continues In that case it has been specifically remarked that the decision of the Privy Council in *Forbes* v *Maharaj Bahadur Singh*,[3] already referred to, has

1 (1915) 29 M L J 505 I L R 39 Mad 1018

2 (1918) 35 M L J 443 I L R 42 Mad 114

3 (1914) 27 M L J 4· L.R. 41 I A 91 : I L R 41 Cal 926 (P C)

4 (1932) I L R 59 Cal 1202

5 (1932) 37 L W 655

6 (1931) 62 M L J 31 I L R 55 Mad 468.

been understood in this Court in *Venkata Lakshmamma* v *Seethayya*[1], as applicable to cases under the Madras Estates Land Act and as meaning that the claim of first charge is available only to a landlord and while the relationship of landlord and tenant subsists.

As against all this imposing array of decisions, Mr Subramaniam Pillai, for the appellant, relies on three facts The first is certain observations of Krishnan, J, and Sadasiva Ayyar, J, in *Venkata Lakshmamma Garu* v. *Achi Reddi*[2]. Krishnan, J., remarked that the Bengal Tenancy Act differed in some respects from the Madras Estates Land Act and especially regarding the definition of a "landholder" and the right of a landholder to bring a holding to sale. But he did not give any *decision* that a landholder in respect of whom the relationship as landholder and tenant had ceased could still bring the holding to sale in *execution* in a *revenue* Court. Sadasiva Ayyar, J, remarked that, after having considered his previous opinion that a landholder who had ceased to be a landholder regarding the *tenant* could not bring the holding for sale in a revenue Court, he was of opinion that his former opinion was unsound as it failed to give sufficient weight to the differences both in language and policy found on a comparison of the provisions of the Bengal Tenancy Act and the Madras Estates Land Act He also did not give any *decision* that a landholder who had ceased to be a landholder in respect of the tenancy could attach the holding and bring it to sale in a *revenue* Court He only expressed his opinion. In other words, his remarks were *obiter* regarding the actual question in issue in this case, *viz*, whether such a landholder can bring the holding to sale in a *revenue* Court in *execution* after he had ceased to be the landholder of the tenant in question. These remarks of Krishnan and Sadasiva Ayyar, JJ, were made in 1921, and the decisions in *Suryanarayana* v *Ramachandrudu*[3] and *Vyraperumal* v *Alagappa*[4], were rendered in 1932 and 1931 respectively, reinforcing the former view.

It is obvious that even if I differ from the views expressed in *Sundaram Ayyar* v *Kulathu Ayyar*[5], *Venkata Lakshmamma* v *Seethayya*[1], *Suryanarayana* v *Ramachandrudu*[3], and *Vyraperumal* v *Alagappa*[4], the decisions by three Benches and a single Judge of this Court, I would not be entitled to decide differently now but would be compelled to refer the matter to a Full Bench, as none of those decisions have been formally overruled or even specifically dissented from But I also agree with the views of the three Benches and the single Judge in question, and so see no reason to refer the matter to a Full Bench It seems to me clear that the policy of the Madras Estates Land Act is to give the landholder who is the present landholder in respect of the holding and ryot preference regarding the recovery of of his rent free from all encumbrances and charges for arrears

Section 125, as amended, makes this still clearer as it makes the sale proceeds not subject to any arrears of rent due in respect of the holding before the date of sale or to interest on such arrears *whether a decree has been obtained or not for such arrears*. Section 127, as amended, also gives the landholder who brings a holding to sale priority in respect of his decree amount after the poundage and costs and expenses of the sale have been deducted So the consequence of allowing the appellant to bring the holding to sale in a *revenue* Court will be to enable him to get a priority for his dues under his decree over the present landholder regarding his claims for rent from 1940 onwards when the appellant ceased to be the landholder This I do not consider that the Estates Land Act will permit So, I respectfully agree with the views expressed in the three Bench rulings and the single Judge's ruling referred to above.

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1 (1920) 39 M L J 30 I L R 43 Mad 786
2 (1921) 40 M L J 319 I L R 44 Mad 433 (F B)
3 (1932) 37 L W 655
4 (1931) 62 M L J 31 I L R 55 Mad 468.
5 (1915) 29 M L J 505 I L R 39 Mad. 1018

Mr Subramania Pillai contends that, in view of the amendment to sections 125 and 127 of the Madras Estates Land Act, the views expressed in those four rulings have become obsolete and that now the appellant will be free to bring the holding to sale in the *revenue* Court and realise his decree dues I cannot agree. As already stated the amendments of sections 125 and 127 have only emphasised the benefit accruing to a landholder bringing a holding to sale in a *revenue* Court and increased the weight of priority given to him. These amendments have, in my opinion, reinforced the strength of the rulings in the above four cases rather than diminished their strength.

In this view, I consider that the lower Courts were right in rejecting the appellant's contentions and referring him to the civil Courts for executing his decree, as in those Courts the sale would not be free from all encumbrances, as in a revenue sale, and he would not get the peculiar advantages vouchsafed to him under a revenue sale

This appeal deserves to be and is hereby dismissed with costs. (Leave asked for and granted)

K S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SUBBA RAO AND MR JUSTICE PANCHAPAKESA AYYAR.

Padmaraja Shetty and others .. *Prisoners* *

Evidence Act (I of 1872), *sections* 30 *and* 133—*Approver's evidence—Necessity for-corroboration—Value of confession of co-accused*

Section 133 of the Indian Evidence Act states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice But it is a rule of practice which has now virtually become a rule of law that corroboration is required Section 30 of the Indian Evidence Act, however, does not compel a Court to accept the confession of a co-accused as corroboration of the approver's evidence It only empowers the Court to take into consideration such confession as against the person jointly tried with him or against the person who makes such a confession Though an accomplice's evidence is legal evidence and not excluded by any of the provisions of the Evidence Act it has been held as a rule of practice that, such evidence should not be accepted as corroborative evidence The same principle should apply in the case of a confessional statement

Case-law discussed

Trial referred by the Court of Session, South Kanara division, for confirmation of the sentence of death passed upon the said prisoner in C C No 30 of 1948 on 11th November, 1948, and appeals by the appellants.

M. K. Nambiar and *M Sekhara Menon, B. Punyakoti Chetti* and *M. Santosh* for Appellants.

The Public Prosecutor (*V L Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

Subba Rao, J—Accused 1 to 9 are the appellants Accused 1 to 3 were convicted by the Sessions Judge of South Kanara under section 302, Indian Penal Code and under section 302 read with section 34 of the Code The first accused was sentenced to death, and the other two accused to transportation for life Accused 1, 2, 4 and 5 were convicted under section 201 of the Code and sentenced to rigorous imprisonment for a term of three years each Accused 3 and 6 to 9 were convicted of the same offence but sentenced to rigorous imprisonment for a term of two years each.

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*Referred Trial No 122 of 1948. 21st February, 1949.
(Cr App Nos. 667 of 1948, 27 of 1949 and 696 of 1948)

For a correct appreciation of the facts and the contentions of the parties the following genealogy may usefully be referred to .

Seshappa
- Padmavathi
  - Amirthavathi
  - Padmaraja
- Marudevi
  - Chandravathi = Ramanna Semitha (deceased).
- Nemiraja Shetty.

The second accused is a brother of Ramanna Semitha. The third accused is the brother-in-law of the first accused Accused 4 to 9 are connected with the first accused either as tenants of his or of some others under his control and influence.

The first accused belongs to a well-known Aliyasanthana Jain family in Garadadi called Padthire family The family house is surrounded by forest tracts with a few other houses belonging mostly to the tenants Naturally the family wielded great influence in that locality Nemiraja Shetty was the manager of the Aliyasanthana family till about 1941 In 1940 he set apart certain property for the maintenance of Chandravathi and her children In 1941, for one reason or other Nemiraja Shetty relinquished his management in favour of Padmaraja Shetty, the first accused After he became the manager Padmaraja Shetty refused to abide by the arrangement entered into by Nemiraja Shetty with Chandravathi, with the result that Chandravathi and her husband had to come to the family house of Padthire for their maintenance Padmaraja Shetty, the first accused, shifted to another house in the neighbourhood As the first accused was not maintaining Chandravathi and his family properly, Ramanna Semitha in his turn was putting obstacles in the way of the first accused's management of the properties Ramanna Semitha had also shifted his wife and child to a nearer village in Belthangadi for convenience of medical treatment and also for the education of his boy As the first accused was not providing Chandravathi with necessary funds, Ramanna Semitha removed a quantity of rice stocked in the family house and sold the same on 5th February, 1948 This enraged the first accused. The first accused along with accused 2 to 8 came to the Padthire house at about 8 P M on a Saturday After the first accused ascertained from his mother the fact that the rice was removed by Ramanna Semitha he directed his companions to take out to the verandah the remaining stock of the rice In the meantime the deceased came to the front entrance of the inner courtyard of the house but as it was bolted from inside he called out for opening it. After some heated discussion and exchange of abuses, the prosecution case is, the accused came out of the house from the back door Accused 1 and 3 shot at the deceased. Accused 1 and 2 beat the deceased with sticks, even after he had fallen down with gunshot injuries and later on accused 1 to 9 together cremated the body in a hurry Exhibit P-30, the sketch of the scene of offence filed in the case, clearly gives the situation of the house and the topography It also indicates the places where the accused and the deceased abused each other and also the place where the deceased was shot at.

We shall first consider the evidence against the first accused P.W 8 is the approver

* * * * *

[After discussing the evidence their Lordships proceeded] ·

We are satisfied that the evidence of the approver is corroborated in material particulars implicating the accused

At this stage it will be convenient to consider the argument advanced by the learned counsel in regard to the law of corroboration The law on this point in India is practically the same as that in England. It is so well settled that it will

be unnecessary to consider the various decisions cited before us It is enough to extract the important principles laid down in the leading case, *Rex* v. *Baskerville*[1],

(1) the uncorroborated evidence of an accomplice is admissible in law ;

(2) it has long been the practice at common law for a Judge to warn the jury of the danger of convicting a person on the uncorroborated testimony of an accomplice or accomplices, but the Judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence ;

(3) the rule of practice has become virtually equivalent to a rule of law ;

(4) the confirmation does not mean that there should be independent evidence of that which the accomplice relates, or his testimony would be unnecessary ; for, if it were required that the accomplice should be confirmed in every detail of the crime, his evidence would not be essential to the case ,

(5) corroboration must be by some evidence other than that of an accomplice, and, therefore, one accomplice's evidence is not corroboration of the testimony of another accomplice ,

(6) corroboration must be independent testimony which implicates him, that is which confirms in some material particular not only the evidence of the crime having been committed but also of the prisoner committing it ,

(7) corroboration can be of real circumstantial evidence of his connection with the crime

In India the same principles have been embodied in the statutory form. Section 133 of the Indian Evidence Act reads as follows

> " An accomplice shall be a competent witness against an accused person ; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice "

Illustration (*b*) of section 114 of the Evidence Act reads as follows

> " An accomplice is unworthy of credit, unless he is corroborated in material particulars "

Section 30 of the Evidence Act also may be noticed. It states :

> " When more persons than one are being tried jointly for the same offence, and a confession made by one such person affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession."

In *Muthukumaraswami Pillai* v *King-Emperor*[2], a Bench of five Judges of this Court had to construe the sections and the learned Judges held by a majority that the evidence of an accomplice need not be corroborated in material particulars before it can be acted upon and that it is open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true. Benson, J , expressed his opinion in the following terms .

> " In my opinion there is nothing in the illustration (*b*) to section 114 which overrides, or renders nugatory, the plain and explicit declaration contained in section 133, or which requires us to hold that the evidence of an accomplice must always, and in all circumstances, be regarded as unworthy of credit unless it is corroborated in material particulars, or which requires us to hold that it is not open to the Court to act on such evidence, even when the Court believes it to be perfectly true "

In dealing with section 114, Wallis, J , observed that the said section laid down only presumptions and the Court is not compelled to raise them but is to consider whether in all the circumstances of the particular case they should be raised The dissenting view was expressed by Abdur Rahim, J. The learned Judge thought that it was well established law that, except in circumstances of any special nature, it was the duty of the Court to raise the presumption that accomplices' evidence is unworthy of credit as against the accused persons unless it was corroborated in material particulars This judgment expressed the well-known principle of the English law that an accomplice's evidence is legal evidence, but it does not lay emphasis

1. (1916) 2 K B 658   2 (1912) I L R. 35 Mad 397 (F B).

on the rule of practice which the later decisions noted. In *Venkataramana* v *Emperor*[1], Sundaram Chetty and Pakenham Walsh, JJ, held that the evidence of an accomplice must as a rule be considered untrustworthy and should be corroborated in material particulars by independent and untainted evidence They relied upon the following passage from the judgment in *Rex* v *Mohesh Biswas*[2] ·

" The corroboration which is needed in order to make Soorat Ali's testimony against the prisoners trustworthy should be corroboration derived from evidence which is independent of accomplices which is not vitiated by the accomplice character of the witness and further should be such as to support that portion of the accomplice's testimony which makes out that the prisoner was present at the time when the crime was committed and participated in the acts of commission "

The Madras High Court again considered the law on the subject in the well-known *Thyagaraja Bhagavathar's case*[3]. Though this judgment was reversed by the Judicial Committee on the scope of section 411-A, Criminal Procedure Code, the observations of the learned Judges in regard to the scope of corroborative evidence are left untouched At page 396, the learned Judges state the law as follows .

" Section 133 of the Indian Evidence Act states that an accomplice shall be a competent witness against an accused person and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice Under the English common law the same rule applies, but both in England and in India, it has become a rule of practice, and, to use the language of the Privy Council in *Mahadeo* v *The King*[4], it is now virtually a rule of law, that corroboration is required It is also an accepted rule that one accomplice cannot corroborate another, but section 30 of the Indian Evidence Act says that when more persons than one are being tried jointly for the same offence, and a confession made by one affecting himself and some of the others is proved, the Court may ' take into consideration ' the confession as against the others as well as against the person who makes the confession There is no corresponding provision in English law In the recent case of *Rajagopal*, In re[5], a Full Bench of this Court had to consider the effect of this section and it accepted as correct the interpretation to be found in Woodroffe and Amir Ali's Law of Evidence, 9th edition, at page 312 "

It is clear from this passage that the law in India is the same as in England except to the extent that it is modified by section 30 of the Indian Evidence Act The Full Bench case reported in *Rajagopal*, In re[5], does not lay down any novel proposition but only endorses the principles of law that have been accepted and followed in this Court The learned Judges state that though legally the approver's evidence is admissible under the Evidence Act and if accepted is sufficient to support a conviction, it should not be accepted unless the case is a very exceptional one On the other point the learned Judges held that the confession of a co-accused can be accepted as corroboration of the approver's evidence This conclusion was arrived at on a consideration of section 30 of the Indian Evidence Act and the passage summarised in Woodroffe and Ameer Ali's Law of Evidence, 9th edition, page 312 We do not think that the learned Judges meant to lay down that the confessional statement has a higher sanctity than the evidence of an accomplice. They should be understood to have only meant that in view of the statutory provision a Court can legally use the confession to corroborate the approver's evidence; and in that particular case they have used and relied upon that confession to corroborate the approver's evidence on material particulars It does not follow from that judgment that as a point of law, a confession of a co-accused must be accepted as corroborative evidence of the approver's evidence It does not affect the rule of practice that the Courts should be loath to accept tainted evidence as a corroboration of an approver's evidence The confession of a co-accused cannot in our view afford better or more reliable evidence than that of an accomplice If an accomplice's evidence is tainted evidence, the confession of a co-accused also is tainted evidence. Section 30 of the Indian Evidence Act does not compel a Court to accept the confession of a co-accused as corroboration of the approver's evidence It only empowers the Court to take into consideration such confession as against the person jointly tried with him or against the person who makes such a confession Though an accomplice's evidence is legal evidence and is not excluded by any of the provisions

1 (1933) M W N. 1129
2 (1873) 19 Suth W R (Crl) page 16
3 (1946) 1 M L J 42 I L R 1946 Mad.
4. (1936) 44 L W 253 (P C)
5 (1943) 2 M L J 634: I.L.R 1944 Mad. 308 (F B).

of the Evidence Act it has been held that as a rule of practice such evidence should not be accepted as corroborative evidence The same principle should apply even in the case of a confessional statement The value of a co-accused's confession as corroborative evidence has been considered by the Lahore High Court in the decision reported in *Sharif* v *Emperor*[1] The learned Judges observed

"In the first place it has been held time after time that the evidence of one approver cannot be corroborated by that of another approver There must be independent corroboration, and in the second place the confession of a co-accused, while it must be taken into consideration, is invariably considered to carry little weight and itself to require corroboration It has occasionally been said of such evidence that it is weaker than the evidence of an approver That being so, the evidence of an approver, corroborated by a confession of a co-accused, must be considered to be inferior to that of the evidence of one approver corroborated by the evidence of another"

We respectfully agree with these observations If this principle is accepted, section 30 of the Evidence Act does not become nugatory There will be very many circumstances when the co-accused's confession could be and should be taken into consideration by a Court in finding out the guilt of the accused In *Emperor* v *Laxman Jairam*[2], some of such circumstances have been narrated The relevant passage may usefully be extracted

"But in my view the confession is not strictly evidence against a co-accused, and I am clearly of opinion that a conviction based solely on the confession of a co-accused would be bad in law There are many occasions on which the Court is undoubtedly assisted by taking into consideration the confession of a co-accused There may be the direct evidence of a single witness which the Court would be more ready to accept if supported by the confession of a co-accused Or, in a case depending on circumstantial evidence, where the question to be decided is what is the proper inference to be drawn from all the circumstances proved, the confession of the co-accused is one of the circumstances which may help the Court in drawing a correct inference"

The learned counsel for the accused contended that there was no corroborative evidence in this case implicating the first accused in the commission of the crime. He laid emphasis upon the fact that no independent witness deposed to the fact that the first accused shot at the deceased He relied upon the possibility of some other accused taking the gun from the hand of the first accused and shooting at the deceased If the argument of the learned advocate is to be accepted it would make the evidence of an approver unnecessary The approver's evidence can be corroborated not only by direct evidence but also by circumstantial evidence. In this case if the evidence of P W 10 and P W 11 is believed we can reasonably infer that the first accused shot at the deceased Further, there is the evidence of P W 5 who deposed that the first accused admitted before him that he shot the deceased and he later died Even *Baskerville's case*[3] relied on by the learned counsel does not support him In that case the evidence relied upon for corroboration is only circumstantial evidence, and, even if accepted, it was not such as to exclude all the possibilities of the accused being innocent of the offence with which he was charged If the evidence in this case is believed, it proves that the accused shot at the deceased and beat him with sticks, along with the second accused The deceased was seen with wounds on the head and the stomach by P W 11. P W 11 says his head was broken and there was blood over all over his person. His intestines had come out

As a result of the wounds he died and he was urgently cremated On these facts, we have no hesitation in holding that the first accused is guilty of murder.

So far as the third accused is concerned, in our view he cannot be convicted for murder unless there was a common intention between the first and third accused to commit murder The Judicial Committee gave an authoritative decision on the interpretation of section 34, I P C, in the decision reported in *Mahbub Shah* v *Emperor*[4] It is not necessary to consider that decision at length except to extract the principle which is found at page 120

"It is clear to their Lordships that common intention within the meaning of the section implies a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the pre-arranged plan As has been often

1 I L R (1944) Lah 463 A I R 1944 Lah 472
2 (1936) 38 Bom L R 1122
3 (1916) 2 K B 658
4 (1945) 2 M L J 144 L R 72 I A 148 I L R 1945 Lah 367 A I R 1945 P C 118 (P C).

observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual, in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case"

Later on, after pointing out the distinction between *common intention* and *same intention*, the Judicial Committee gave the important caution that the inference of common intention within the meaning of the term in section 34 should never be reached unless it is a necessary inference deducible from the circumstances of the case. No doubt, this judgment was interpreted by Chandrasekhara Ayyar and Kuppuswami Ayyar, JJ, in the decision reported in In re *Nachimuthu Goundan*[1], as not to rule out the possibility of a common intention developing in the course of the events, though it might not have been present to start with In this case the evidence points out that there was no intention to commit murder at all, till the first accused was enraged after the exchange of abusive words between him and the deceased The evidence only discloses that the intention was to remove the grain still remaining in Padthire house Indeed, the witnesses speak to the fact that the first accused asked accused 2 to 5 to take out to the verandah the remaining stock of rice, presumably for removing it to the Punjila house It is no doubt true that the accused secured two guns, and it is obvious on the evidence that they were secured more as a precaution against any possible emergencies than to use them against any particular person After the exchange of hot words between the accused and the deceased, the first accused took the gun from the third accused, went out and shot at the deceased According to the evidence, the third accused took the gun from the hand of the fourth accused and followed him and shot at the deceased Can it be said on the facts that they had a common intention to do so? For aught we know, the first accused did not even know that the third accused was following him with a gun in his hand It is not suggested that the third accused handed over the gun to the first accused and persuaded him to shoot the deceased The first accused of his own accord took away the gun from the hands of the third accused. As there was no pre-arranged plan and the circumstances disclose that the first accused rushed to the hay rick to shoot at the deceased taking the gun from the hands of accused 3 on the spur of the moment and he had not even the knowledge of the third accused having a gun, it is impossible to hold that there was any common intention between the two accused, to commit murder On the evidence, it is not possible to convict the third accused for murder as it is not proved that the bullet from his gun hit the deceased He did not take part in the subsequent beating of the deceased On the aforesaid facts, we are of opinion that the accused is guilty only of an attempt to commit murder

So far as the second accused is concerned, if there was no common intention to commit murder, the only remaining evidence against him is that he beat the deceased with a cane stick He is a brother of the deceased P W 8 says that he gave along with the other accused, three or four blows with a stick P W 11 said that the second accused beat the deceased with a cane stick On the evidence it is impossible to say that this accused had the intention to kill his brother It cannot even be said that he had knowledge that the deceased had received a gun shot wound at the time when he used the gun P W 11 said that the deceased's head was broken In the circumstances, in our view, this accused can be convicted only under section 325 of the Indian Penal Code for having caused grievous hurt to the deceased

There remains the charge under section 201, I P C, against all the accused for causing the evidence of the commission of the offence to disappear P W 8, the approver, describes the part taken by accused 1 to 8 The fourth accused in his confessional statement implicates all these accused as having taken part in disposing of the dead body P Ws 12, 13, 14 and 16 corroborate the evidence of the approver P Ws 12 and 13 took part in preparing the firewood to burn the body P W 14 prepared the pyre to cremate the deceased P W 16 carried the body to the pyre All these witnesses are admittedly accomplices who, if their evidence is true, are also liable to be convicted under section 201 along with the

1 (1946) 2 M L J 137 : I L R 1947 Mad 425

other accused The question, therefore, is whether this tainted evidence can be accepted to corroborate the evidence of the approver The principle that the tainted evidence of an accomplice should not be accepted as corroborative evidence of the approver has been accepted and followed in innumerable cases One of such decisions is that of the Judicial Committee reported in *Mahadeo* v *King*[1] Their Lordships observe

> "It is well settled that the evidence of an accessory, which Sukraj plainly was on his own showing, must be corroborated in some material particular not only bearing upon the facts of the crime but upon the accused's implication in it, and further that evidence of one accomplice is not available as corroboration of another *The King* v *Baskerville*[2] This rule as to corroboration, as was pointed out in the case just cited, long a rule of practice, is now virtually a rule of law . "

Following this principle we are not prepared to accept the evidence of the accomplices as corroboration of the approver's evidence In the circumstances of the case, we are also not prepared to accept the confessional statement of the fourth accused as corroborating the approver's evidence There is no other evidence against accused 2, 3 and 5 to 9 We therefore hold that the charge under section 201, I P C, is not made out against accused 2, 3 and 5 to 9 We set aside the conviction of the said accused under section 201, I P C The same cannot be said of accused 1 and 4 There is enough circumstantial evidence in the case to bring home the guilt to accused 1 In regard to accused 4, his confessional statement Exhibit P-13 can certainly be relied upon to corroborate the approver's evidence We therefore convict accused 1 and 4 under section 201, I P C

As regards the sentences, the facts already narrated disclose that there was no premeditation to commit murder. The deceased was shot by the first accused on the spur of the moment in view of the acrimonious exchange of words that passed between them All the accused gathered for the purpose of removing away the grain and, unfortunately and unexpectedly, this incident took place We, therefore, consider that the ends of justice would be met if the first accused is awarded the lesser penalty of law The death sentence imposed on him is set aside and instead he is sentenced to transportation or life We also sentence him under section 201, I P C, to three years rigorous imprisonment, but the two sentences shall run concurrently

The second accused was sentenced by the Sessions Judge to transportation for life We set aside the conviction for murder and convict him under section 325, I.P C, and sentence him to five years rigorous imprisonment

We convict the third accused under section 307, I P C, and sentence him to seven years rigorous imprisonment We sentence accused 4 to two years rigorous imprisonment The conviction and sentences on the accused 2, 3 and 5 to 9 under section 201, I P C, are set aside Accused 5 to 9 are acquitted

V P S. *Sentences modified Accused 5 to 9 acquitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE HORWILL AND MR JUSTICE BALAKRISHNA AIYAR

Thiruvendipuram Dorairajam Nayanim Varu and others . *Appellants**

v.

Vemaswami Rama Naidu and others *Respondents.*

Civil Procedure Code (V of 1908), section 47—Execution of personal decree under Order 34, rule 6, against family property of the deceased judgment-debtors and their legal representatives—Right of legal representatives to object to the execution on the ground that there was no debt

In execution of decree on a mortgage executed by a mother and her two sons, the hypotheca was brought to sale and as it was insufficient to discharge the mortgage debt, a personal decree under Order 34, rule 6, Civil Procedure Code, was passed against the sons after overruling their objection that nothing remained due In execution of this decree, the legal representatives of those two sons,

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1 (1936) 44 L W 253 1936 M W N 889 at page 891 (P C) 2 (1916) 2 K B 658.

* A A O No 462 of 1947. 7th July, 1949.

who had died in the meanwhile, objected to the execution on the ground that no debt was due On the question whether the executing Court could go into the question,

Held, that as the legal representatives were questioning the correctness of the decree itself, it cannot be gone into by the executing Court

Lakshmadu v *Ramudu*, I L R (1940) Mad 123 and *Hamidgani* v *Ammasahib Ammal*, (1941) 2 M L J 622 I L R 1942 Mad 271 (F B), relied on

Appeal against the order of the District Court, South Arcot, dated 11th August, 1947, in E P No 88 of 1945 in O S No 12 of 1924 on the file of the Court of the Subordinate Judge of Nellore

N R Raghavachariar for Appellants

K Umamaheswaram for Respondents

The Judgment of the Court was delivered by

Horwill, J —A fairly simple question has been raised by the appellants, although it has been argued with considerable vehemence by their learned advocate A mortgage was executed by a mother and two sons , and mortgage decrees, preliminary and final, were passed against them The hypotheca was brought to sale ; but as it was insufficient to discharge the mortgage debt, an application was put in under rule 6 of Order 34 of the Civil Procedure Code for a personal decree against the two sons Amongst other pleas, they stated that various payments had been made and that nothing remained due Their objections were overruled and a personal decree was passed against the sons for the amount that the plaintiff claimed. In due course, execution was taken out , but by the time with which we are concerned both the sons had died and their legal representatives brought on record The latter raised no objection to being brought on record as legal representatives ; but when the decree was transmitted to another Court for execution against the family property of the two judgment-debtors and their legal representatives, objection was taken that no debt was due and that therefore the property was not liable for the discharge of a debt that had at no time been in existence The lower Court held that an executing Court could not go into this question and so ordered execution to proceed The legal representatives have appealed

The general line of argument in the lower Court on behalf of the legal representatives seems to have been that their fathers—two of the three mortgagors —were not really debtors at all but mere sureties for their mother That, however, would not mean that any decree passed against them would not be binding on their sons Two other points have been put forward here One is that since the sons were sureties for their mother and then the mother, the principal debtor, was exonerated, the sons, who were merely sureties, would not be liable This point was not raised in the Court below , and as it depends on the ascertainment of facts, we cannot allow it to be argued here The second point is the only one that requires our consideration here The contention now is that the Court that passed the personal decree determined wrongly the question whether their fathers had discharged the mortgage debt by various payments made by them These allegations, as already stated, had been put forward by their fathers and had been negatived by the learned Judge The appellants are therefore attacking the correctness of the decree Since they were not parties to the decree (unless it can be said that as far as these questions are concerned, their fathers represented them), they are entitled to have this question re-agitated , but the question is whether the lower Court was right in holding that the question could be considered only in a separate suit filed by the legal representatives or whether that question can be gone into in execution proceedings

We consider that this matter has been decided finally by two recent decisions of this High Court, the first being *Lakshmadu* v *Ramudu*[1], a decision of a Bench, and the other *Hamidgani* v *Ammasahib Ammal*[2], a decision of a Full Bench In the former case, the father had executed a mortgage deed and a decree had been passed against him. The father died ; and in execution the sons alleged that the debt

1 I L R (1940) Mad 123

2 (1941) 2 M L J 622 · I L R 1942 Mad. 271 (F B).

was not a true one This plea of the sons cut at the very root of the mortgage and therefore at the decree based upon it If the father had mortgaged family property for no consideration at all, then it was clearly an alienation that was not binding on the sons, and so the decree also was not binding on them The remedy sought to be adopted by the sons in that case was to file a separate suit, and it was urged by the decree-holder that was not the proper remedy and that the legal representatives should have raised whatever objections they had to the execution of the decree against the family property in execution It appears that they put forward their claims in the final decree proceedings, but were not allowed to argue the point there, because, so the learned trial judge held, the consideration of that question was foreign to a mortgage suit and that the proper time for them to object was when execution was taken against the property which they claimed was theirs The learned Judges were inclined to think that since the decree-holder had objected to the legal representatives raising the question in the final decree proceedings, it would not be open to him to resist the putting forward of the claim in a separate suit, for to do so would be to blow hot and cold The principal question however considered by the learned Judges was whether this objection could properly be said to arise in the execution, discharge, or satisfaction of the decree, and they held that it could not, because the legal representatives were attacking the decree itself Abdur Rahman, J, who delivered the judgment of the Bench, said

"If, on the other hand, these are being raised by a third party and are of a nature which go to the root of the matter and attack the decree itself, they could not be gone into in execution proceedings for the simple reason that an executing Court cannot be asked to go behind the decree' If persons who were not parties to the suit (the sons) and who have been already found not to be represented by their father, desire to challenge the decree or the mortgage on the basis of which the decree was passed, they could not do so in execution proceedings"

After discussing the question of estoppel, the learned Judge said

"We must hold that the grounds raised by the plaintiffs in the suit do not fall within the ambit of section 47, Civil Procedure Code, and could not have been enquired into by the executing Court"

The question was again considered by a Full Bench in *Hamidgani* v *Ammasahib Ammal* That related to a suit for specific performance of a contract to sell The promisor was a Muslim, and a relative of his, who was entitled to a share in the property, was originally impleaded, but as she had not joined the promisor in the promise, her name was struck out A decree was passed and execution was taken out When the Court sought to compel the execution of the sale deed, the relative brought a suit for a declaration and injunction, and the question arose whether the relief sought by her could be granted in the suit, or whether the question should have been raised during the execution proceedings The learned Judges said, after considering and overruling *Kuniyali* v *Mayan*[2]

"When a person comes into Court in execution proceedings as the legal representatives of a deceased party he cannot question the decree which has been passed If the decree concerns property in which he claims an interest, the decree will not be binding upon him unless he was a party to the suit If he was not a party to the suit as in this case, his rights will be entirely unaffected and he will be in a position to enforce them in a suit instituted by him for that purpose"

The learned Judges then went on to consider the principle of section 47, Civil Procedure Code, and held that it did not apply to a case of that kind

The learned advocate for the appellants seek to distinguish these cases as ones dealing with property decrees and not money decrees, and he particularly relies on a sentence towards the end of *Hamidgani* v *Ammasahib Ammal*[1] which runs

"There are decisions of this Court to the effect that in execution proceedings arising out of money decrees questions relating to the property attached must be decided in execution proceedings and not by a separate suit"

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1 (1941) 2 M L J 622 I L R 1942 Mad 271 (F B) 2 (1883) I L R 7 Mad 255

The learned advocate did not however go on to complete the sentence, the latter portion of which was

> "but this is an entirely different matter because the correctness of the decree is not called into question"

The learned advocate has cited a very large number of cases to which only the briefest reference is necessary, to the effect that if a money decree is obtained against a father and it is sought to be executed against the joint family property of the father and the sons, the sons are entitled to show in the execution proceedings themselves that the debt is not binding on them We have not called upon the learned advocate for the respondents to reply, but he has indicated to us that he does not dispute the correctness of this proposition and indeed we have no doubt on this point ourselves But the difference between the cases referred to by the learned advocate for the appellants and the case that is now under consideration before us is that in the present case, unlike the cases cited, the legal representatives are questioning the correctness of the decree itself As we have stated above, they say that the Court which passed the personal decree against the father erred in passing the decree it did and that the Court should have found that the sum which the plaintiff claimed remained due to him had been already discharged by the various payments alleged by their fathers in the personal decree proceedings to have been made by them Those findings cannot be attacked in execution proceedings, as very clearly pointed out by Abdur Rahman, J, in *Lakshmadu* v *Ramudu*[1]

In *Thavasimuthu* v *Thavasimuthu*[2], it was held that the nature of the debt can be called in question in execution by the legal representatives In *Kanchamalai* v *Shahaji Rajah*,[3] a decision of a Bench of five Judges of this Court, Varadachariar, J, at the end of his judgment said

> "The sons may wish to raise a contention that the property sought to be sold is 'joint family property', and that the decree against the father was passed in respect of an illegal or immoral debt In view of section 53, Civil Procedure Code, these questions must be decided by the executing Court and they cannot be said to fall under Order 21, rule 90 Nor, in view of the very wide terms of section 47, Civil Procedure Code, could it be maintained that they can be raised and decided in a separate suit"

With great respect we entirely agree with what the learned Judge here said; but, as we have pointed out, in the case before us the very correctness of the decree has been called in question In *Venkatakrishnayya* v *Venkatanarayana Rao*[4], some general remarks of Ramesam and Cornish, JJ., have been referred to. In *Lakshmanan Chettiar* v *Muthuchelliah Goundan*[5], Varadachariar, J, sitting with Burn, J, laid down the same principle and suggested by implication, although the matter was not before them, that the question whether a promissory note debt against a father is binding on the sons can be gone into in execution proceedings *Lachmi Prasad Singh* v *Basant Lal*[6] and *Imtiaz Bibi* v *Kabia Bibi*[7] do not carry us any further than the Madras cases and are to very much the same effect It is unnecessary to discuss them or *Ma Shwe Mra Pru* v *Maung Ba On*[8], *Tanabai* v *Ranganath*[9], *Bhagat Ram* v *Nizam Din*[10] and *Ramakrishna* v *Vinayak Narayan*[11], which have also been cited. The only decision which can be said to support the appellants in the least is *Indar Pal* v *The Imperial Bank*[12] In that case, the remarks on which the learned advocate for the appellants relies are these

> "A creditor who had obtained a decree against the father of a joint Hindu family, is entitled to put to sale the family property The son whose interests are threatened is entitled to an opportunity of contesting both the factum and the nature of the debt, and there is nothing in law to prevent him from coming into Court in the execution department and preventing, if possible, on these two grounds, the passing of his interest to the auction purchaser"

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1 I L R (1940) Mad 123
2 A I R 1931 Mad 824
3 (1936) 70 M L J 162 I L R 59 Mad 461 (F B)
4 A I R 1936 Mad 733
5 (1934) 68 M L J 104
6 (1911) 16 I C 970
7 (1929) I L R 51 All 878
8 (1927) I L R 5 Rang 659
9 A I R 1926 Nag 476
10 A I R 1921 Lah 173
11 (1910) I L R 34 Bom 354
12 (1915) I L R 37 All 214

The learned Judges were not called upon to make such a wide statement, for they found in the case before them there was no reason at all to think that the alienation was not binding on the son. However, even if we take this *obiter dictum* as a correct statement of the law on this point, it would still not help the appellants; for here we are not merely considering the question of the existence or non-existence of a debt, but the question whether the trial Court rightly decided a claim made by their fathers to the effect that they had made certain payments and thereby discharged their liability.

In the result, the appeal is dismissed with costs.

V S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAGHAVA RAO.

Desayi Chelapathi Reddi ... *Appellant**

v.

The Provincial Government of Madras, represented by the Collector of Cuddappah, Cuddappah ... *Respondent.*

Madras Estates Land Act (I of 1908), *sections* 136 (d), 139, 142 *and Indian Contract Act (IX of* 1872), *section* 69—*Action taken by District Collector under sub-section* (1) *of section* 142—*Procedure to be followed*—*Shrotriem village*—*Existence of desabandam inam grants*—*Liability of the holder of the shrotriem village to repair works of irrigation*—*His right to be re-imbursed by the desabandam inamdar*—*New point taken in second appeal*—*When not allowed.*

As a sequel to the action taken by the District Collector under sub-section (1) of section 142 of the Madras Estates Land Act, the plaintiff instituted this suit under sub-section (3) for a declaration that the Provincial Government had no right to call upon him either to effect any repairs to the two tanks situate in his shrotriem village or to pay the costs incurred by the Government on the grounds, that the plaintiff was under no obligation to repair the tanks as there were desabandam inam grants for the repair and maintenance of the tanks, confirmed by the Inam Commissioner, that the holders of these inams were the persons liable and not the plaintiff, and that the proportion of the charge which he was liable to pay was wrongly calculated. It was also contended for the first time in second appeal that the description in the Inam Fair Register shows that the shrotriem is not a whole Inam village governed by the Act.

Held, that (*i*) the Inam Register is not itself the original grant though of course a very authentic piece of evidence of the terms of the original grant. The question whether a grant is a whole village inam or inam of a fraction of a village is a question of fact on which, however strong the *prima facie* evidence furnished by the recitals of the Inam Fair Register, it is open to the defendant to produce evidence by way of rebuttal and as the point was taken for the first time in second appeal, it cannot be allowed to be raised.

(*ii*) The width of the language of section 142 of the Act embodies a general provision applicable to all tanks which serve partly an estate and partly government land, and there is no reason to restrict its application only to tanks not endowed with desabandam inams. It provides for the invariable extension of works of repairs by the District Collector and apportionment by him of the charges incurred as between the landholder and the Government after notice to the landholder giving him an opportunity to examine the stated cost of the repair and urge his objections thereto. No notice is taken by the statute of what is to happen if in connection with the latter kind of irrigation works, the default to maintain them in good repair is that of a desabandam inam endowed for such repair. This does not however mean that such shrotriemdar cannot make good that money for himself, since this right can be enforced under section 69 of the Contract Act.

(*iii*) In cases of action taken under section 142 of the Act it is not necessary to follow the procedure laid down in sections 136 (D) and 139 of the Act, which have relevance only to cases of applications under section 138.

Appeal against the decree of the District Court, Cuddappah, in A. S. No. 123 of 1943, preferred against the decree of the Court of the Subordinate Judge (Temporary) of Cuddappah in O. S. No. 23 of 1942.

T. Venkatadri and *S. Obul Reddi* for Appellant.

The Government Pleader (*K. Kuttikrishna Menon*) for Respondent.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit instituted by the plaintiff, the appellant here as well as in the lower appellate Court, for a declaration that

*S. A. No. 621 of 1946. 4th February, 1949.

the Provincial Government had no right to call upon him either to effect any repairs to two tanks called Mussalareddipalle Kunta and Bassampalle Kunta, situate in his shrotriem village of Mussalareddipalle or to pay the costs of the repairs incurred by the Government The suit was the sequel to action taken by the District Collector of Cuddappah under sub-section (1) of section 142 of the Madras Estates Land Act and was instituted under sub-section (3) on both the grounds referred to therein, namely, that the plaintiff was under no obligation to repair the tanks, and that the proportion of the charge which he was liable to pay under sub-section (1) had been wrongly calculated In support of the first ground it was alleged in the plaint that there were desabandam inam grants for the repair and maintenance of the tanks confirmed by the Inam Commissioner, at the time of the inam settlement in 1861, that the holders of these inams—not the plaintiff—were the persons liable to repair the tanks, and that the Government had all along been calling upon them only to repair the tanks till in 1938 for the first time it chose to initiate proceedings against the palintiff under section 142 (1) of the Act In support of the second ground there were no definite averments in the plaint which contented itself with the rather negative statement that it was not clear how the Collector had arrived at the figure Rs 2,083-3-0 in respect of which a bill had been presented to the plaintiff by an order of the Collector dated 29th May, 1941 There were also three more points raised in the plaint all of which were directed to showing that the order of the Collector was altogether outside the scope of section 142 The first was that the tanks in question did not serve any Government lands at all for section 142 (1) to come into operation The second was that there was no complaints from any ayacutdars of the tanks that they required any repairs The third was that all the repairs contemplated by the estimates prepared by the Government and forwarded by the plaintiff had not been completed and that such completion was the *sine qua non* of any order of the Collector under section 142 dividing the charges incurred by the Government for the repairs between themselves and the plaintiff

The plaint allegations were very closely traversed in the written statement. Issues were raised at the trial which are set forth in paragraph 4 of his judgment by the learned Subordinate Judge of Cuddappah who tried the cause It is unnecessary to refer in specific terms or in close detail to the findings recorded by the trial court on all the issues It is sufficient to state that the learned Subordinate Judge held that the Government had some lands, though very small in extent under the ayacut of the tanks, *although not under S 142 of the Madras Estates Land Act*, which, in his opinion, did not apply to a situation like the one in the present case where there was a desabandam inamdar bound to maintain the tanks in good repair, the whole village inamdar, *under Board s standing order No* 56(2), *clause* 2, like the zamindar under clause 1, could resume a desabandam inam in the event of default by the inamdar to keep the tank in good repair, and reimburse himself in the amount that he might be called upon to pay the Government under section 142, and that therefore there was no hardship to the inamdar involved in his being held liable to bear the Collector's apportionment of charges under section 142 (1). In this view of the matter the learned Subordinate Judge dismissed the suit He also held that all the repairs originally contemplated were not effected, but that there was however, no evidence adduced by the plaintiff to show that the amount claimed by the Government for his share so far as the work actually done was concerned was incorrect There was just one more finding which the learned Subordinate Judge recorded, namely, that the procedure laid down by S 136(D) and 139(1) was not followed in the present case An appeal was preferred by the plaintiff against the judgment and decree of the learned Subordinate Judge to the District Court of Cuddappah, which confirmed that decree on its acceptance of the findings of fact of the learned Subordinate Judge on the basis of which he had dismissed the suit. The learned District Judge however differed from that judgment as to the inapplicability of section 142 of the Madras Estates Land Act to a case where there was an inamdar bound to maintain the tank in good repair under

a desabandam inam grant and also as to the applicability of the procedure prescribed by S 136(D) and 139 (1) to the case on hand Against the judgment and decree of the learned District Judge the plaintiff has preferred this second appeal in which his learned advocate has raised three points only at the hearing, one not raised in the courts below or even in the memorandum of second appeal, and two others which were accepted by the trial court but rejected by the learned District Judge on appeal I have after a very careful consideration of every one of these points come to the conclusion that the appeal must fail

The new point which I shall deal with first is that the Madras Estates Land Act does not at all apply to the suit shrotriem village which is a Hissa shrotriem as described in the Inam Fair Register Ex P-1 Hissa shrotriem is defined in Mclean's Mannal of Administration, Volume 3, page 354, column 2, lines 17 to 20, as an inam village the revenue of which is shared between the inamdar and the Government or between the inamdar and the zamindar as the case may be, and it is said in column 21 of Ex P-1 that the share of the Government in the Hissa shrotriem of Mussalareddipalle is 12 annas in the rupee and that of the shrotriemdar 4 annas in the rupee on the annual beriz of the village It is therefore argued by Mr Venkatadri that the shrotriem is not a whole village Inam governed by the Act The argument is, in my opinion *nonsequitur*. The Inam Register is not itself the original grant, though of course a very authentic piece of evidence of the terms of the original grant The question whether a grant is a whole village inam or inam of a fraction of the village is a question of fact on which, however strong the *prima facie* evidence furnished by the recitals of Ex P-1, it would have been open to the defendant to produce evidence by way of rebuttal, had the point been taken in the trial court Moreover in paragraph 9 the judgment of the learned Subordinate Judge, there occurs the observations

"For information sake I may state that, Mussalareddipalle is a whole inam village"

That observation he makes in the course of his discussion of the applicability of Board's standing order No 56(2), clause 2, to the present case. There was no ground in the Memorandum of Appeal to the District Court objecting to the accuracy of the observations so made by the learned Subordinate Judge I am not in the circumstances prepared to entertain this point in second appeal.

The next point urged for the appellant is that, at any rate, section 142 of the Madras Estates Land Act has no application to the case of a tank in respect of which there is a desabandam inam granted, and that the right of resumption on the part of the shrotriemdar in respect of the desabandam inam situate within the shrotriem in the event of default on the part of the desabandam inamdar which is declared by Board's standing order No 56 which after all has not the force of law does not affect the inapplicability of section 142. Assuming that the incidence of the burden of maintaining the tanks in a proper condition is at root on the desabandam inamdar, and assuming further that the Board's standing orders do not necessarily have the effect of clothing the shrotriemdar with the right of resumption, I am still of opinion that by the width of its language section 142 of the Madras Estates Land Act embodies a general provision applicable to all tanks which serve partly an estate and partly Government land, and there is no reason for restricting its application only to tanks not endowed with desabandam inams. On a careful scrutiny of the provisions of Chapter VIII of the Madras Estates Land Act it will be seen that there are three broad contrasts maintained therein, (1) between major irrigation works and minor irrigation works, (2) between irrigation works (major or minor) endowed with desabandam inams and irrigation (major or minor) not endowed with such inams, and (3) between irrigation works (major or minor) serving lands in an estate wholly and irrigation works (major or minor) serving partly an estate and partly Government land. The first of these contrasts has reference to two points of detail; the officer to whom the applications under the chapter shall be made [*Vide* section 136 (c)] and the amount of deposit by way of security to be made in connections with applications provided for by section 138. The second of

these contrasts is brought by section 140 which declares the liability of the desabandam inamdar in the case of tanks endowed with desabandam inams to execute works of the kinds specified in an order passed under clause (*a*) of sub-section (1) of section 139 or to pay for their execution. The third of these contrasts is indicated by section 142 as between irrigation works serving an estate wholly and irrigation works serving partly an estate and partly Government land The section provides for the *invariable* execution of works of repairs by the District Collector and apportionment by him of the charges incurred as between the landholder and the Government after notice to the landholder giving him an opportunity to examine the stated cost of the repair and urge his objections thereto Here no notice is taken by the statute of what is to happen if in connection with the latter kind of irrigation works the default to maintain the irrigation work in good repair is that of the holder of a desabandam inam endowed for such *repair* No provision similar to that contained in section 140 (1) is to be found enacted in regard to cases dealt with by section 142 (1). I shall assume for a moment that there is nothing in *rerum naturae* which would on *a priori* considerations necessitate the conclusion that sections 140 and 142 are mutually exclusive, but I must not at the same time disregard the consideration that not merely the locus of section 140 (1) which occurs in between section 139 and section 142 but also the specific reference in section 140 (1) to the works specified in the order passed under clause (*a*) of sub-section (1) of section 139 suggests that the right of re-imbursement on the part of the holder of the estate against the desabandam inamdar provided for by section 140 (1) cannot be extended to cases of the kind contemplated by section 142.

Whether the absence from the statute of a provision for the landholder's re-imbursement against the desabandam inamdar in connection with cases dealt with by section 142 similar to that contained in section 140 (1) in regard to cases of irrigation works serving an estate wholly is a *casus omissus*, accidental or deliberate, I cannot say for certain I presume however that it is accidental rather than deliberate for I can see no principle on which to infer a legislative intent that the right of re-imbursement should exist in the one class of case and not in the other I am aware too that a *casus omissus* ought not to be created by interpretation save in some case of strong necessity as observed by Lord Fitzgerald in *Mersey Docks* v. *Henderson Brothers*[1], quoted in Broom's Legal Maxims, 10th edition, page 360 All the same I am not inclined to go so far as to hold that the maxim *casus omissus pro omisso habendus est* (meaning, a case omitted is to be held as intentionally omitted) applies to the present case At the same time having regard to the consideration based on the locus and language of section 140 (1) which I have adverted to above, I am inclined to hold that it is not part of the function of the Court in a case like the present to strain the language of section 140 (1) so as to bring within it a claim of re-imbursement by the shrotriemdar against the desabandam inamdar in cases dealt with by section 142 To quote from Hailsham's, *i e*, the 2nd edition of Halsbury's Laws of England, volume 31, page 497, paragraph 635 :

> "It is not competent to any Court to proceed upon the assumption that Parliament has made a mistake-there being a strong presumption that Parliament does not make mistakes It blunders are found in legislation, they must be corrected by the Legislature, and it is not the function of the Court to repair them Thus, while terms can be introduced into a statute to give effect to its clear intention by remedying mere defects of language, no provision which is not in the statute can be implied to remedy an omission, in the absence of any ground for thinking that such a course is necessary to carry out the intention of Parliament"

This does not however mean that the *shrotriemdar* who has been called upon under section 142 to pay the Government his proportionate share of the expenditure incurred by them cannot make good that money for himself. I am not satisfied that the right of resumption of the desabandam inam which the shrotriemdar may exercise on account of the inamdar's failure to maintain the tank in good repair carries with it *per se* or as incidental or ancillary to such right as seems to have been supposed by the Courts below, a right of re-imbursement in respect of

1. (1888) 13 A.C. 595 at 607.

that proportionate share The more correct way of sustaining a right of re-imbursement in a case like this seems to be to say that this right, like the right of resumption which is incidental to the reversionary right of the shrotriemdar, originates in the desabandam inamdar's failure to fulfil the obligation to maintain the tank in good repair which as between himself and the shrotriemdar is his, although as between the shrotriemdar and his ryots it may be the shrotriemdar's according to the exposition of the law by the Privy Council to be found in *Madras Railway Co.* v *Zamindar of Carvetnagarum*[1] Even the proportionate share of the amount paid by the shrotriemdar to the Government under section 142 must in the circumstances be treated as liable to be recovered by the shrotriemdar from the desabandam inamdar under section 69 of the Contract Act. As the result of an analysis of the situation to its root with reference to the ultimate incidence of the burden of maintaining the tank in good repair it seems to me that as a person interested in the payment of money to the Government which as between himself and the Government would, if unpaid, be recoverable as an arrear of land revenue under section 142 (1) and which as between himself and the desabandam inamdar the latter was bound to pay on account of his default to maintain the tank in good repair, the shrotriemdar would be entitled to sue the inamdar for re-imbursement in respect of the money paid by him to the Government This section as also section 70 of the Indian Contract Act have been referred to and relied upon in a recent judgment of this Court reported in *Annamalai Chettiar* v *Muniappa Naidu*[2] as supporting a suit by certain mittadars to recover costs incurred by them from the desabandam inamdars in executing certain repairs to a desabandam tank in accordance with the requisition of the Collector under section 14 of the Indian Railways Protection Act for the proper irrigation of the lands under its ayacut.

In this view of the matter, there is no force, I think, in the *argumentum ab inconvenienti* advanced by Mr Venkatadri in support of his construction of section 142. There is a legal maxim *casus omissus* and *oblivioni datus dispositioni communis juris relinquitur*, which in simple English means, a case omitted and consigned to oblivion is left to the disposal of the common law (Bishop's case 37 (*a*) 5 Cokes (37-*a*)) 111, on the basis which I have indicated earlier that the right of re-imbursement on the part of the shrotriemdar against the desabandam inamdar in the cases dealt with by section 142 is a *casus omissus*—accidental or deliberate, it does not matter. There is really no hardship resulting to the holder of the estate from the lacuna in the statute since the right in question is one recognised by the common law of contract in England which in India is embodied in sections 69 and 70 of the Indian Contract Act I may say in this connection that I am perfectly clear in my mind that section 142 of the Madras Estates Land Act cannot be construed as negativing the right of re-imbursement under the general law or under another statute Let us assume on the principle *expressio unius est exclusio alterius* that under the Madras Estates Land Act as such no express right of re-imbursement exists in the case of payments made by the shrotriemdar to the Government under section 142 which exists by way of a specific provision in the cases of tanks solely serving the needs of the estate. Even then I do not think the absence of any provision for such a right in one enactment necessarily excludes a similar right by virtue of another or by necessary implication repeals the just and equitable right of re-imbursement under the general law. There is nothing in the relevant sections of the Madras Estates Land Act to suggest such exclusion or repeal In these circumstances the principle embodied in the latin maxims *generalia specialibus non derogant* or *generalibus specialia derogant* has no application to the construction of section 142 of the Madras Estates Land Act with which I am concerned

There is just one other aspect of the matter to which I wish to refer in dealing with the contention of the appellant's learned advocate that the order of the District Collector under section 142 (1) was wrongly made, because the shrotriemdar was, to use the language of section 142 (3) under no obligation to repair the irrigation work

1 (1874) L.R. 1 I A 364 (P C) 2 (1946) 2 M L J 268.

concerned, the party under such obligation being really the desabandam inamdar. It may be argued from the language of section 142 (3) (*a*) that whatever the generality of the language of sub-section (1) it stands necessarily curtailed by the implication, if not by the express language of sub-section 2 (*a*) and that section 142 (1) must therefore be restricted in its operation to cases where there is no desabandam inamdar at all on the scene The argument, however, loses its force if only it is borne in mind that under the permanent settlement with the zamindars or the inam settlement with the whole village inamdars the responsibility for the repair of the tanks situate in the estate was treated as that of the holder of that estate in a question between himself and the Government as well as between himself and the ryots Sub-section 3 (*a*) can therefore be of assistance to the holder of the estate in case proceedings are taken against him by the Government under sub-section (1), only if he is able to establish that the tank is not situated within his estate or that the needs of the estate are not at all served by it

I now pass on to the third and last contention urged before me on behalf of the appellant which I can dispose of briefly, that the procedure prescribed by section 136 (D) and section 139 was not followed in the present case The contention is, in my judgment, altogether unfounded Those sections have relevancy only to cases of applications made under section 138 but not to cases in which action is proposed to be taken by the Government under section 142 The procedure applicable to the latter class of cases is prescribed by that section itself, namely, that of a notice to the landholder by the District Collector giving the former an opportunity to examine the stated cost of the repair and urge his objections thereto It has been found by the lower appellate court that that procedure was followed in the present case which is one governed by section 142 and not one in which there is any application of the kind contemplated by section 138 which would have to be dealt with in accordance with the procedure prescribed by sections 136 (D) and 139 That finding, in my opinion, is correct

All the three points taken before me for the appellant failing, this second appeal in the result necessarily fails and is dismissed with costs (No leave)

V P S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE PANCHAPAKESA AYYAR

Varadadesikachariar *Petitioner* *

Indian Penal Code (XLV of 1860), section 161 and The Prevention of corruption Act (II of 1947), section 4—Acceptance by public servant of gratification other than legal remuneration—Presumption of acceptance as motive or reward—Attitude of modern law towards bribery

The petitioner was a public servant and he accepted Rs 100 and a gold ring as reward for exercising his official favours in favour of the bribe-givers by recommending to his superior officer, their retention in their jobs, despite a retrenchment discharge notice served on them He was convicted for an offence under section 161 of the Penal Code, and in revision, it was contended that the petitioner did not receive the gifts as illegal gratification, or bribe, but simply as 'mariyadas,' or honours rendered to him by persons benefited by his recommendation, who gave them willingly and even joyfully out of gratitude for his recommending them

Held, that it is well known that modern law attaches little weight to euphemistic terms used, or to the free will of the bribe-giver The essence of the matter is the real nature of the payment to be gathered from the circumstances and under the general presumption in section 4 of The Prevention of corruption Act II of 1947, *viz*, that in any trial for offences punishable under section 161, where it is proved that an accused person has accepted or obtained for himself any gratification other than legal remuneration or any valuable thing from any person, it shall be presumed unless the contrary is proved that he accepted or obtained it as a motive or reward as is mentioned in section 161 of the Penal Code

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the judgment of the court of Session, Chingelput division, dated 19th July, 1948, in C A No 39 of 1948, preferred against the judgment of the court of the Sub-Divisional Magistrate, Trivellore, in C C No 177 of 1947

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* Crl R C No 783 of 1948 27th July, 1949

K S Jayarama Aiyar for *C. K. Venkatanarasimham* for Petitioner.

The Assistant Public Prosecutor for the Crown.

The Court made the following

ORDER —This is a petition by one Varadadesikachari to set aside his convictions under section 161, Indian Penal Code (in respect of two counts) by the Sub-Divisional Magistrate, Tiruvallur, confirmed by the Sessions Judge of Chingleput on appeal The facts are briefly these —

The petitioner, Varadadesikachari, aged 42, was living in Royapuram and was working as a Clerical Supervisor, Control Office, Return Stores Depot, Alamadhi, on a daily wage of Rs 4-8-0 The workshop of the Return Stores Depot, Alamadhi, was under the control of a European Officer by name Lieut. C J. Wince, who has been demobilised and has returned to England now The petitioner used to put up papers, for orders, to Lieut Wince and was in the eyes of illiterate coolies, like P Ws 3 to 9, a man of great influence with that officer. Lieut Wince received an anonymous petition against the petitioner which finally started the enquiry against the petitioner. The sum and substance of the charges against the petitioner is that he, being a public servant, in or about August 1946, accepted Rs 100 (besides fruits for Rs 5) from one R K Parasuraman, P W 5, as illegal gratification, as reward for exercising his official favours to P W 5 and 21 other tent-menders of Bangalore group, *viz*, for recommending to Lieut Wince their retention in their jobs at R S D, Alamadhi, despite a retrenchment discharge notice served on them, and that on 22nd August, 1946, he accepted a gold ring, M O 2, worth Rs 35-7-6, from one Avadi Krishnan, P W 8, as illegal gratification, as a reward for exercising his official favours to P W 8 and other tent-menders of the non-Bangalore group, namely, for recommending to Lieut Wince their retention in their jobs at R S D, Alamadhi, despite a retrenchment discharge notice served on them, and that in the same month he accepted Rs 10 from one, C Gangadaram, P W 9, through P W 3, as illegal gratification, as a reward for exercising his official favours to P W 9, *viz*, the recommendation to Lieut Wince for his retention in his A grade job at R S D, Alamadhi, in spite of a notice retrenching him from A grade, and, subsequently entertaining him in the III grade Both the courts below have, after an elaborate discussion of the entire evidence, found that the petitioner received the Rs 100 and the gold ring and was guilty regarding the charges of illegal gratification on the first two counts, though they gave him the benefit of the doubt regarding the third count, as there was no independent corroboration of the evidence of the bribe-giver, P W 9, who, of course, was an accomplice.

Mr K S Jayarama Iyer, for the petitioner, did not seriously dispute the fact of the acceptance of the Rs 100 and the gold ring by the petitioner from P Ws. 3 to 5, and 7 and 8 respectively That fact was proved beyond all possibility of dispute, by the evidence of P Ws 3 to 8 and the recovery of the ring from the petitioner He only raised three contentions The first was that the petitioner did not receive them as illegal gratification, or bribe, but simply as "*mariyadas*", or honours rendered to him by the persons benefited by his recommendation, who gave them willingly, and even joyfully, out of gratitude for his recommending them It is well-known that modern law attaches little weight to euphemistic terms used, or to the free will of the bribe-giver Thus, many illegal cesses imposed by, and given willing to, a zamindar have been set aside even though they are clothed in gorgeous terms as "Kanikka", or voluntary gift, *nazars*, marriage presents, etc Many a payment has been held to be illegal gratification, though it has been joyfully given to the corrupt officer and is called a gift given in gratitude, *mamool* or by other euphemistic terms A bribe, as distinguished from an extortion, is always voluntary The distinction between a bribe and extortion is roughly that between adultery and rape The essence of the matter is the real nature of the payment, to be gathered from the circumstances and under the general presumption mentioned in section 4 of Act II of 1947 Section 4 says that, where

in any trial of offences punishable under section 161, Indian Penal Code, it is proved that an accused person has accepted or obtained for himself any gratification other than legal remuneration or any valuable thing from any person, it *shall be presumed unless the contrary is proved* that he accepted or obtained it as a motive or reward as is mentioned in section 161, Indian Penal Code In this case, this petitioner did not prove anything to the contrary, and the evidence proved conclusively that the parties intended these gifts to be only "illegal gratifications", as defined in section 161, Indian Penal Code, The age-long custom of giving and taking such bribes will only be a reason for reducing the sentences When the petitioner promised to recommend them, and when they gave the money and the ring, there was an implied bargain for, and fulfilment of an illegal gratification transaction, despite the euphemistic term "*maniyada*" used I, therefore, find against the first contention

The next was that the petitioner had merely recommended the tent-menders, the givers of the Rs 100 and the gold ring, to Lieut Wince, and that he had himself no power to retain the persons who made the gifts, or compel Lieut. Wince to retain them, and so would not be liable under section 161, Indian Penal Code Reliance was placed on a ruling of Jackson, J *in re Venkiah*[1] I have looked into that ruling It will not apply strictly to the facts of this case. Further, it is a ruling of 1924, long before Act II of 1947 has raised the mandatory preumption referred to above Reliance was also placed on a Bench ruling in *Venkatarama Naidu* v *Emperor*[2] The facts in that case are also not strictly applicable to the facts here That is also far earlier than Act II of 1947, which has been enacted raising a mandatory presumption in view of the alarming increase in bribery in the country during this horrible post-war epoch and the need to deal with such cases with a strong hand free from the cob-webs of technical defences regarding absence of strict proof of motive and acceptance of the gifts as *mamool*, *maniyada*, and other euphemistic terms dating from Hindu and Moghul times It is obvious that this petitioner was a panjandrum under Lieut. Wince and believed to be able to influence him, and that he had made recommendations only in his capacity as a Supervisor entitled to make those recommendations, and not as an independant third party philanthropist or samaritan Hence, he will be clearly liable under S 161, Indian Penal Code

The last contention was that, considering the entire circumstances and especially the fact that these payments were willingly made and were not stipulated for before the recommendations were made, and that these are the petitioner's first offences, and date from 1946, and that the petitioner has been dismissed from service, the sentences might be modified and a fine imposed instead The learned Public Prosecutor has no objection to this No doubt bribery ought to be put down with an iron hand, as the learned Sessions Judge has rightly remarked But each offender has to be dealt with in the light of the facts in his case After considering the entire circumstances, I modify the sentences of imprisonment and fine imposed on the petitioner, and seeing that the man has been dismissed from service for these very offences, impose a fine of Rs 250, or in default, rigorous imprisonment for two months, on both the counts together Time for payment of the balance of fine till 3 P M on 14th August, 1949

V P S *Sentence modified.*

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1 (1924) 47 M L J 662 2 (1929) M W N Crl 143

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Dr. A. Krishnaswamy .. *Petitioner**

v.

V. Natesan and others .. *Respondents.*

Practice—Inspection—Election Petition to set aside election filed before the Chief Judge of the Court of Small Causes—Ordering inspection of marked rolls, counterfoils of ballot papers, etc.—Duty of Court.

In an election petition, the powers of ordering inspection must be exercised with some circumspection. It is necessary that before an order for inspection is made, the Judge should be satisfied that the inspection of the documents was required *bona fide* for the purpose of the enquiry. Since great sanctity is attached to the secrecy of the ballot it is not advisable to give a roving inspection of the ballot papers and other documents and thus violate the principle of secrecy of ballot. Where an order for inspection is made on the consent of both sides it cannot be said that the Court had applied its mind and considered whether in fact the inspection was required for the *bona fide* purpose of proving the petitioner's case.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of Small Causes, Madras, dated 1st December, 1948, in M.P. No. 8960 of 1948, in Election No. 1 of 1948.

D. Narasaraju and *V. Somasundaram* for Petitioner.

Messrs. John and *Row, K. V. Rajagopalan* and *S. V. Rama Aiyangar* for Respondents.

The Court delivered the following

JUDGMENT :—This is a petition to revise the order of the learned Chief Judge of the Court of Small Causes ordering inspection of the marked electoral roll, counterfoils of the ballot papers, unused ballot papers, tendered and challenged votes and the return of the polling officers to the first respondent who was the petitioner in Election Petition No. 1 of 1948 on the file of the Court of Small Causes, Madras.

The first respondent was the unsuccessful candidate in a municipal election, and he filed Election Petition No. 1 of 1948, for declaring that the election of the first respondent who is the petitioner here who was the successful candidate for the 26th division, as invalid and for setting aside the election. There was also a prayer that a fresh election be ordered. The ground on which he filed the Election Petition was, among others, that there was false personation and the election has been materially affected by such false personation. During the pendency of the Election Petition the first respondent filed C.M.P. No. 8960 of 1948, for directing that the documents referred to, *viz.*, the marked electoral roll, counterfoils of the ballot papers, unused ballot papers, tendered and challenged votes and the return of the polling officers be brought to Court by the fifth respondent who is the Commissioner of the Corporation of Madras, and that the parties thereto be granted inspection of the same. On that, notice was ordered returnable on the 30th November, 1948. A consent memo was filed on the 1st December, 1948, which was signed by Messrs. John and Row, counsel for the Corporation of Madras, and Mr. K. V. Rajagopalan, Advocate for the first respondent, *i.e.*, the petitioner in the Election Petition. The consent memo states as follows :

"Inspection of the documents mentioned in the application will be given at the Corporation Office by some responsible officer of the Corporation of Madras by breaking open the seals after previous notice to the parties and in their presence and after inspection to reseal the packets and in their presence. If the inspection lasts more than a day, the packets will be resealed at the close of each day and be broken open on the next day likewise in the presence of parties till inspection is over."

It is contended on behalf of the petitioner that the order of inspection has been passed without notice to the petitioner who was the unsuccessful candidate, and notice of the application for inspection of the documents referred to in the petition

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*C.R.P. No. 32 of 1949. 25th July, 1949.

was necessary before an order for inspection could be passed by the learned Judge. On this point it is clear that either the signature of the senior or junior counsel for the petitioner is not found in the consent memo filed before the Court and in which an order was made, but the signatures of only the counsel for the first respondent and the Commissioner, the fifth respondent are found Even though the notice appears to have been ordered returnable on the 30th November, 1948, I find that there has been no notice given to the petitioner It is further argued that even if notice had been given to the petitioner or his counsel, he was not heard, and a consent order was passed to which the parties were only the first respondent and the Commissioner of the Corporation of Madras On similar facts C R P. No 12 of 1949 was filed in High Court and it was heard by Govinda Menon, J, and after examining the law on the question the learned Judge held that in an application of this kind the maxim *audi alteram partem* has to be applied and that no order should have been passed without hearing the opposite side I am in entire agreement with the observation of the learned Judge Though ordinarily under the rules of Small Causes Court, *i e*, Order XI, rule 1, governing inspection, it would be competent for the learned Judge to give inspection during the pendency of any suit to any party of such of the documents in possession of the other party relating to any matter in question in the suit, the lower court should have considered that in an election petition the powers of ordering inspection must be exercised with some circumspection It is necessary that before an order is made, the learned Judge should be satisfied that the inspection of the documents was required *bona fide* for the purpose of the enquiry Since great sanctity is attached to the secrecy of the ballot papers it is not advisable to give a roving inspection of the ballot papers and other documents and thus violate the principle of secrecy of ballot I would refer to the observation of Denman, J, in *Stowe* v *Jolliffe*[1], where the learned Judge observes that,

> " the Court must be satisfied by evidence on oath that the inspection is reasonably and *bona fide* required for that purpose The grounds alleged for requiring it must be looked into "

In this case it does not appear that the court applied its mind and considered whether in fact the inspection was required for the *bona fide* purpose of proving the petitioner's case, since the order that has been made was in terms of the consent memo filed by the first respondent and the Commissioner of the Corporation of Madras

I therefore allow the petition and remand the application to the learned Chief Judge of the Small Causes, Madras, for fresh disposal, after giving notice to the other parties including the petitioner The petitioner will have his costs from the first respondent

V S *Petition allowed*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Lahore)

PRESENT — LORD OAKSEY, SIR MADHAVAN NAIR, SIR JOHN BEAUMONT AND SIR MACNAGHTEN

Bhagwan Das *Appellant* *

v

The King *Respondent*

Criminal Procedure Code (V of 1898) section 492—Appointment of Advocate General as Public Prosecutor—Legality

It is part of the executive authority of the Province to make appointments to the post of Public Prosecutor and the executive authority of the Province being vested by section 49 of the Government of India Act in the Governor, he is entitled to appoint the Advocate-General as Public Prosecutor under section 492, Criminal Procedure Code

1 (1874) L R 9 Com Pleas 446

* P C Appeal No 63 of 1947 6th April, 1949.

L Saunders for Appellant

B Sen and *Miss Tyabji* for the King

Their Lordships' judgment was delivered by

LORD OAKSEY — Special leave to appeal was granted in this case without their Lordships being acquainted with the necessary documents, which were no doubt not available Leave was granted limited to the question of whether or not the proceedings were valid having regard to the fact that the appeal was signed and filed in the High Court by the Advocate-General and not by the Public Prosecutor

The relevant documents have now been produced before their Lordships, and the facts are as follows

By the Government of India Act, 1935, it was provided by section 55, that every Province was to have an Advocate-General On 1st April, 1937, the Government of India Act came into force On 3rd April, 1937, a notification in the Gazette provided that in exercise of the powers conferred on him by section 492 of the Code of Criminal Procedure, 1898, the Governor of the Punjab is pleased to appoint the Advocate-General of the Punjab to be a Public Prosecutor generally for the Punjab On 5th April, 1937, two days later, Mr Ram Lall was appointed Advocate-General On 9th February, 1938, he was appointed a Judge On the 11th February, 1938, Mr Sleem, the officer who filed the appeal to the High Court in these proceedings, was appointed Advocate-General

In their Lordships' view, by his appointment as Advocate-General, he became a public prosecutor under the provisions of the notification in the Gazette of 3rd April, 1937

In 1940 Mr Basant Kishen was appointed an assistant to Mr Sleem as Advocate-General, and by a notification in the Gazette on 11th November, 1940, he was appointed a Public Prosecutor

Those are the relevant documents In those circumstances, it appears clear to their Lordships that Mr Sleem, the Advocate-General, was a Public Prosecutor and was entitled to file this appeal

It was submitted on behalf of the appellant that under section 492 of the Code of Criminal Procedure, sub-section 1, which provides that

> "The Provincial Government may appoint, generally, or in any case, or for any specified class of cases, in any local area, one or more officers to be called Public Prosecutors,"

the Governor of the Punjab had no power to appoint the Advocate-General to be a Public Prosecutor under that section because the Governor was not the Provincial Government for that purpose

The attention of counsel for the appellant was drawn to section 49 of the Government of India Act, 1935 He submitted that it was no part of the executive authority of a Province to appoint Public Prosecutors within the meaning of section 492 of the Code of Criminal Procedure and that, therefore, the Governor had no power under the provisions of section 49 of the Government of India Act to make this appointment

Their Lordships are unable to accept this argument It appears to them that it was a part of the executive authority of the Province to make appointments to the post of Public Prosecutor and that, the executive authority of the Province being vested by section 49 of the Government of India Act in the Governor, he was entitled to appoint the Advocate-General a Public Prosecutor

For these reasons their Lordships will humbly advise His Majesty that this appeal should be dismissed

Solicitors for Appellant—*Lambert and White*

Solicitors for Respondent—*Solicitor High Commissioner for India*

V S —— *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from The Supreme Court of Ceylon)

PRESENT :—LORD SIMONDS, LORD DU PARCQ AND LORD NORMAND

George Edmund de Silva . . . . . *Appellant* *

v.

The Attorney-General of Ceylon and others . . . *Respondents*

Practice—Leave to appeal to Privy Council—Decision of Tribunal on petition questioning validity of an election to a legislative assembly.

The validity of an election held under the Ceylon (Parliamentary Elections) Order in Council, 1946, was questioned before the Supreme Court and it was tried by a Special Tribunal constituted under the Order in Council and a declaration was made by that Tribunal that the election in question was void. On a question whether leave to appeal to the Privy Council against such a declaration could be granted,

Held, such a dispute as was involved in the case concerned the rights and privileges of a legislative assembly, and, whether that assembly assumed to decide such a dispute itself or it is submitted to the determination of a Tribunal established for that purpose, the subject-matter was such that the determination must be final demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. An appeal in such dispute has never yet been entertained.

Sir Valentine Holmes and *R. K. Handoo* for Appellant.

Frank Gahan for Respondent.

Their Lordships' judgment was delivered by

LORD SIMONDS.—Their Lordships have humbly advised His Majesty that in their opinion this petition for special leave to appeal should be refused with costs. These are their reasons.

The petitioner George Edmund de Silva prays for special leave to appeal from a determination of Windham J., a Judge of the Supreme Court of the Island of Ceylon acting as Election Judge under the provisions of the Order in Council hereafter mentioned, whereby the election of the petitioner as member of the House of Representatives for the Kandy Electoral District was declared to be void for certain reasons into which it is unnecessary to enter. When their Lordships had partially considered the case on its merits, it appeared that a question of jurisdiction arose upon which they desired the assistance of Counsel for the Attorney-General of Ceylon. Having now heard full argument upon the question they are satisfied that the matter in dispute is one in which the prerogative right to entertain an appeal does not exist and that the petition must be refused accordingly.

By an Order in Council called the Ceylon (Parliamentary Elections) Order in Council, 1946, which was made under the authority of the Ceylon (Constitution) Order in Council, 1946, provision was made for the election of members to serve in the House of Representatives for Ceylon. The said Order in Council after making all the usual and appropriate provisions in regard to qualifications of electors and the holding of elections and other relevant matters and having defined corrupt practices and prescribed that every person who should be guilty of a corrupt practice should on conviction be liable to certain penalties, by section 76 enacted that the election of a candidate as a member should be avoided by his conviction for any corrupt or illegal practice, and by section 77 that the election of a candidate as a member should be declared to be void on an election petition on any of a number of grounds therein stated which might be proved to the satisfaction of the election judge. Part V of the Order deals with Election Petitions. By section 75 (1) it is provided that every election petition shall be tried by the Chief Justice or by a judge of the Supreme Court nominated by the Chief Justice for the purpose, and by section 75 (3) that, for the purpose of sommoning or compelling the attendance of witnesses at the trial of an election petition, the election judge shall have

* 11th April, 1949.

the same power, jurisdiction and authority as are possessed and exercised by the Judge of a District Court in the trial of a civil action and witnesses shall be sworn in the same manner as near as circumstances will admit as in the trial of such an action and shall be subject to the same penalties for the giving of false evidence Section 81 is as follows

"At the conclusion of the trial of an election petition the election judge shall determine whether the member whose return or election is complained of, or any other and what person, was duly returned or elected, or whether the election was void, and shall certify such determination to the Governor. Upon such certificate being given, such determination shall be final and the return shall be confirmed or altered or the Governor shall within one month of such determination by notice in the Government Gazette order the holding of an election in the electoral district concerned, as the case may require in accordance with such certificate"

By section 82 (1) the election judge was also required to report in writing to the Governor whether any corrupt or illegal practice had or had not been committed by or with the knowledge and consent of any candidate at the election or by his agent, and by section 82 (3) when an election judge reports that a corrupt or illegal practice has been committed by any person, that person shall be subject to the same incapacities as if at the date of the said report he had been convicted of that practice

At an election held on the 23rd August, 1947, for the election of a member for the Kandy Electoral District the petitioner headed the poll with 7,942 votes, being closely followed by Mr Ilangaratne (a respondent to this petition) with 7,737 votes Shortly after two election petitions were filed in the Supreme Court of Ceylon questioning the validity of the election on a number of grounds, and after a protracted trial Windham, J, a Judge of the Supreme Court, who had been nominated by the Chief Justice to try them, on the 24th February, 1948, declared the election of the petitioner as member for the Kandy Electoral District to be void and the petitioner to be subject to the incapacities set out in section 58 (2) of the Order in Council and thereupon certified his determination to the Governor-General who ordered a fresh election to be held It was duly held and Mr Ilangaratne was elected

It was under these circumstances that the petitioner sought special leave to appeal from the declaration and determination of Windham, J, and that the Attorney-General for Ceylon opposed, contending that an appeal is not competent.

It appears to their Lordships that for them the question is concluded by authority In *Theberge* v *Laudry*[1], where the combined effect of the Quebec Controverted Elections Act, 1875, and the Quebec Election Act of the same year was to create a position in all relevant respects similar to that of the petitioner under the Ceylon Order in Council, it was held that no appeal lay to His Majesty in Council and the observations made by Lord Cairns, L C, in delivering the opinion of their Lordships are exactly applicable to the present case It is no doubt true, as counsel for the petitioner urged, that the prerogative right to entertain an appeal is "taken away only by express words or the necessary intendment of a statute or other equivalent act of state" (see *Renouf* v *A G*[2]), but, as was pointed out in *Theberge* v *Laudry*[2], the preliminary question must be asked whether it was ever the intention of creating a tribunal with the ordinary incident of an appeal to the Crown In this case as in that it appears to their Lordships that the peculiar nature of the jurisdiction demands that this question should be answered in the negative It was contended for the petitioner that different considerations apply where, as here, the jurisdiction of the election judge to hear election petitions is not substituted for that of the legislative body itself but is created *de novo* upon the establishment of that body But this appears to their Lordships to be an unsubstantial distinction and in effect to be met by the later case of *Strickland* v *Grima*[3] Such a dispute as is here involved concerns the rights and privileges of a legislative assembly, and,

1 (1876) L R 2 A C 102
2 (1936) A C 445 at 460.
3 (1930) A C 285

whether that assembly assumes to decide such a dispute itself or it is submitted to the determination of a tribunal established for that purpose, the subject-matter is such that the determination must be final, demanding immediate action by the proper executive authority and admitting no appeal to His Majesty in Council. This is the substance of the authorities to which reference has been made, and it is noteworthy that in accordance with them an appeal in such a dispute has never yet been admitted It is for these reasons that their Lordships have humbly tendered their advice to His Majesty that the petition ought not to be granted

T L Wilson & Co Solicitors for Appellant

Burchells Solicitors for Respondents

V.S. *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SOMASUNDARAM

Sheik Khader Sahib and another *Petitioners* *

Evidence Act (I of 1872), section 27—Extent of admissibility

The extent of the statement admissible under section 27 does not depend upon whether the extent serves to corroborate or not the other evidence in the case The only limitation is that the extent must relate distinctly to the facts discovered, subject to its relevancy being proved by other evidence

Case-law discussed

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Cuddapah, in C A Nos 2 and 1 of 1948, respectively (C C No 1 of 1947), Stationary Sub Magistrate, Cuddapah)

V Rajagopalachari, R Ramalinga Reddi and *V V Raghavan* for Petitioners

The Public Prosecutor *(V L Ethiraj)* on behalf of the Crown

The Court made the following

ORDER —Accused 3 and 1 are the petitioners respectively in the above cases. They were convicted and sentenced to rigorous imprisonment for six months by the Stationary Sub-Magistrate, Cuddapah, for an offence under section 411, Indian Penal Code In appeal, the Sub-Divisional Magistrate, Cuddapah, confirmed the convictions and sentences

On 27th November, 1946, between 7 and 8 P M there was a theft of gold and diamond jewels, cash and other properties of the value of about Rs. 10,000 in the house of one Rao Sahib K Venkatesan Chetti in Cuddapah Town The Circle Inspector of Police on receipt of information, investigated the case In the course of the investigation, he recovered M Os 1 to 4 from the tank bund on the 28th November, 1946 The next day he had the tank searched as a result of which he recovered M Os 5 to 38 He suspected the 1st accused who was traced and arrested on 18th December, 1946, and he made a statement in consequence of which M Os 39 to 62, 72 to 82, 85 and 86 were recovered from a pit adjoining the pial of the house of accused 3 Accused 3 was then arrested and on information furnished by him M Os 63 and 64 were recovered from a pit under a flower pot in the back-yard of his house A search of his house resulted in the recovery of a small tin, M O 83 containing Rs 382-8-0 He was then taken to the police station and there he made a further statement in consequence of which M Os 65 to 71 were recovered from a pot buried in a corner in the kitchen of accused 3 The properties were later identified by P W 1 as his The case against petitioners rests mainly on the

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* Crl R C Nos 432 and 343 of 1948 20th April, 1949
(Crl R. P Nos Nil and 313 of 1948)

statements made by them under section 27 of the Indian Evidence Act and the consequent recovery of the stolen articles

The statement attributed to the first accused and admitted by the lower court is as follows

"On 27th November, 1946, i e, the second day of Moharram I brought out a trunk from the residence of Rao Sahib P Venkatesam Chetti at about 7-30 in the evening I bundled the jewels that were in the trunk in a cloth and I buried that cloth bundle by the side of the pial of Khadar Sahib in a pit I will show you the spot"

Accused 3 as already stated made two statements The portions admitted by the lower court are ;

(a) "I dug out the pit to find out what it contained and found a number of jewels I took out one gold pannirubuddi and gold kadiam, set with stones from among the jewels and kept back the bundle in the pit I buried the gold pannirubuddi and the hand kadiam in my backyard under a flower pot in a pit I will point out the spot"

(b) "I took some more jewels from the place where Bechu concealed them in addition to gold pannirubuddi and gold kadiyam I buried them in my house in one corner of the kitchen I will point out the place"

On the above two statements by the two petitioners they were convicted and sentenced as aforesaid The only point in revision is whether the statements admitted by the lower court are admissible and if not, to what extent they are admissible. According to the Full Bench decision of our High Court in *Athappa Goundan*[1] In re, the whole of the above statements will be admissible But that decision has been overruled by the Judicial Committee in *Kotayya* v *King Emperor*[2], in which their Lordships said that in their Lordships opinion *Athappa Goundan* In re[1], was wrongly decided In the Privy Council case, the statement that was admitted by the lower court was this

"About 14 days ago, I, Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank We all beat Bodupatti China Sivayya and Subayya to death The remaining persons Pullayya, Kotayya and Narayana ran away Dondapati Ramayya who was in our party received blows on his hands He had a spear in his hands He gave it to me then I hid it and my stick in the rick of Venkatanarasu in the village I will show if you come. We did all this at the instigation of Pulukuri Kotayya"

Their Lordships held that the whole of the statement except the passage,

"I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come"

is inadmissible

There was a confessional statement made by accused 3 in that case which was deposed to by the Police Sub-Inspector who said that accused 3 said to him

"I stabbed Sivayya with a spear I hid the spear in a yard in my village I will show you the place"

Their Lordships referring to this said

"The first sentence must be omitted This was followed by a mediatornama, Ex Q-1, which is unobjectionable except for a sentence in the middle He said that it was with that spear that he had stabbed Bodupatti Sivayya which must be omitted"

This decision of the Privy Council has been referred to and followed by a Bench of this Court in *The Public Prosecutor* v *Ooi Goundan*[3], in which it has been held that the statement

"I have buried in the margin of the eastern ridge of my sugarcane garden the knife If you come with me I shall take and give it"

is admissible

It is now contended by Mr Rajagopalachari, learned counsel for the petitioner, that the Judicial Committee and the Bench of this Court admitted portions referred

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1 (1937) 2 M L J 60 I L R (1937) Mad 695 (F B)
2 (1947) 1 M L J 219 L R 74 I A 65. I L R (1948) Mad 1 (P C)
3 (1947) 2 M L J 427

to in their decision because they were to use the phrase of the learned counsel, 'innocuous" He relies strongly on the enunciation of the principles laid down earlier by their Lordships on the construction of section 27. Their Lordships state

> "On normal principles of construction their Lordships think that the proviso to section 26 added by section 27, should not be held to nullify the substance of the section"

I entirely agree with the learned counsel that section 27 should not be construed so as to lift the ban imposed by the two preceding sections At the same time I do not agree with him when he states that the Privy Council admitted and intended to admit only those portions which are innocuous as admissible under section 27 In the Privy Council, it was contended on behalf of the Crown that the "fact discovered" is a physical object produced and that any information which relates distinctly to that object can be proved Their Lordships did not agree with that contention and pointed out

> "It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced, the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact"

They further observe as follows

> "Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife, knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant"

In the end their Lordships have held, as already stated that the statement, "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village I will show if you come" is admissible The spear and the stick will be relevant only when they are proved by other evidence to have been used in the commission of the offence Similarly, the Bench of this Court has held in *The Public Prosecutor* v *Oor Goundan*[1], that the statement

> "I have buried in the margin of the eastern ridge of my sugarcane garden the knife If you come with me I will take and give it"

is admissible In *Vellingiri*[2], Rajagopalan, J, has held that the statement

> "I sold the (dynamo) to the proprietor of a Soda factory near the Pillayar Temple in Anuppapalayam for Rs 15"

is admissible No doubt he also observes

> "Earlier in point of time was the statement of the accused that he had sold it to P W 4 was the fact deposed to P W 4 The question is, was it the accused's statement that led to the discovery of the sale by the accused to P W 4? That was a fact discovered by the Sub-Inspector as a result of the statement in Ex P-3 though proof of it in court came only subsequently with the statement made on oath by P W 4"

It is the contention of Mr Rajagopalachariar that in the above case the statement that "I sold, etc" was admitted because P W 4 subsequently spoke to the same and that the statement of the accused was only used to corroborate P W 4's evidence I do not think that Rajagopalan, J, intended that "I sold, etc" is admissible because P W 4 spoke to the same The extent of the statement admissible under section 27 does not depend upon whether the extent serves to corroborate or not the other evidence in the case The only limitation is that the extent must relate distinctly to the facts discovered subject to its relevancy being proved by other evidence The burial of the jewels of the accused in the pit becomes relevant only when the jewels are proved to be stolen property The statement

> "I buried the cloth bundle by the side of the pial of Khadar Sahib in a pit I will show you the spot"

by itself is innocuous It is no more harmful than

1 (1947) 2 M L J 427 2 Crl R C No. 477 of 1948

'I hid it (spear) and my stick in the rick of Venkatanarasu in the village I will show you'

which is admitted by the Privy Council as the portion admissible It is only when the spear or the stick is proved to have been used in the commission of the offence the fact discovered is relevant Similarly only when the jewels are proved to be stolen, their burial in the pit by the accused becomes relevant I therefore hold the following portions as admissible as regards accused 1

"I buried that cloth bundle by the side of the pial of Khadar Sahib in a pit I will show you the spot"

As regards accused 3

"I buried the gold pannirubuddi and the hand kadiam in my backyard under a flower pot in a pit I will point out the spot"

"I buried them (some more jewels) in my house in one corner of the kitchen I will point out the place"

If the statement to the extent above mentioned are admissible then they clearly prove that the accused were in possession of the stolen articles and they have not satisfactorily accounted for their possession The conviction and sentence are therefore confirmed and the petitions are dismissed

V P S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —THE HON'BLE MR JUSTICE RAGHAVA RAO

The Province of Madras represented by the Collector of Tanjore *Appellant**

v

Sri Vedaranyeswaraswami Devasthanam at Vedaranyam, represented by its managing trustee K Ponnayya Pandarasannadhi and another *Respondents*

Madras Estates Land Act (I of 1908), *section* 20-A *and* 189—*Road or Puntha poromboke—Original grant by Raja—Confirmation by British Government—Reversionary right whether vests in British Government—Decision of District Collector under section* 20-A *of Act—Whether bars the present suit*—Res judicata—*Decisions of revenue authorities on questions of title*—

A road poromboke or Puntha poromboke is not communal property and the right of reversion is in the landowner and not in the Government The same principle applies to cases of whole village inam areas

Secretary of State v *Krishna Rao,* (1945) 2 M L J 352 (P C) and *Maharajah of Pithapuram* v *The Chairman, Municipal Council, Cocanada,* (1936) 71 M L J 749, followed

Case-law reviewed

Where a temple devasthanam sued the Government for a declaration that a portion of a street in the inam village belonging to it which had been assigned by Government in favour of second defendant was not legal in view of an old grant of the entire village by the State under Hindu Rajas and confirmed later by the British Government, on the question whether an earlier decision by which the District Collector under section 20-A of the Madras Estates Land Act had held that the street was one which existed before the permanent settlement and that the reversionary right really belonged to the Government and that the property was no longer required for the purposes for which it had been originally intended

Held, (1) that the reversionary right did not vest in the Government,

(2) that the suit was not barred under section 189 of the Act as the District Collector had no jurisdiction to make the order he made in view of the non-vesting of the reversionary right in the Government

Secretary of State for India v *Mask and Co*, (1940) 2 M L J 140 L R 67 I A 222 I L R 1940 Mad 599 (P C), applied

(3) That the principle of *res judicata* would not apply to the case as the District Collector's order pertained to a distinct plot other than what was in dispute in the present case Further the doctrine of *res judicata* can have no application to decisions of revenue authorities on questions of title, like orders under section 20-A of the Madras Estates Land Act

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*S A No 1072 of 1946 13th July 1949.

Appeal preferred against the decree of the Court of the Subordinate Judge of Mayuram, dated 9th March, 1946, in A S No 110 of 1945, preferred against the decree of the Court of the District Munsiff of Tiruvarur, in O S No 82 of 1945

The Government Pleader (*K Kuttikrishna Menon*) for Appellant

T V Muthukrishna Aiyar, R. T Gopalakrishnan and *A. Sundaram Aiyar* for Respondents

The Court delivered the following

JUDGMENT —This second appeal arises out of a suit by the Sri Vedaranyeswaraswami Devasthanam at Vedaranyam for a declaration against the Province of Madras represented by the Collector of Tanjore as the first defendant that a portion of the Sannadhi Street in the village of Vedaranyam had been wrongly assigned by the first defendant to the second and for recovery of possession of the street property from the second defendant after removing the structures built upon it by him pursuant to the assignment The plaintiff claimed to be the grantee of the entire village in inam from a Tanjore King of old under a grant which has not been produced but which, as appears from the inam title deed, was confirmed by the British Government in 1863 The plaintiff accordingly urged that the reversionary title to the street which was one dedicated to the public including the villagers was all along vested in it.

The second defendant based his title on an assignment made to him by the first defendant after its conversion into ryotwari land as the result of an order of the District Collector of Tanjore under section 20-A of the Madras Estates Land Act, dated 31st July, 1944, which held that the street was one which had existed from before the permanent settlement, that the reversionary right to it was really that of the Government and that the property was no longer required for the purpose for which it had been originally intended and all along used Both the defendants pleaded that the order of the District Collector was correct and that in any case, there having been no appeal preferred by the plaintiff against the order in the manner provided for in the sixth column of Part B of the schedule to the Act, the plaintiff was precluded from questioning its correctness by force of sub-sections (2) and (3) of section 189 of the Act There was also a question of *res judicata* raised by the defendants in their pleadings on the basis of the decision of the District Court of Negapatam in A S No 35 of 1940 confirmed by the High Court in C R P No 1506 of 1942 which related to another plot in the suit village and in respect of which an order under section 20-A of the Act similar to the one in the present case was passed by the District Collector and upheld in appeal by the District Judge The learned District Munsiff dismissed the suit, finding in favour of the defendants on all the pleas taken by them in answer to the suit The learned Subordinate Judge, in appeal, reversed the District Munsiff's decision on all the points The first defendant accordingly appeals against the judgment and decree of the learned Subordinate Judge

The questions which arose for determination in the Courts below and which the learned Government Pleader has argued here are of some importance, although not of any great difficulty After reserving decision and considering all the questions carefully I have come to the clear conclusion that the appeal must fail

The first contention of the learned Government Pleader is that the reversionary right in respect of the street poramboke in the said inam village belonged to the Government Whatever the arguability of the position taken up by him, on the authority of decisions like *Narayanaswamy Naidu* v *Secretary of State for India*[1] and *Venkatarama Sivan* v *The Secretary of State for India*[2], might have been prior to the latest ruling of the Privy Council in the *Secretary of State* v *Krishna Rao*[3], the position is, in my opinion, altogether incapable of any serious argument in view

1 (1912) 24 M L J 36
2 (1919) 36 M L J 203
3 (1945) 2 M L J 352 L R 72 I A 211 : I L R (1946) Mad 225 (P C)

of that decision in which, construing an inam title deed like Ex P-1 in the present case containing the words "besides poramboke", their Lordships held that the decision in *Narayanaswamy Naidu* v. *Secretary of State for India*[1] must be regarded as overruled by the *Urlam case*[2] The Privy Council case like the case in *Narayanaswamy Naidu* v. *Secretary of State for India*[1] was concerned, it is true, not with a street poramboke but with a river bed or channel poramboke used for the purpose of irrigation . but the passage at pages 240 and 241 of the report of their Lordships' judgment which I am quoting supplies, in my opinion, authority which concludes the present case as well adversely to the appellant.

"Since the decision of this Board in what usually called the *Urlam case*[2], there can no longer be any question but that a grant of the proprietary interest includes the grantor's rights in tank, river and channel poramboke, and it is unnecessary to consider what effect, if any, such a grant has on what is called communal poramboke, such as burning grounds, threshing floors and the like In their Lordships' opinion the judgment of the Madras High Court in *Narayanaswamy Naidu* v *Secretary of State for India*[1], where a contrary opinion was expressed, must be regarded as overruled to that extent by the *Urlam case*[2] In the present case the High Court said, 'There is not the slightest indication that any rights were reserved by the Government except the right to collect Rs 1,182 every year Further, the expression 'besides poramboke' was put in to indicate that not merely the lands that were then cultivated as dry wet or garden were granted but also all the other rights which the grantor had, as is pointed out by the Judicial Committee in the *Swamigal case*[3]' With this their Lordships agree, as they do with the rest of the High Court's judgment"

In the present case, the Court is not concerned with any kind of communal poramboke as to which opinion was reserved by their Lordships but with a street poramboke which, as Mr Chandrasekhara Aiyar, J, in his unreported judgment in C R P No 1506 of 1942, marked as Ex D-2 seems to have been inclined to think and which I too am inclined to think is not communal land The learned Judge's observation in the Civil Revision Petition which has been extracted in paragraph 18 of the Lower Appellate Court's judgment and to which reference will be made by me in another context hereafter in this judgment runs as follows —

"The second point argued before me is that a road cannot be regarded as property set apart for any communal purpose as specified in sub-clauses (*a*) and (*b*) of clause 16 of section 3 Ordinarily speaking, a road is poramboke and not communal land as is the case with tank and channel beds and bunds, threshing floors, cattle-stands and village sites The villagers would no doubt use the road, but other people who are not residents of the village might use the road as well It is not communal property in the sense in which the other properties in sub-clauses (*a*) and (*b*) are There is something to be said for this view, but here again the petitioner raised no such objection to the jurisdiction of the Collector to decide the question"

It seems to me that the learned Judge's reference in this observation to tank and channel beds and bunds as communal poramboke is not in accord either with the remarks of the Privy Council in *The Secretary of State* v *Krishna Rao*[4], in which their Lordships advert to a possible distinction between tank, river and channel poramboke on the one hand and commual poramboke such as burning grounds, threshing floors and the like on the other, or with the tenor of section 3, sub-section (16) of the Madras Estates Land Act which from the definition of "ryoti land" separately excludes beds and bunds of tanks and of supply, drainage surplus or irrigation channels in clause (*a*) and threshing floor, cattle-stands, village sites and other lands situated in any estate which are set apart for the common use of the villagers, in clause (*b*) But that point apart, I have no hesitation in agreeing with the view *prima facie* accepted by the learned Judge as sound that a road poramboke is not communal property And if as to road poramboke or what is sometimes called in the Telugu part of the Presidency as Puntha poramboke, the law is clear in zamindari areas as laid down by Varadachariar, J, in *Maharajah of Pithapuram* v *The Chairman, Municipal Council, Cocanada*[5], after a review of all prior decisions and a careful examination of principle with which I respectfully agree that the right of reversion is in the landholder and not in the Government, there is no reason on principle why the same should not be the case in whole inam village areas ; nor

1 (1912) 24 M L J 36
2 (1917) 33 M L J 144 L R 44 I A 166 I L R 40 Mad 886 (P C)
3 (1942) 2 M L J. 367 L R 69 I A 22 I L R (1942) Mad 893 (P C)
4 (1945) 2 M L J 352 L R 72 I A 211 = I L R (1946) Mad 225 (P C)
5 (1936) 71 M L J 749

can there be any doubt about the matter in view of the remarks of the Privy Council in *The Secretary of State* v *Krishna Rao*[1], quoted above, which although made in connection with a case of river bed or channel poramboke, as already observed by me, is equally conclusive of a case of street poramboke like the present The first contention of the learned Government Pleader must accordingly be repelled

The learned Government Pleader's second contention that the suit is barred by section 189 of the Madras Estates Land Act might, at first sight, seem sound ; but must, in my opinion, go the same way as the first The principles in the light of which the point falls to be decided are to be found stated by the Privy Council, in a passage in the decision in *Secretary of State for India* v *Mask & Co* [2], which runs in these terms

> "It is settled law that the exclusion of the jurisdiction of the civil Courts is not to be readily inferred but that such exclusion must either be explicitly expressed or clearly implied It is also well settled that even if jurisdiction is so excluded, the civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure "

Applying these principles it seems to me as clear as clear could be that if, as held by me already, the property is not one in respect of which reversionary rights can vest in the Government, the District Collector had no jurisdiction to make the order of conversion into ryotwari land which he did make under section 20-A (*b*) (ii) of the Madras Estates Land Act The case would then be one in which "the provisions of the Act were not complied with," in the language of Lord Thankerton in the Privy Council decision just referred to and the plaintiff would not stand confronted with any effective bar in his way under section 189 of the Act

The third and last contention on behalf of the Government has in my judgment even less of merits than the other two In the first place the decision of the District Judge in A S No 35 of 1940 relied upon as *res judicata* related to a different plot of land in the suit village Further, the view in revision expressed by Chandrasekhara Aiyar, J , in Ex D-2 so far as it goes sounds rather in favour of the plaintiff, although his Lordship refused to interfere in revision at that juncture Moreover, as rightly held by the lower appellate Court in the present case on the authority of the decisions in *Varagunarama Pandia Chinnathambiar* v *Rengasami Naidu*[3], *Chakrapani Rao* v *Venkatadri Appa Rao*[4], *The Raja of Sivaganga* v *Venkatachalam Chetty*[5] and *Ramaswamy Goundar* v *Ramaswamy Goundar*[6], the doctrine of *res judicata* can have no application to decisions of revenue authorities on questions of title, like orders under section 20-A of the Madras Estates Land Act All the points taken for the appellant failing, the second appeal fails and is dismissed with costs of the first respondent

(Leave to appeal is refused)

K C *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HORWILL

T. G Varadarajulu Naidu and others *Petitioners**

v

K J Narayanaswami Naidu *alias* Lakshminarayana Naidu and others *Respondents*

Civil Procedure Code (V of 1908), Order 23, rule 1—Suit for injunction—Filing of written statement—Plaintiffs' application to withdraw suit in its present form and file a fresh suit on the same subject-matter—How far such a permission could be granted

In order to seek permission of the Court under Order 23, rule 1 of the Civil Procedure Code for withdrawing a suit filed and for filing a fresh suit on the same subject-matter, there must be something in the nature of a formal defect before such permission can be granted.

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1. (1945) 2 M L J 352 L R 72 I A 211 I L R (1946) Mad 225 (P C)
2 (1940) 2 M L J 140 L R 67 I A 222 I L R (1940) Mad 599 at 614 (P C)
3 (1939) 2 M L J 292
4 A I R 1937 Mad 303
5 (1934) 67 M L J 268
6 (1942) 2 M L J 595

* C R P No 1599 of 1947 8th July, 1949.

Where the plaintiffs, sons of the 1st defendant's brother, claimed to restrain by injunction the 1st defendant's sons from interfering with their possession of the house in question and the defendants filed a written statement to the effect that they had an equal share in the house, on the question whether the plaintiffs could be permitted to withdraw their suit and file a fresh one on the same subject-matter because of the necessity to secure a wider consideration of matters raised by the written statement,

Held, that such an application could not be granted as the Court had no jurisdiction to grant leave to file a fresh suit when there was no formal defect in the plaint The Court if it thought fit could only permit plaintiffs to amend their plaint in such a way as to satisfy their desire to secure a wider consideration of the matters

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Trichinopoly, dated 19th March, 1947, in I A No 368 of 1947, in O S No 69 of 1946

T V Ramanatha Aiyar for Petitioners

K S Desikan for Respondents

The Court delivered the following ,

JUDGMENT —Defendants 2 to 5 are the sons of the first defendant and the plaintiffs are the sons of the first defendant's deceased brother The plaintiffs claimed in their plaint that a certain house belonged to their father and that a room in that house had with his permission been occupied by the defendants. Quarrels having arisen between the plaintiffs and the defendants, this suit was filed for the recovery of possession of that room and for an injunction to restrain the defendants from interfering with their possession of other portions of the house. The defendants claimed that they had an equal share in the house After perusing the written statements the plaintiffs thought it desirable that a fresh suit should be instituted in which wider questions could be raised , and so made an application to the Court under Order 23, rule 1, Civil Procedure Code, to withdraw the suit, praying for liberty to institute a fresh suit in respect of the same subject-matter. That application was allowed

Order 23, rule 1 permits the Court to grant liberty to institute a fresh suit with regard to the same subject-matter provided .

" (*a*) that a suit must fail by reason of some formal defect, or (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim "

It has been laid down that (*b*) must be read as *ejusdem generis* with (*a*) There must be something in the nature of a formal defect before permission can be granted to file a fresh suit on the same cause of action The learned Subordinate Judge's order is a very brief one , the relevant portion of which is

" the plaintiffs contended that they (plaintiffs) should seek a decision on these questions (questions raised in the written statement) in a properly instituted suit I would grant them the permission sought "

Nothing is said in this order about the existence of any formal defect, and there does not in fact seem to be any formal defect It may be desirable that some of the questions raised in the written statement, which were not strictly speaking a part of the suit as framed by the plaintiffs, might be considered in the suit , and some foundation for the consideration of subsidiary points is found in paragraph 11 of the plaint The learned Judge had however no jurisdiction because of this to grant the plaintiffs liberty to file a fresh suit on the same cause of action The proper method of securing the wider consideration of the matters raised was by the amendment of the plaint ,

The order of the lower Court is therefore set aside and permission is granted to the plaintiffs to file an application in the lower Court to amend the plaint I do not wish to say anything on the merits of such an application, if it be made The learned Judge will have to consider what the plaintiffs say in support of the application, if they make it, and what the defendants have to say against it The respondents must pay the costs of the petitioners in this Court

K C ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE RAGHAVA RAO.

A. Krishnaraya Kodgi .. *Appellant**

v

A Sarvothama Kodgi and another . *Respondents.*

Gift—Construction—Deed containing a clause that the property will go back to the donor in case of a certain contingency—Donor acting in his capacity as joint family manager—Clause whether a reverter equivalent to a defeasance of gift over

A deed of gift by a manager of a joint family consisting of himself and his brother purported to give away to a society land forming part of the inheritance of the donor from his maternal grandfather for the sake of acquiring spiritual benefit to his grandfather's soul A clause in the deed also provided that in the event of failure of the purpose of the gift the land shall revert to the donor himsel on his paying the price of any building upon such land On the failure of the purpose of the gift the land was conveyed to the donor under a deed of sale In a suit by the donor's brother, on a construction of the reverter clause,

Held, (1) The suit could not be regarded as one for enforcing a right of pre-emption but is one claiming that the purchase by the donor enures for the plaintiff also under the reverter clause to the extent of a moiety

(2) The clause of reverter in question was not one of repugnancy to the absolute estate created by the deed and is not equivalent to defeasance by way of an executory gift over, but a covenant between two persons, the donor and the donee, that the latter should re-convey to the former upon a certain contingency

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A S No 494 of 1945, preferred against the decree of the Court of the District Munsiff, Coondapur, in O S No. 6 of 1944

T Krishna Rao for Appellant

K Y Adiga and *K. P Adiga* for Respondents

The Court delivered the following

JUDGMENT —The question for decision in this second appeal is one of construction of a deed of gift, Ex P-2, executed on 20th March, 1918, by the first defendant, appellant before me, in favour of the second defendant, the Indian section of the Theosophical Society, Benares, represented by its General Secretary at the time, for the use and benefit of the local lodge at Coondapur. On 6th October, 1942, finding the suit property no longer required for the use and benefit of the local lodge which apparently had by that time ceased to exist and basing itself on the clause of reverter contained in Ex P-2 the second defendant by its General Secretary at the time executed a deed of sale of the suit property in favour of the first defendant The plaintiff, the first respondent before me, sued in the Court of the District Munsiff of Coondapur for recovery of possession of the entire subject-matter of the gift deed but succeeded in obtaining a decree for only a half which was later confirmed on appeal by the learned Subordinate Judge of South Kanara.

The first defendant appeals to this Court against the appellate decision, urging as he did in the courts below, firstly that the suit must be regarded as in effect one for enforcing a right of pre-emption and as not brought in time, *i e*, within one year from the date of the taking of possession by the first defendant as prescribed by Art 49 of the Indian Limitation Act, and secondly that the clause of reverter contained in Ex P-2 must be regarded as altogether invalid in law and that Ex D-1 executed pursuant to such a clause could not operate to clothe the plaintiff with any title whatsoever

Before I deal with the contentions of Mr Krishna Rao, the learned advocate for the appellant it is as well that I set forth *in extenso* the document, Ex P-2, on the terms of which the validity of the contentions necessarily depends

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* S A No 387 of 1947 4th February, 1949

"This day the twentieth of March 1918, the deed of gift executed to the registered Indian section of the Theosophical Society having its headquarters at Benares, and now represented by its present general secretary T Ramachandra Rao, Retired Subordinate Judge, Benares, by Mr Krishna Rao Kodgi, son of Govindarao Kodgi, landlord, Brahmin, aged 25, living at Amavasubail, Coondapur taluk, witnesseth

Whereas the undermentioned land forming a portion of the whole land Survey No 67 sub 8 was inherited by me from my deceased grandfather Krishna Rao, Yediala and of which I am in possession, as the managing member of the family consisting of myself and my brother Sarvothama Rao Kodgi and whereas I am desirous of perpetuating the memory of my abovesaid maternal grandfather and of imparting to him spiritual benefit thereby, I do hereby execute this day this deed of gift and convey absolutely with all rights to the abovementioned general secretary, Benares, for the use and benefit of the local lodge of the Coondapur Theosophical Society the undermentioned land together with all trees, etc, thereon besides the incomplete building erected thereon by the Theosophical Society and have handed over the possession of site, etc, to K Narayanaswami Aiyar on behalf of the abovesaid General Secretary In the event of the site and building aforesaid not being required for the above purpose, the property shall revert *to me* on the condition of my paying to the said Indian section of the Theosophical Society the then estimated value of the building alone In proof whereof, I have this day affixed my signature to this deed of gift"

Now, to take up the first of the contentions of the appellant, I am of opinion that the courts below are perfectly correct in their view of the matter. No doubt the plaintiff does employ the term "pre-emption" in his plaint; but it is not pretended that the plaintiff is asserting a right of "pre-emption" in priority to the first defendant purchaser What he is doing in fact and in truth is to claim that the purchase by the first defendant enures to his benefit also under the reverter clause in Ex P-2 to the extent of a moiety The plaintiff says that although the second defendant alone executed Ex. P-2 he did so as manager of the joint family so that if the clause of reverter could and did operate, it would operate to his benefit as well as that of the first defendant With this view of the construction of Ex. P-2, which the Courts below adopted I agree I accordingly repel the first of the contentions of Mr Krishna Rao

But it is said—and this is the second contention of Mr Krishna Rao—that the clause of reverter is itself inoperative (*a*) either because it is repugnant to the absolute estate created by Ex P-2 in favour of the second defendant, or (*b*) because it is a clause of defeasance by way of an executory gift over which, to be valid, must not violate the rule against perpetuity laid down in section 14 of the Transfer of Property Act In the latter case it is further urged that it is immaterial that in fact a re-conveyance did come into being during the lifetime of the donor. So far as the first ground of the second contention is concerned, I am of opinion on a careful construction of the deed that the clause in question is not at all one of repugnancy to the absolute estate created by the deed but is, if at all, only one of defeasance. The distinction between the two classes of clauses which is, however subtle, quite real is well brought out in the following observations made by Sundaram Chetti, J., in *Govindaraja Pillai* v *Mangalam Pillai*[1], with which I respectfully agree:

"The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be, that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void, but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative"

As regards the second ground the argument ignores the words "to me" underlined (italicised) by me in setting forth the gift deed above. The clause does not run in terms of reverter to the *donee* and his *heirs* The decision of the Judicial Committee of the Privy Council in *Sarajubala Debi* v *Jyotirmoyee Debi*[2] does not accordingly apply to the case on hand

In fact, I am inclined to think that the clause in question is not a clause of reverter equivalent to defeasance by way of an executory gift over. It is, in my

1 (1932) 63 M L J 911 at 913 I L R 59 Cal 142 (P C).
2 (1931) 61 M L J 501 : L R 58 I.A 270.

judgment, a covenant between the donor and the donee that the latter should re-convey to the former in a certain contingency That the rule against perpetuity does not in this country apply to agreements is fairly well established by decisions of this Court of which I need only refer to *Munuswami Naidu* v *Sagalaguna Naidu*[1] and to the Full Bench decision of the Calcutta High Court reported in *Moulvi Ali Hossain Mian* v *Rajkumar Haldar*[2], which reversed the earlier decisions of that Court to the contrary.

The two contentions of the appellant therefore failing, the second appeal fails and is dismissed with costs

No leave.

K C. *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Bombay.†)

PRESENT —LORD OAKSEY, SIR MADHAVAN NAIR, SIR JOHN BEAUMONT AND SIR MALCOLM MACNAGHTEN.

Yusofalli Mulla Noorbhoy *Appellant* *

v

The King *Respondent*

Criminal Procedure Code (V of 1898), section 403 (1)—Acquittal in a prosecution launched without proper sanction—Effect—If can be pleaded as a bar to a subsequent trial on same facts but with a fresh proper sanction—Failure to appeal against such acquittal—Effect—Magistrate finding sanction bad after hearing prosecution evidence—Procedure to be followed at that stage—Acquittal of accused—Operation as discharge

The whole basis of section 403 (1) of the Criminal Procedure Code is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal A Court cannot be competent to hear and determine a prosecution the institution of which is prohibited in the absence of a valid sanction and hence a prosecution launched without a valid sanction would be nullity

Basdeo Agarwalla v *King-Emperor*, (1945) 1 M L J 369 (1945) F L J 45 (1945) F C R 93, approved

Where in a prosecution launched without a sanction as required by law an order of acquittal is passed, it would not, on the omission of the Government to appeal against it, become binding on the expiration of the period limited for appeal by Article 157 of the Limitation Act, because the order being a nullity there is nothing to appeal against The Government might apply to the High Court, if they so desired, to quash the proceedings But the omission of Government to take such a step which was not incumbent, could not convert an order made without jurisdiction into an order passed by a Court of competent jurisdiction

An order of acquittal passed in such a prosecution cannot be pleaded as a bar to a subsequent prosecution on the same facts, but after obtaining a proper sanction

Where after a trial had proceeded to the point at which much of the prosecution evidence had been given, the prosecution refuses to attempt to prove that proper sanction has been given and the trying Magistrate comes to the conclusion that the sanction given was bad and the prosecution incompetent, he ought to discharge the accused on the ground that he had no jurisdiction to try him. But if an order of acquittal is passed instead, it would be an order without jurisdiction and could only operate as an order of discharge

To rely apart from the terms of section 403, Criminal Procedure Code, upon the Common Law rule, that no man should be placed twice in jeopardy it must be shown that the first trial was before a Court competent to pass a valid order of acquittal or conviction For this purpose there is no distinction between a conviction and an acquittal

Quære Whether section 403, Criminal Procedure Code, constitutes a complete Code in India upon the subject of *autrefois acquit* and *autrefois convict* or whether in a proper case the Common Law can be called in aid to supplement the provisions of the section

Decision in 49 Bom L R 802, affirmed

W W K Page and *R K Handoo* for Appellant

J M Tucker and *J M R Jayakar* for the King

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1 (1925) 51 M L J 229 I L R 49 Mad 387 2 A I R 1943 Cal 417 77 C L J 216 (F B).
† 49 Bom L R 802.
* P C Appeal No 30 of 1948 30th May, 1949

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT —This is an appeal by special leave against two judgments of the High Court of Judicature at Bombay[1], dated 17th June, 1947, setting aside two orders of the Court of the Presidency Magistrate, 6th Additional Court, dated 16th September, 1946, whereby two prosecutions of the appellant for the offences of hoarding and profiteering under the Hoarding and Profiteering Prevention Ordinance, 1943 (Ordinance No XXXV of 1943) (hereinafter called "the Ordinance") were held to be barred by reason of the provisions of section 403, Criminal Procedure Code, since in the view of the learned Magistrate the accused had been previously tried and acquitted on exactly similar charges and facts by a Court of competent jurisdiction The real question before the Board is whether in the circumstances of the case the plea *autrefois acquit* was open to the appellant, and that question in essence depends upon whether the earlier prosecution was before a Court of competent jurisdiction.

The appellant is the sole proprietor of Messrs Alladin Dhanji, dealers in crockery, glassware and cutlery in Bombay He was charged in the Court of the Presidency Magistrate, 6th Additional Court, under section 13 (1) read with section 5 of the Ordinance with the offence of hoarding He was also separately charged in the said Court, under section 13 (1) read with section 6 of the Ordinance, with the offence of profiteering He pleaded not guilty to both charges. Section 14 of the Ordinance is in the following terms

"No prosecution for any offence punishable under this Ordinance shall be instituted except with the previous sanction of the Central or Provincial Government or of an officer not below the rank in a Presidency town of a Deputy Commissioner of Police, or elsewhere of a District Magistrate empowered by the Central or the Provincial Government to grant such sanction"

Sanction to the appellant's prosecution had been granted before the institution thereof by C C Desai, Controller-General of Civil Supplies, who was authorised to give such sanction by virtue of a notification of the Government of India duly published.

The separate hearing of the two charges against the appellant proceeded in the normal manner under the Code of Criminal Procedure, evidence for the prosecution was called, and on 1st October, 1945, charges were framed; subsequently further evidence was called for the prosecution and some of the witnesses were re-called for cross-examination, and the case was adjourned to 17th December, 1945 On that date Mr Khandalawalla, counsel for the prosecution, made a statement which the learned Magistrate took down in the following words:

"In view of the High Court decision in Revisional Application No 191 of 1945, *Purshottam Harjivan* v *Emperor*[2], as this Court is not competent to try this offence, he does not wish to tender the witnesses already examined for further cross-examination nor to lead any further evidence"

Thereupon the Magistrate recorded an order in the following terms:

"Mr Mullick's evidence is deleted Accused acquitted for reasons to be recorded separately."

On the same day, the learned Magistrate recorded his reasons for the orders of acquittal in identical terms on the two charges After referring to the said statement of Mr Khandalawalla and the order made upon it the learned Magistrate continued

"On a perusal of the said decision, however, I find that the filing of this charge-sheet by the prosecution itself is invalid in law, because the sanction signed is by the Controller-General under a notification of the Government of India, and the said notification does not state that the various officers therein mentioned are not below the rank of a District Magistrate Thus it is the incompetence of the prosecution to proceed against the accused without sanction as provided for in law. As however the invalidity of the sanction invalidates the prosecution in Court, the accused was acquitted"

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1. 49 Bom L R 802

2 A I R. 1946 Bom 492 47 Cr.L J. 900.

It is clear from this statement of the learned Magistrate that he had read the decision of the High Court in Revisional Application No 191 of 1945, *Purshottam Harjivan* v *Emperor*[1], and on the strength of that decision reached the conclusion that the prosecution was incompetent The decision of the High Court in that case was that in order to establish the validity of a sanction under section 14 of the Ordinance, it was essential for the prosecution to prove that the officer who signed the sanction was not below the rank of a District Magistrate The Court did not base its opinion as to the invalidity of the sanction on the omission from the notification of a statement that the officers referred to therein were not below the rank of a District Magistrate, as the learned Magistrate seems to have thought The present case arises in a Presidency town, so that, if this decision of the High Court be correct, the prosecution had to prove that the Controller-General of Civil Supplies who gave the sanction was not below the rank of a Deputy Commissioner of Police As the Controller is not in the same cadre as a District Magistrate or a Deputy Commissioner of Police, the reluctance of the Crown to undertake the task of establishing the comparative status of these officers is understandable

In addition to his orders of acquittal the learned Magistrate on the same day passed two orders under section 517, Criminal Procedure Code, directing that the cutlery, glass, and other articles belonging to the appellant which had been marked as exhibits in the case, should be returned to him

The Government of Bombay did not appeal against the two orders of the learned Magistrate acquitting the appellant, but against his further orders made under section 517, Criminal Procedure Code, the Government filed two appeals, and on 16th April, 1946, the High Court in such appeals directed that the property should be handed over to the Chief Presidency Magistrate, and that the orders of the learned Magistrate disposing of the property under section 517 should be set aside

On 10th April, 1946, fresh sanctions to prosecute the appellant were obtained from the Government of Bombay, and on the 13th April fresh prosecutions were instituted against the appellant for the same offences and on the same facts as in the former prosecutions

On 16th September, 1946, the learned Magistrate acquitted the appellant, holding that the fresh prosecutions were barred under section 403, Criminal Procedure Code The Government of Bombay appealed against these orders of acquittal, and, on 17th June, 1947, the High Court of Bombay allowed the appeals, set aside the orders of the learned Magistrate acquitting the accused, and directed that the case should be sent to the Chief Presidency Magistrate who was directed to send the case to any Magistrate other than the Magistrate who had made the orders of acquittal, for disposal according to law

Section 403, Criminal Procedure Code, so far as relevant, is in these terms

"(1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while sueh conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237"

"(4) A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged"

"*Explanation* The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section"

The view which the High Court took was that the previous decision of such Court in Revision Application No 191 of 1945, *Purshottam Harjivan* v *Emperor*[1]

1. A I R 1946 Bom 492 47 Cr L J 900

was correct, from which it followed that no valid sanction for the first prosecution of the appellant had been obtained Following the decision of the Federal Court in *Basdeo Agarwalla* v *King-Emperor*[1], which was based on a clause in another Ordinance expressed in language similar to that used in clause 14 of the present Ordinance, the Court held the earlier prosecution of the appellant to have been wholly null and void, and that accordingly the appellant had not been previously tried by a Court of competent jurisdiction within section 403

Before this Board the correctness of the decision of the High Court in Revision Application No 191 of 1945, *Purshottam Harjivan* v *Emperor*[2] has not been challenged, and their Lordships feel no doubt that the decision was correct, and that, as it was not proved that the officer who granted the sanction in the earlier prosecutions, was not below the rank of a Deputy Commissioner of Police, those prosecutions were without valid sanction.

Mr. Page for the appellant urged various grounds against the decision under appeal His first contention was that the expressions "Court of competent jurisdiction" in section 403 (1) and "Court . not competent to try the offence" in section 403 (4) refer to a Court competent to try the class of cases in which the particular offence falls, and do not involve that the Court must be competent to try the particular case In their Lordships' view this argument is quite untenable. The whole basis of section 403 (1) is that the first trial should have been before a Court competent to hear and determine the case and to record a verdict of conviction or acquittal If the Court was not so competent it is irrelevant that it would have been competent to try other cases of the same class, or indeed the case against the particular accused in different circumstances, for example if a sanction had been obtained. This case fell under section 403 (1) and the terms of section 403 (4) do not call for discussion.

The next contention urged was that the learned Magistrate did not adjudicate on the validity of the sanction The argument was that the trial had proceeded to the point at which much of the prosecution evidence had been given and the Magistrate had framed a charge , that at that stage counsel for the prosecution refused to attempt to prove that a proper sanction had been given or to call further evidence, and that in the circumstances the learned Magistrate had no option but to acquit the accused under section 258, Criminal Procedure Code. This is the view of the matter which commended itself to the learned Magistrate and induced him to hold that section 403 was a bar to the second possession. This contention might have had some force in it if it were supported by the facts, that is, if the Magistrate acquitted the accused because he thought the prosecution had failed to prove their case, and if he was not asked to decide, and did not decide, on the validity of sanction But this is not what happened It is clear, as already noted, that the learned Magistrate himself considered the decision in Criminal Revision Application No 191 of 1945, *Purshottam Harjivan* v *Emperor*[2] and came to the conclusion, on the basis of that decision, that the sanction was bad, and the prosecution incompetent This conclusion was clearly right, whether or not the Magistrate correctly appreciated the grounds on which the decision of the High Court was based. Having reached that conclusion, the learned Magistrate ought to have discharged the accused on the ground that he had no jurisdiction to try him The orders of acquittal were passed without jurisdiction, and could only operate as orders of discharge.

The next contention was that the failure to obtain a sanction at the most prevented the valid institution of a prosecution, but did not affect the competency of the Court to hear and determine a prosecution which in fact was brought before it. This suggested distinction between the validity of the prosecution and the competence of the Court was pressed strenuously by Mr. Page, but seems to rest on no foundation A Court cannot be competent to hear and determine a

1 (1945) 1 M L J 369 (1945) F L J 45 (1945) F C R 93 (F C)

2. A I R 1946 Bom 492 · 47 Cr L J 900.

prosecution the institution of which is prohibited by law and section 14 prohibits the institution of a prosecution in the absence of a proper sanction The learned Magistrate was no doubt competent to decide whether he had jurisdiction to entertain the prosecution and for that purpose to determine whether a valid sanction had been given, but as soon as he decided that no valid sanction had been given the Court became incompetent to proceed with the matter. Their Lordships agree with the view expressed by the Federal Court in *Agarwalla's case*[1], that a prosecution launched without a valid sanction is a nullity.

The next contention was that as the orders of acquittal passed by the learned Magistrate in the first prosecution were not appealed from they became binding on the expiration of the period limited for appeal by Article 157, Limitation Act. This is merely to regard another aspect of the same problem If the orders of acquittal were passed by a Court of competent jurisdiction, though wrongly, they would be binding unless set aside in appeal But if the orders were a nullity there was nothing to appeal against It may well be that the Government, if embarrassed by the orders of acquittal, might have applied to the High Court to quash them, and in this connection reference may be made to the decision of the House of Lords in *Crane* v *Director of Public Prosecutions*[2]. But the omission of Government to take such a step, which was not incumbent, could not convert an order made without jurisdiction into an order passed by a Court of competent jurisdiction. Some emphasis was laid on the conduct of the Government of Bombay in appealing against the orders passed by the learned Magistrate under section 517, Criminal Procedure Code It may be that the High Court ought not to have entertained such appeals, but no question as to the validity of the orders made in these appeals is before the Board. It was rightly conceded by Mr Page that the action of the Government of Bombay in appealing against the orders made by the Magistrate under section 517 could not operate by way of estoppel to confer jurisdiction upon the Magistrate which he did not otherwise possess

The last point urged by Mr Page was that even if the case did not fall within the terms of section 403, Criminal Procedure Code, the appellant could none the less rely on the Common Law rule that no man should be placed twice in jeopardy. But this argument again depends on whether the earlier orders of acquittal were valid Under the Common Law, a plea of *autre fois acquit* or *autre fois convict* can only be raised where the first trial was before a Court competent to pass a valid order of acquittal or conviction, *R* v *Bowman*[3], *R* v *Bates*[4], and *R* v *Marsham*[5]. It is true, as pointed out by Mr Page, that those cases are cases in which there had been a conviction at the earlier trial but their Lordships see no distinction for the present purpose between a conviction and an acquittal Unless the earlier trial was a lawful one which might have resulted in a conviction, the accused was never in jeopardy The case of *R* v *Simpson*[6], on which Mr Page relied, is distinguishable because the first order on which the plea of *autrefois acquit* was based was held by a majority of the Court to be voidable, and not void This argument therefore fails on the facts, and it is not necessary for their Lordships to consider whether section 403, Criminal Procedure Code, constitutes a complete Code in India upon the subject of *autrefois acquit* and *autrefois convict*, or whether in a proper case the Common Law can be called in aid to supplement the provisions of the section

For these reasons their Lordships will humbly advise His Majesty that this appeal be dismissed

Solicitors for Appellant *T L Wilson & Co*

Solicitor for the King *Solicitor, High Commissioner for India*

V S *Appeal dismissed.*

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1 (1945) 1 M L J 369 (1945) F L J 45: (1945) F C R 93
2 (1921) 2 A C 299. 90 L J. K.B 1160.
3 6 C. & P. 337.
4 (1911) 1 K B 964. 80 L J K B 507
5 (1912) 2 K B 362 81 L J K B 957.
6 (1914) 1 K B 66. 83 L J K.B. 233.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Kotrike Venkata Ramiah Chetty .. *Appellant* *

v.

Chinna Pulliah and another .. *Respondents*

Civil Procedure Code (V of 1908), Order 21, rule 103—Failure to file the suit—Effect.

One *K* effected a simple mortgage on his properties in favour of *R* who transferred the mortgage-right to the defendant, who in his turn transferred it to the plaintiffs' father *B*. After *B's* death, plaintiffs obtained a decree against *K* and in execution purchased the hypotheca themselves. The sale was duly confirmed and full satisfaction of the decree recorded by the execution court. But when the plaintiffs sought to obtain delivery they were obstructed by a third party against whom the plaintiffs filed a petition for removal of obstruction which petition was dismissed. Thereupon the plaintiffs filed the suit for recovery of money on foot of failure of consideration for the transfer in favour of their father.

Held, that the suit was not maintainable. Though the plaintiffs need not have got the order confirming the sale set aside or the order recording the full satisfaction vacated, the plaintiffs could not file the suit without pursuing their remedy of a suit under Order 21, rule 103 of the Code, as the order which became conclusive on failure to file a suit, was conclusive only between the parties and did not establish conclusively absence of title in the plaintiffs' vendor to the property in question so as to afford the plaintiffs a cause of action on the basis of such a want of title.

Appeal against the decree of the District Court, Anantapur, in A. S. No. 91 of 1945, preferred against the decree of the Court of the District Munsif, Kurnool, in O. S. No. 93 of 1943.

P. Chenchiah, V. S. Narasimhachari and *N. Appu Rao* for Appellant.

K. Srinivasa Rao for Respondents.

The Court delivered the following

JUDGMENT :—This second appeal arises out of a suit for recovery of money on foot of failure of consideration for a transfer in favour of the father of the plaintiffs of a certain mortgage right. The defendant against whom the Courts below have decreed the suit is the transferor of the mortgage right.

The facts relevant to the determination of the two questions of law which have been argued before me lie in a short and narrow compass. One Karnam Appiah effected a simple mortgage of certain properties in favour of one Ranga Reddi in 1929, having become the owner thereof by a sale deed from the original owner Sitaveerayya. In 1934 Ranga Reddi transferred the mortgage right to the defendant who in his turn transferred it later to the plaintiffs' father, one Baliah. After Baliah's death the plaintiffs obtained a decree against the original mortgagor, Appiah, and in execution purchased the hypotheca themselves. The sale was duly confirmed and full satisfaction of the decree recorded by the execution Court. When, thereafter, the plaintiffs sought to obtain delivery, they found themselves obstructed by a third party, one Reddi Narayana Reddi, against whom they consequently filed a petition for removal of obstruction, which was, however, dismissed. Thereupon they instituted the present suit to which the answer made so far as is material to this appeal was that they had a double hurdle in their way fatal to the action. Firstly, they had not pursued their remedy of suit under Order 21, rule 103, Civil Procedure Code. Secondly, they had not got the order confirming the sale set aside or the order recording full satisfaction vacated. The answer did not find favour with the Courts below. The defendant therefore appeals to this Court. Mr. Chenchiah, his learned counsel, has raised the two points again here before me.

Mr. Srinivasa Rao for the respondents has tried to meet the first of the points by urging that the provision of Order 21, rule 103, Civil Procedure Code, with reference to the institution of a suit for setting aside an order made under rule 98,

* S. A. No. 1121 of 1946. 11th July, 1949.

99 or 101 is only a permissive and not a mandatory provision, as the use of the word "may" therein suggests, and that the order under rule 99 in the present case is sufficiently efficacious to prove conclusively the absence in the defendant of the title which the latter had purported to convey to the plaintiff's father, nonetheless and in fact the more so because of plaintiffs' failure to follow up the summary order by the statutory suit This argument in my opinion misses the real spirit and purpose of the provision in rule 103 The order does, no doubt, become conclusive, but only as between the parties to it, unless displaced by the result of the suit to be instituted by the party against whom the order is made Of course, he may or may not institute the suit, but if he does not, the order becomes conclusive in favour of his adversary That does not mean that as against persons who are not parties to the order it can be held up by the party against whom it is made, as in this case is being done by the plaintiffs, as conclusively proving the absence of any title in himself to the property in question and as affording him a cause of action on the basis of such want of title The order relied upon by the plaintiffs is after all a summary order which the execution court made because it was satisfied,—and that was all that it had to be satisfied about —that the obstruction was occasioned by a person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account No question of title could be gone into at that juncture, nor was any such question decided by the order. In these circumstances I should have thought it incumbent on the plaintiffs *prima facie* to institute the suit under Order 21, rule 103, Civil Procedur Code before they could claim that the consideration paid by their father for the defendant's transfer of the mortgage right to him had failed and failed finally. But, says Mr Srinivasa Rao, "If you looked into the summary order in the present case, you would find how futile it should have been for my clients to resort to a suit which was bound to fail in view of the very conclusive documentary evidence relied upon by the learned District Munsiff in his order" The reference is to certain documents said to evidence an attachment of the suit properties effected as long ago as 1929 by a certain decree-holder against the original owner Sitavirayya, a claim made by Karnam Appiah in connection with that attachment, the rejection of that claim by the execution court, and the institution by Appayya of a regular suit to have the order of rejection set aside which was eventually dismissed It is contended by Mr Srinivasa Rao that these documents would have created an insurmountable obstacle in his clients' way, had they filed a suit under Order 21, rule 103 of the Civil Procedure Code, and that I must accordingly hold them relieved of the obligation which they might ordinarily be under to file such a suit and hold the failure of consideration for the transfer of the mortgage right in favour of the plaintiffs' father completely established The argument is unsound for two reasons In the first place, the documents are not before the court in the present litigation, and a mere reference to them or a statement of facts supposed to be proved by them in a prior judicial order, not *inter partes* cannot be evidence of such facts Moreover, as the learned District Munsiff who made the summary order, Ex D 2, himself observes, therein, the proceedings evidenced by these documents are all subsequent to the mortgage by Appayya in favour of Ranga Reddi, the rights in respect of which became the plaintiffs' eventually by progress of title through successive links and would not be binding on them They would therefore have been open to attack by the plaintiffs in a regular suit under Order 21, rule 103, had they filed one They have not filed such a suit, nor have they proved conclusively enough in the present suit that Appiah had no right to effect the mortgage which they became entitled to in due course In these circumstances I accept the first contention of Mr Chenchiah as well founded

The second contention of Mr Chenchiah is sought to be supported by the authority of the rulings in *Muthukumaraswami Pillai* v *Muthuswami Thevan*[1], *Keshavan* v.

1 (1926) 52 M L J 148 I L R 50 Mad 639

Bipathumma[1] and *Amarnath* v *Chhotelal Durgaprasad*[2]. Before I deal with the argument founded on these decisions, it may be as well to deal with a point of view founded on the Full Bench ruling of this High Court in *Macha Koundan* v. *Kottara Koundan*[3] which met with acceptance by the courts below as conclusive of the present case, but which in my opinion is not, strictly speaking, so. That point of view is that because, as held by the Full Bench, a stranger auction-purchaser who loses possession of the property purchased by him on account of the paramount title of a third party is entitled to recover by suit against the decree-holder the price paid at the auction on the ground of failure of consideration owing to the utter absence of any title in the judgment-debtor to the property sold in execution, it follows that the plaintiffs, the decree-holders-auction-purchasers in the present case, are entitled to recover from the defendant in enforcement of the covenant for title in favour of their father the amount of consideration paid by their father for the defendant's transfer of the mortgage right to him which ultimately resulted in the mortage decree and the execution sale thereunder which has become ineffective on account of obstruction to delivery of possession to them occasioned by a third party. In my opinion there is no adequate parity of facts between the case decided by the Full Bench and the situation which fell to be dealt with by the courts below in this case such as would attract the Full Bench decision to this case In fact, different considerations do arise here which did not complicate the case before the Full Bench Mr Chenchiah has attempted to attack the Full Bench ruling as requiring re-consideration and has drawn my attention to the case reported in *Amarnath* v *Chhotelal Durgaprasad*[2], in which a Full Bench of five Judges of the Allahabad High Court disapproved of this High Court's Full Bench ruling in *Macha Koundan* v *Kottara Koundan*[3], after a very exhaustive discussion of the entire case-law on the point and of the juristic principle pertinent to the point The warranty of title in a judicial sale even to the limited extent recognised in our Full Bench ruling is not accepted by the Allahabad Full Bench according to which the doctrine *caveat emptor qui ignorare non debuit quod jus alienum emit*—let a purchaser, who ought not to be ignorant of the amount and nature of the interest which he is about to buy, exercise proper caution—must have unqualified operation in all cases of sales in execution held under the present Code of Civil Procedure which contains no such provision as that of section 315 of the earlier Code I do not propose to assess the merits of this argument of Mr Chenchiah, firstly, because I am bound by the Full Bench decision of this court which, I may observe, embodies undoubtedly a more equitable view than that of the fuller Bench of the Allahabad High Court, and secondly, because in my opinion the decision of the Full Bench affords on the facts here no conclusive, logical ground for the kind of analogical deduction which the courts below have made from it.

Putting aside the Full Bench ruling in this view, I have to consider next the rulings in *Muthukumaraswami Pillai* v *Muthuswami Thevan*[4], *Keshavan* v *Bipathumma*[1], and *Amarnath* v. *Chhotelal Durgaprasad*[2], which Mr Chenchiah craves in aid of his submission that so long as the auction sale in execution of the mortgage decree stands and until it is set aside by an appropriate application made for that purpose to the execution court, which so far has not been made, and which if made hereafter, will be beyond time under Art 166 of the Limitation Act, the plaintiffs cannot maintain the present action against the defendant for recovery of money which their father had paid him by way of consideration which subsequently failed, as they would have it, on account of the obstruction from a third party in the matter of delivery of possession to them pursuant to the auction-purchase It is true that, as pointed out in the rulings relied upon by the learned Counsel, as between parties to the auction-purchase the sale by virtue of its confirmation becomes absolute and all matters decided in the proceedings concluded by the sale certificate,

1. (1935) 41 L W 422 (F B)
2. I L R 1938 All 922 (F B.)
3. (1935) 69 M L J 750 I L.R 59 Mad 202 (F B)
4. (1926) 52 M L J 148. I L R 50 Mad. 639.

such as satisfaction of the decree are *res judicata* But, does it follow that a person like the defendant who was not a party to those proceedings or even to the subsequent order under Order 21, rule 99 of the Civil Procedure Code would either be bound by or entitled to take advantage of the result of such proceedings or of such order ? In my opinion, the answer is No The gist of the action against the defendant, which is no more and no less than that the execution sale in favour of the plaintiffs has become futile and fruitless by the effective assertion of a title paramount by a third party, entails no re-opening of anything decided in the presence of the defendant by the court auction sale or the proceedings prior thereto , nor does it put the plaintiffs under the necessity to have the sale set aside which was held quite regularly, although as now transpires, without sufficient title in the judgment-debtor There are, further, no provisions in the Civil Procedure Code which either justify or warrant any attempt on the part of the plaintiffs to have the sale set aside, of which, it may be said, they have not availed themselves.

In the result, accepting the first and rejecting the second of the contentions raised by the appellant, I allow the appeal and dismiss the suit with costs throughout.

No leave

V. P. S. *Appeal allowed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Nagpur)

PRESENT :—LORD OAKSEY, SIR MADHAVAN NAIR AND SIR MALCOLM MACNAGHTEN

Mt. Gomtibai . *Appellant**

v

Kanchhedilal and others *Respondents.*

Will—Proof of solemn execution by person of competent understanding—Plea that will was executed under undue influence—Onus

Undue influence in order to invalidate a will, must amount to coercion or fraud Its existence must be established as a fact and it must also appear that it was actually exercised on the testator.

Where once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent the burden of proving that it was executed under undue influence is on the party who alleges it

C S Rewcastle and *Dingle Foot* for Appellant.

Sir Thomas Strangman, B Sen and *Miss Tyabji* for Respondents

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR —This is an appeal from the judgment and order of the High Court of Judicature at Nagpur, dated 29th September, 1941, which set aside an order of the Additional District Judge of Jubbulpore, dated 20th September, 1939

The appeal arises out of an application made by respondent 1 for the grant of probate of a will (dated 31st July, 1938) executed by one Ganesh Prasad—hereinafter referred to as the testator—on 1st August, 1938, in which he had been appointed as the executor.

The testator died on 4th August, 1938, and respondent 1, as the executor, applied for probate of the will on 29th August, 1939.

The appellant Gomtibai is the widow of the testator. She filed a caveat under section 284, clause (4), Succession Act, 1925, on 15th September, 1939.

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*P C Appeal No 34 of 1947 14th June, 1949.

In her written statement, she denied the testamentary capacity of the testator, alleged that he was "mentally and physically imbecile and infirm," and that the will had been executed under the undue influence of Maheswarilal, the natural father of the testator, with the help of respondent 1 She added that the testator had no independent advice and even she was in the dark about it. Execution and attestation of the will, which she denied in the statement, are not now in contest. The legatees of the will who are the other respondents (respondents 3 to 6) supported the validity and execution of the will.

Two questions arising for determination in the appeal are

(1) Whether the testator executed the will "in his right mind and with disposing mental capacity" (issue 2),

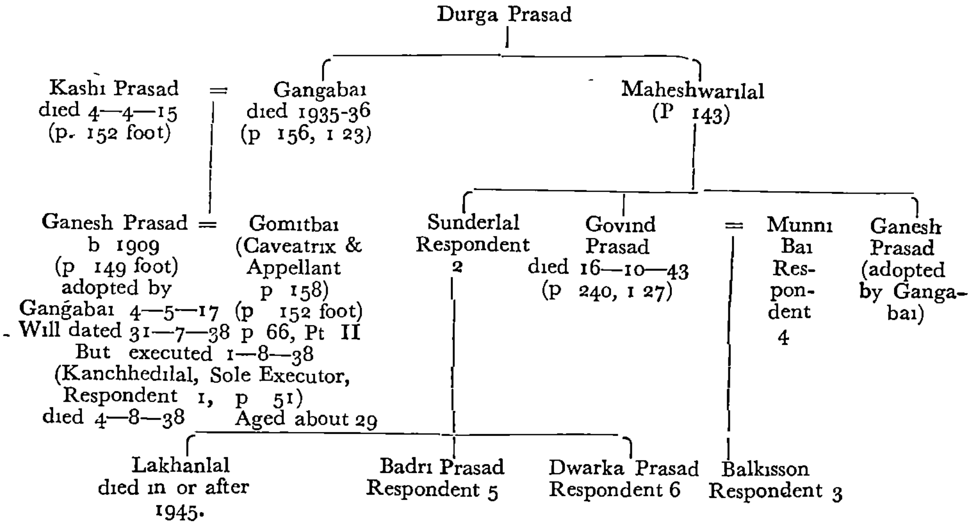
(2) "Was Maheshwarilal in a position to dominate his will, and did he use his position to induce him to execute this will?" (Issue 3), *i e*, whether or not the will was executed under the undue influence of Maheshwarilal

The Additional District Judge found both issues in favour of the appellant. He held that the testator did not possess the disposing mental capacity, and that undue influence was exercised in the preparation of the will He accordingly refused probate

The High Court on appeal set aside that order of the Additional District Judge and admitted the will to probate

The principles of law applicable to the case not being in dispute, the decision of the case depends entirely on a consideration of the evidence which is mainly oral.

The relationship of the testator and the legatees appears from the following genealogical table (This table was prepared by the respondents and is more detailed than the one on the record).



The testator was the natural son of one Maheshwarilal, he was adopted in 1917 by Gangabai under the authority of her husband Kashiprasad, who died in 1915 The testator was then about 8 years old After adoption he ceased to be a member of his natural family Maheshwarilal was the brother of Gangabai, the adoptive mother His other sons, grandsons and the widow (appellant) of the testator were the legatees under the will

The will was prepared by B.V Shukla, pleader (Applicant's witness 4). He also attested it. The other attestors are V.R Sen, M B, B S, (appellant's witness 3), and S. Golchha Advocate (Applicant's witness 6).

In the recital to the will, it is stated that the testator is not keeping good health, his health does not improve, and the trouble is increasing day by day and his health is becoming weaker It is also stated that the will is executed for the protection and management of the property.

The terms of the will are thus conveniently summarised in the respondent's case :

> "Under the terms of will, Mt Gomti Bai (the appellant) was to receive Rs 50 per month for her maintenance, and the back portion of the parlour was to be given to her for residential purposes Out of the remaining properties four annas (one-fourth) share was to be given to Sunderlal (respondent 2), one anna and four pie (one twelfth) share to Lakhanlal (since deceased), Badriprasad (respondent 5), Dwarkaprasad (respondent 6) each and 8 anna share (one-half) to Govind Prasad (since deceased and now represented by respondents 3 and 4)"

It was also mentioned in the will that after the death of the testator's wife, the property set apart for her maintenance and residence should be distributed amongst his two brothers and nephews, in proportion of their shares The properties belonging to the deceased, including moveable and immoveable, after deducting the liabilities were estimated as amounting to Rs 74,442-2-7

A few features of the will specially emphasised by Mr Rewcastle, the learned counsel for the appellant, in support of his arguments may here be noticed These are (1) the extremely small provision made for the appellant, who always lived on affectionate terms with the deceased, justifiably termed by the learned Judges of the High Court as "shabby" They refer to it in these terms

> "The feature about the case which is disquieting is that the wife was not told anything about the will and that it deals with her very shabbily"

(2) the fact that the *entire* property was disposed of by the testator amongst the members of his natural family, (3) the absence of a provision in the will for having an adoption made by the appellant as the testator was childless at the time of his death Their Lordships will deal with these aspects later in considering the evidence in the case Before discussing the evidence, it will be convenient to refer briefly to the principles of law applicable to the case, which are really not disputed, so that the evidence may be examined from the proper standpoint.

The law is well settled that the *onus probandi* lies on the person who propounds the will, and this onus is in general discharge by proof of capacity, and the fact of execution, from which the knowledge and the assent to its contents by the testator will be assumed *Barry* v. *Butlin*[1]. But where a will is prepared and executed under circumstances which excite the suspicion of the Court :

> "It is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document"

(*Tyrell* v *Painton*[2], See also *Charles Harwood* v *Baker*[3])

> "Where once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent"—

that is, when the propounder of the will has discharged the onus

> "the burden of proving that it was executed under undue influence is on the party who alleges it."

(*Boyse* v *Rossborough*[4]). In the case just cited, it is also stated that :

> "influence in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will must be an influence exercised either by coercion or by fraud"

To the same effect is the statement in the earlier case, *Barry* v *Butlin*[1], *supra*

> "The undue influence and the importunity which, if they are to defeat a will must be of the nature of fraud or duress"

As observed in *Craig* v *Lamoureux*[5], the burden of proving undue influence is not discharged by merely establishing

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1. 2 Moo P C 480
2. (1894) L R P 151 42 W R 343
3. (1840) 13 E R 117 3 Moo P C 282
4. (1856-57) 6 H L C 2 at p 48 26 L J. Ch 256
5. (1920) A C 349

"that a person has the power unduly to overbear the will of the testator It must be shown that in the particular case the power was exercised, and that it was by means of the exercise of that power that the will was obtained."

It follows from what has been said that respondent 1, in order to discharge the burden lying on him, should show that the testator executed the will in his right mind and with disposing mental capacity, and then, in order to succeed, the appellant will have to establish that the will was executed under undue influence—as explained above.

That first question for consideration is, had the testator the right mental capacity at the time when he executed the will? The evidence bearing on this question overlaps the evidence regarding the alleged undue influence and its exercise. Certain facts appearing in the evidence serve both purposes However, their Lorsdhips will try to deal with each question separately. The testator was 29 years old when he died He was an unusually fat man with an abormally bulky body He is said to have weighed 3¾ maunds some days before his death. He was called in derision "Gobar Ganesh" which means dull-headed He was not educated He was weakminded, as both Courts have found Possibly he suffered from dropsy This became more and more intensified towards July, 1938, and ultimately caused his death He was not able to manage his estate or to understand accounts He had no friends and was always lonely. Relying on these, the increasing deterioration of his health in 1938, which is conceded, the evidence mainly of Dr D Silva amongst the witnesses, and inferences drawn from certain general circumstances, Mr. Rewcastle argued that the intelligence of the testator was very much below the usual standard and that he was almost an "imbecile" and signed the will at the command of his father without understanding its contents The learned counsel stated that at any rate the circumstances connected with the preparation and execution of the will are so full o suspicion that the Court must scrutinise the circumstances and unless it is shown affirmatively that the testator knew the full significance of what he was doing when he executed the will, the probate should not be granted

What their Lordships have to see is whether or not, on the day he executed the will, the testator was a free agent possessed of sufficient mental capacity to grasp the full significance of the document to which he was putting his signature. Their Lordships will first consider the evidence given by the respondents on this point before dealing with the grounds urged by the appellant, and as they agree with the views of the High Court they will deal with the matter only very briefly.

The evidence of Kanchhedilal the executor and of two attesting witnesses shows clearly that the testator was in full possession of understanding when he executed the will Kanchhedilal knew the testator from his birth and was his family lawyer for a long time He is a senior lawyer of standing at the Jubbulpore Bar He says he saw him on 31st July, the night before the will was executed, when the testator asked him whether he would consent to be his executor Kanchhedilal says that on that day he had "a sound mind and clear understanding" There was no cross-examination of the witness on this point. Dr Sen, one of the attesting witnesses treated the testator for some time He was also the family physician He says the testator signed and executed the will in the presence of all the attesting witnesses and that on that day he

"was possessed of clear understanding when he executed the will. I could not call Ganesh Prasad imbecile from what I know of him"

There is very little cross-examination with reference to the statement of the witness that Ganesh Prasad was possessed of clear understanding on the day when he executed the will The witness asked the testator whether the will was all right and he replied in the affirmative Mr. Shukla, another attesting witness, who also prepared the will, says that the testator

"was mentally sound and had a proper power of understanding when he gave me the instructions to prepare the draft of the will and when the will was scribed out and when the will was actually executed I used to see him at least once a week till his death He could not be called imbecile but he was not an intelligent person His sickness did not impair his intelligence or powers of understanding".

The High Court does not reject the evidence of this witness though the learned Judges say that he would have been more weighty if the draft of the will which he had prepared had been produced, saying at the same time that

"It is, however, only fair to him to say that according to him he handed it over to Ganesh Prasad who placed it in a box along with the will"

The respectability of this witness cannot be challenged He is a pleader of some standing Reading his evidence as a whole their Lordships cannot see why it should not be accepted The evidence of the other attesting witness Sunderlal Golchha, an advocate, is also to the effect that the testator was possessed of sufficient mental capacity at the time when he executed the will He knew the testator from his boyhood. He says he was not imbecile but he was not very intelligent. He looked at the will.

" Ganesh Prasad had glanced over both sides of the will and then he signed it He was in his senses and he recognised the attesting witnesses when he signed the will"

To a certain extent some of the appellant's witnesses may be said to corroborate the evidence noticed above Ramjas, a doctor practising the Indian system of medicine, used to treat the testator He says he treated him for 12 or 13 days before his death also. He visited him on the morning of the day when the will was executed Though he says that the condition of the testator was not good, that he replied in low tone, that he was not well when he asked him how he was, that his tongue was fluttering when he was talking, he said he was

"in his ordinary senses then I asked him to show his pulse and he extended his hand and I felt it"

More or less to the same effect is the evidence of Gomtibai, the appellant She says

"He did talk on that Monday morning but he used to falter and he could not talk after that".

Towards the evening of that day his condition steadily grew worse till he died on the 4th Considering the evidence as a whole, their Lordships are satisfied that at the time when the will was executed the testator possessed sufficient mental capacity to realise the significance of what he was doing and he executed it knowing full well that he was executing his last will

The testator was not a man of high intelligence but the evidence shows that he was not incompetent to understand the contents of the will which he was executing Neither the evidence of Dr D'Silva, the chief medical witness of the opposing party on this point, nor the general circumstance relied on by Mr Rewcastle, is helpful in deciding the question Dr D'Silva is, no doubt, a highly qualified doctor but he was not the testator's family doctor He is said to have visited him some three years before his death He does not seem to have treated him though he says he prescribed for him His evidence was rightly disregarded by the High Court

The general circumstances relied on to show that the testator had not sufficient mental capacity and that he executed his will under undue influence may be now referred to These are the features of the will to which their Lordships drew attention at the beginning of the judgment, these being, the fact that the testator made only the paltry provision of Rs. 50 per mensem for his wife's maintenance though he had a rich and valuable estate, that he left all his property to his natural family sacrificing the interests of the family which became his after his adoption, and that there was no provision made in the will for having an adoption made by his wife as he was childless at the time of his death On close examination it will be found that none of these circumstances would support the inference sought to be drawn from them. Their Lordships would agree that the

provision made in the will for the maintenance of the appellant is "shabby" in view of the fact that the estate left behind by the testator was very valuable: but the question which their Lordships have to consider is, did the testator and the people who advised him think that the provision was inadequate? If this disposition contained in the will "was apparently just what everybody expected" then no inference can be drawn from it, assuming that the testator possessed testamenary capacity and that his will was not procured by undue influence. (See the observation of Lord Macnaghten at page 177 in *Baudains* v *Richardson*[1]). There is nothing in the evidence to show that anyone thought that the provision was inadequate Mr Shukla, with whom the testator discussed the terms of the will before it was scribed, says:

"It did not strike to me that he had made shabby provision for his wife In my opinion the provisions made by him for his wife was an adequate one. I believed that the provision made for his wife was quite proper for her ordinary comforts The family to which his wife belonged had no high standard of life so far as living was concerned The charitable and religious ideas of the females for doing good for the souls of their husbands did not strike me when I drafted the will in which provision was made for the wife of Ganesh Prasad"

Their Lordships have already stated that they see no reason why this witness should not be believed It is said that this provision in the will may be traced to the undue inflnence exercised on him by his father and that it also shows that he was unable to think for himself (because he was mentally so weak) what would be an adequate provision for the maintenance of his wife In this connection it may be noted that evidence makes it clear that the appellant's father and brother had free access to the testator during the time when the will was made, and after The appellant in her evidence says that

"Sheodinlal, my father, had been attending Ganesh Prasad practically every day during his last illness He used to come usually in the evenings He used to talk to Ganesh Prasad about his health My brothers also used to come to see Ganesh Prasad"

To the same effect is the evidence of the appellant's witness Narbada Prasad, who says

"Sheodinlal used to sit with Ganesh Prasad every day for a fortnight till the death of the latter. There was no fixed time for him to come but he used to come and sit with him for at least half an hour every time"

Neither the father nor the brother has been called on the appellant's side as a witness In the circumstances their Lordships agree with the view of the High Court that

"Sheodinlal's absence from the witness box can only be due to the fact that he knew that the will represented Ganesh Prasad's wishes and that he would not be able to stand up to cross-examination on the point"

If it was the testators's wish that his wife should be given a maintenance of Rs 50 only and he gave effect to it in his will, it cannot be said that it was brought about by the undue influence of the father, however much one may feel that the wife was left in the cold as a result of the arrangement

The other feature of the will, namely, the distribution of the estate amongst the natural relations of the testator, is also not helpful in supporting the appellant's case The learned Judges of the High Court have sufficiently dealt with this question, and their Lordships accept their view that this arrangement was quite natural and what one would expect in the circumstances of the case. The following extract from the judgment of the High Court may be quoted to show that the provision relating to the distribution of the estate cannot in the circumstances be considered unnatural .

"... There is evidence to show that there are no other reversioners that the witnesses know of, but the line is so long under the Hindu law before those claiming through a female can inherit that one can well understand Ganesh Prasad's desire to provide for his own natural brothers and nephews rather than run the risk of having the property fall into the hands of persons so remote from him as to be complete strangers The fact that this desire happened to coincide with Maheshwarilal's

1. (1906) A C 169 75 L J P C 57

wishes and even that it was what he fully intended to extort if not given naturally, is neither here nor there, because if it was in fact the testator's wish and he gave effect to it, there is no case of undue influence "

The absence of a provision in the will relating to adoption, which was very much emphasised in the course of argument, also does not support the appellant's case Some days after the arguments were closed their Lordships were informed that the testator was a Hindu of the Agarwala caste It is true that the Hindus believe that a son either by birth or adoption confers spiritual benefit on the father ; but it would not necessarily follow that the will does not truly represent the wishes of the testator because, being childless, he did not make a provision for adoption In their Lordships' view the absence of a provision relating to adoption in the will cannot be attributed either to infirmity of mind of the testator, or to undue influence said to be exercised by Maheswarilal

On a consideration of the evidence, their Lordships hold that the testator executed the will in his right mind and with disposing mental capacity.

The next question for consideration is whether the will came to be executed by the undue influence of Maheswarilal. Evidence does not disclose any specific act showing the exercise of undue influence It was said that at the time of the execution of the will the testator " looked " at his father and then executed the will Their Lordships are unable to draw any inference in favour of undue influence or the exercise of it from the fact that both father and son " looked at each other " when the latter signed the will In one portion of his judgment the learned District Judge refers to the behaviour of the testator in the presence of his father to show that he must have exercised undue influence on the testator He says :

" The evidence shows that Ganesh Prasad behaved like a cat in the presence of Maheshwarilal ; that he was very dutiful and obedient to him, and that he never knew to say 'no' as expressed by Dr Bharat and therefore there was no alternative for him other than signing the will, as desired by the presence of Maheshwarilal on the occasion Maheshwarilal had supreme control over Ganesh Prasad, and he certainly exercised it in securing the present will from him "

The above facts do not necessarily show either that the testator did not possess mental powers sufficient enough to grasp the significance of what he was doing when he executed the will, or that the will was brought about by the exercise of undue influence on the father's part Facts have to be interpreted in relation to the surrounding circumstances and the nature of the people concerned. The testator may have behaved very submissively, or may not have spoken in the presence of Maheswarilal. There is force in the learned Judges' observation that this is not an uncommon phenomenon in India It may be conceded that Maheshwarilal was a dominant personality and that his influence was very much felt in the management of the house-hold and the affairs of the estate He and his other sons, *i e*, the brothers of the testator and their children, all lived with the testator, and the property which belonged to the testator exclusively came to be looked upon—at any rate Maheshwarilal may be said to have looked upon it—as if it belonged to the entire family This may no doubt generate a suspicion that Maheshwarilal wielded considerable influence over the testator, but it must be remembered that there is evidence that the testator wanted to make provision for his brothers, and there is no evidence that there were any immediate reversioners or others with the claim on the estate whose interests had to be safeguarded Assuming that his father influenced the testator in disposing of his property in the manner he had done in the will, there is nothing to show that the disposition was not agreeable to his own wishes in the matter No doubt the term of the will relating to the maintenance of his wife—the really disquieting feature of the will—looked at from the modern standpoint is not satisfactory, their Lordships have already dealt with it It is said that the will was executed in great secrecy, but it cannot be said to have been executed in a " hole and corner fashion ". It may be accepted as true that the testator's wife did not know anything about the will ; if this is unnatural, her father and brothers must have known all about it, and their Lordships are unable to draw any sinister inference from the circumstance that the wife did not know anything about it.

Maheshwarilal had no ancestral property when Kashiprasad asked him to join him at Jubbulpore Kashiprasad educated him, set him up in business and got him married It is admitted that after the adoption of his son (the testator) Maheshwarilal began to manage the estate The gravamen of the charge against Maheshwarilal under this head (undue influence) is that he joined his brother-in-law as a very poor man, by the time of the testator's death he not only became rich, but accounts showed that the estate became indebted to him—apart from the fact that under the will all the property was distributed amongst his sons and grandsons This charge cannot be put more forcibly than has been done by the learned Judges They state as follows :

"Put shortly the argument was this We start with two estates, a rich one and a poor one The owner of the rich estate adopts the poor man's son, and the poor man thereupon manages the rich man's estate The rich man dies, and in a short time, we find the rich estate poor and the poor estate rich We find that in the course of his management the poor man has taken loans from the rich man's sestate and then written them off in the rich man's books We also find the poor man supposedly lending large sums of money to the rich man without any explanation as to how the money was come by In the circumstances it is argued that that is enough to swing the balance against Maheshwarilal, the poor man in the picture drawn above"

The learned Judges have examined the accounts carefully and shown that, as a matter of fact, no adverse inference against Maheshwarilal in support of the charge of undue influence can be drawn from the facts disclosed by them It would serve little purpose to go through the evidence which has been dealt with in detail by the learned Judges After going through the items of accounts to which their Lordships' attention was drawn by learned counsel, their Lordships agree with the opinion of the learned Judges that

"Maheshwarilal did well out of the estate in the sense that they all lived together and that he has been able to accumulate something for himself, but we see nothing inherently wrong in what he has done considering the relationship and considering the fact that he served without pay all these years . . ."

Undue influence, in order to invalidate a will, must amount to coercion or fraud. Its existence must be established as a fact and it must also appear that it was actually exercised on the testator.

Considering the evidence as a whole their Lordships are satisfied that the charge of undue influence has not been made out.

For the above reasons, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs

Solicitors for Appellant .—*T. L Wilson & Co.*

Solicitors for Respondents .—*Hy S. L. Polak & Co.*

K.S. *Appeal dismissed.*

[THE FEDERAL COURT OF INDIA.]

PRESENT —H J KANIA, *Chief Justice*, S FAZL ALI, M PATANJALI SASTRI, MEHRCHAND MAHAJAN AND B. K MUKHERJEA, JJ

Jainarain Ram Lundia *Appellant**

v.

Surajmull Sagarmull and others . *Respondents*

Contract—Negotiations by correspondence—Conclusion of contract—Further negotiations with regard to new matters—Effect on concluded contract—Contract conditional on some person being party to it—Contract, if and when possible without such person being a party to it—Contract Act (IX of 1872), section 43—Scope and effect of—Specific Relief Act (I of 1877), section 12 (c), illustration (iii)—Specific performance in respect of sale of specified shares—Ordering of

If after a contract is concluded and its terms settled further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both parties

* C.A. No. XXXI of 1948. 6th May, 1949.

or that both parties treated it as incomplete and inconclusive Once completed, the contract can be got rid of only with the concurrence of both parties

When parties enter into an agreement on the clear understanding that some other person should be a party to it, no perfected contract is possible so long as this other person does not join the agreement But where there is no such clear intention found that the contract would not be binding unless a third party becomes a party to it and there is no suggestion that any injustice would be done to a party if he is compelled to perform the agreement which he has made, courts would enforce the agreement

Unlike English law, the Indian law by virtue of the provisions of section 43 of the Contract Act makes all joint liability, joint and several, in the absence of any agreement to the contrary It is, therefore, open to the promisee to sue any one or some of the joint promisors, and it is no defence to such a suit that all promisors must have been made parties

When shares are limited in number and are not ordinarily available in the market, it is quite proper in view of illustration (iii) under clause (c) of section 12 of the Specific Relief Act to grant a decree for specific performance of a contract for the sale of such shares

Sir Tek Chand, Senior Advocate, Federal Court (*G K Dua*, Advocate, Federal Court, with him), instructed by *Ganpat Rai*, Agent, for Appellant

K P Khaitan, Senior Advocate, Federal Court (*C S Saran* and *A K. Sen*, Advocates, Federal Court, with him), instructed by *S P Varma*, Agent, for Respondents 1 and 2.

The Judgment of the Court was delivered by

Mukherjea, J—This appeal is directed against an appellate judgment of the Calcutta High Court, dated the 18th June, 1946, affirming with slight variation, the decision of a single Judge of the Original Side of that Court, dated the 14th of August, 1944

The suit, out of which this appeal arises, was one for specific performance of a contract for sale of certain shares in a private limited company, together with fractional interest in a partnership business, and it was commenced by two plaintiffs who are respondents 1 and 2 in this appeal, against four defendants, two of whom, *viz*, defendants 3 and 4, figure as appellants before us Of the other two defendants, the defendant No 2 is not a party to this appeal at all, inasmuch as the suit against him was withdrawn and dismissed in the trial court and his name was struck off from the list of defendants altogether As regards defendant No 1, though he was retained as a party, the plaintiffs gave up their claim against him before the hearing of the suit was concluded in the trial court, and he has been made only a *pro forma* respondent in this appeal The controversy in this Court, therefore, lies entirely between the two plaintiffs on the one hand and the defendants 3 and 4 on the other, and to appreciate the contentions that had been raised on behalf of the appellants, a short resume of the material facts would be necessary

On 29th February, 1936, a partnership firm, known as Marwari Brothers, was brought into existence on the basis of a partnership agreement, executed on that date by and between a number of parties The parties were (1) Lakshmi Devi Sugar Mills (of which Kedar Nath Khaitan, the plaintiff No 2 was the Managing Agent), (2) Kedar Nath Khaitan, (3) Bholi Ram, (4) Gobordhan Das and his brother Badri Prosad, (5) Jainarain Ram Lundia and (6) Biseswar Nath Under the terms of the partnership deed, the first, second, third and fifth parties had each a three annas' share in the business, while the fourth and the sixth parties were each of them given a two annas' share The main object of the partnership was to promote a private limited company, for the purpose of erecting and working a Sugar Mill in the district of Champaran in Bihar and securing for the firm the Managing Agency of the Mill By a supplementary deed executed on the 1st December, 1936, certain modifications were introduced into the original terms, and it was provided *inter alia* that the partnership would be for a period of 90 years, and that in case of death of any of the partners, his heir or heirs would automatically step into his place and be taken as partners without effecting dissolution of the partnership.

In pursuance of this agreement, a sugar mill was started and incorporated as a private limited company under the name of Ganga Devi Sugar Mills, Limited, with a share capital of Rs 8 lakhs, which was divided into 800 shares of Rs 1,000 each Of these 800 shares, the first three parties named above, all of whom belong to Pedrona in the district of Gorakhpur and have hence been described as thePedrona group of partners in the judgment of the High Court, subscribed for and obtained a total of 450 shares ; while the remaining 350 shares were acquired by the other three parties, who being residents of Bettia in the province of Bihar, have been referred to as the Bettia group in the judgment One hundred out of these 350 shares were obtained by Gobordhan Das and his brother Badri Prosad (defendants 1 and 2), some of which were registered in their own names and others in the name of other members of their family , 150 shares were secured by Jainarain (defendant No. 3) and 100 shares by Biseswar Nath, the father of defendant No 4 Biseswar Nath died on 29th November, 1939, and his son Madanlal became a partner in his place On 7th September, 1940, Gobordhan Das and his brother Badri Prosad separated from each other and divided the family property amongst themselves

It appears that ever since the sugar mill was started, there was dissension amongst the partners who were arrayed in two opposite factions or groups, and there was constant friction and quarrel between what has been called the Pedrona and the Bettia groups It was realised that the business could be carried on properly if one of the groups would walk out of the partnership, leaving the field entirely to the other group Early in December, 1940, the parties met at Pedrona and there was a talk at that meeting that the Bettias might sell out their interest to the Pedronas, but no final agreement was arrived at It is clear from the evidence, and not disputed before us, that towards the end of December, 1940, Kedar Nath Khaitan (plaintiff No 2) instructed Bhuramull, his head Gomostha, to go to Calcutta and negotiate, on behalf of the holders of 450 shares in the sugar mill, the purchase of the shares and interests of the Bettia group in the mill as well as in the partnership business It is not disputed that on 28th December, 1940, Gobordhan Das, Jainarain Ram and Madanlal (defendants 1, 3 and 4) wrote a letter to Mr Probhu Dayal Himatsingka, a well-known Solicitor of Calcutta, authorising the latter to sell to the "Khaitans or anybody else" the 350 shares held by them at a price not less than Rs. 700 per share, the purchaser to get by his purchaser also the interest of the vendors in the patnership firm of Marwari Brothers Badri Prosad, the brother of Gobordhan Das, admittedly did not sign this letter. Bhuramull met Himatsingka in Calcutta on 30th December, 1940, and the case of the plaintiffs, as made in the original plaint, was that on the 1st January, 1941, there was an agreement come to, between Bhuramull, representing the two plaintiffs and Himatsingka, as representative of the four defendants, by which the latter agreed to sell to the former 350 shares in the Ganga Devi Sugar Mills, Limited, and seven annas' share in the firm of Marwari Brothers on the terms and conditions set out in the letter, dated 2nd January, 1941, written by Himatsingka to the plaintiffs In substance, the terms were that those 350 shares would be sold at the price of Rs 700 per share and the puchasers would, by the purchase, acquire the seven annas' share of the vendors in the partnership business as well ; all monies appertaining to the seven annas' share in the firm would go to the plaintiffs, but the amount deposited by the defendants, which stood to their credit in the books of the firm, would be returned to them These terms, the plaintiffs averred, were confirmed by their Solicitor by a letter, dated 2nd/3rd January, 1941. It appears that soon after this exchange of letters, Gobordhan Das, the defendant No 1, repudiated the contract and declined to sell any shares held by him The other two partners, Jainarain and Madanlal, however reiterated their desire and willingness to abide by the agreement and sell the 250 shares belonging to them on the terms and conditions set out in the letter of their Solicitor Later on, they too resiled from the agreement and refused to comply with its terms, and this led to the institution of the present suit

The plaint was filed on the 18th August, 1941, and the two plaintiffs averred that they were ready and willing to perform their part of the agreement and

claimed specific performance of the contract for sale of 350 shares in Ganga Devi Sugar Mills and seven annas' share in Marwari Brothers as against the four defendants, *to wit*, Gobordhan Das, Badri Prosad, Jainarain and Madanlal, all of whom it was alleged, were bound by the agreement entered into on the 1st of January, 1941 There was an alternative claim for damages, in case no decree for specific performance was given

The claim was resisted by all the four defendants There were separate written statements filed by Gobordhan Das and Badri Prosad, and one joint written statement was put in on behalf of defendants 3 and 4 All the defendants traversed the allegations in the plaint and denied that there was any concluded agreement which could be enforced specifically It was also asserted that the shares of the Ganga Devi Sugar Mills could not be sold except in the manner laid down in the Articles of Association of the Company Gobordhan Das, the defendant No 1, took the further plea that he was not the owner of 100 shares which were purchased by him out of the funds of a joint Mitakshara family The family had separated since then and as a result of the partition, only 19 shares were allotted to him Badri Prosad adopted the same defence and alleged further that so far as he was concerned, there was no authority given to Himatsingka or anybody else to enter into a contract on his behalf and as he had separated from his brother Gobordhan Das long before, there was no authority left in the latter to bind him by any agreement Allthese facts, it was said, were fully known to the plaintiffs

The suit was heard by Sen, J On the second day of hearing, the counsel for the plaintiffs stated to the Court that he would not proceed against Badri Prosad, the defendant No 2 Upon this, the Court made an order directing that the suit would stand dismissed as against defendant No 2 Four witnesses were examined on behalf of the plaintiffs and their evidence was closed on 8th February, 1944 No oral evidence was adduced on the side of the defendants On the 11th of February, 1944, the plaintiffs' counsel, in course of his arguments, prayed for leave to amend the plaint which he said was necessary in view of the fact that the suit against Badri Prosad was withdrawn and dismissed This prayer was granted and an amended plaint was filed on 14th of February next in which the name of Badri Prosad was omitted from the list of defendants and the agreement sought to be enforced was alleged to have been entered into between the plaintiffs and the three defendants only In answer to this amended plaint, additional written statements were filed on behalf of defendants 3 and 4 and in them they took the additional plea that as the alleged agreement to sell the shares or transfer the interest of the defendants in the Managing Agency business was made entirely on the basis that all the four defendants, including Badri Prosad, would join in the transfer and as Badri Prosad did not join, the proposed agreement had never been perfected ; and even if it could be taken to be a concluded agreement no decree for specific performance should be given in view of the fact that the suit was withdrawn against Badri Prosad Arguments were heard on all these points and the hearing of the suit was concluded on 18th February, 1944 Towards the close of the hearing, the plaintiffs gave up their claim against Gobordhan Das also and prayed for a decree in respect of 250 shares belonging to defendants 3 and 4 and their five annas' share in the Managing Agency business on payment of the full consideration money as contemplated by section 15 of the Specific Relief Act By his judgment delivered on 14th August, 1944, Mr. Justice Sen negatived the various contentions of the defendants and substantially accepting the plaintiffs' story as correct, gave them a decree Although the claim against Gobordhan Das was abandoned, it appeared that due to oversight the suit was decreed against him as well in respect of his 19 shares in the sugar mill and his fractional interest in the partnership firm There were two appeals taken against this decision, one by defendant No 1 and the other by defendants 3 and 4 Both the appeals came up for hearing before an appeal bench, consisting of Gentle and Das, JJ The appeal of defendant No 1 was not resisted by the plaintiffs, and it was allowed and the decree of Sen, J , so far as it affected the defendant No. 1, was set aside The appeal of defendants 3 and 4

was heard fully on its merits and the learned Judges, by their judgment dated 18th of June, 1946, dismissed the appeal and affirmed the judgment of Sen, J., with this modification that agreeably to the decision in the other appeal, the decree for specific performance was to be confined to 250 shares belonging to defendants 3 and 4 and their five annas' share in the firm of Marwari Brothers and these shares and interests were ordered to be transferred to the plaintiffs on payment of the full consideration money stipulated in the original agreement Against this decision, the defendants 3 and 4 applied for and obtained leave to appeal to the Privy Council, but as before the records could be transmitted to England the jurisdiction of this Court was enlarged by Act I of 1948, the appeal has come up for hearing before us It may be noted that Madanlal, the defendant No 4, died after this appeal was admitted and his mother and heiress Dhupeswari Debi has been substituted in his place

Sir Tek Chand, who appeared in support of the appeal, has contended before us, firstly, that there was no complete or concluded agreement in the present case which could be specifically enforced The correspondence between the parties, it is said, would show that the parties were still negotiating in regard to the terms of the contract and no finality had been reached His second argument is that the whole basis of the agreement between the parties was that all the four persons, who represented, what has been called the Pedrona group of partners, would join in transferring their shares and interests to the plaintiffs This being the essential condition of the contract, no perfected agreement could come into being so long as Badri Prosad stood out and did not join in the agreement The third contention raised by the learned counsel is that the contract being joint and indivisible, it was not open to the plaintiffs to claim relief against some of the parties to the contract to the exclusion of the rest Lastly it is said that as damages would be an adequate remedy in a case like this, no decree for specific performance should have been given

So far as the first point is concerned, Sir Tek Chand argues that the letters exchanged between the parties or their Solicitors subsequent to 1st January, 1941, would clearly show that there was no completed agreement on that date It is said that when there is no document in writing signed by the parties and the contract has got to be gathered from a series of letters exchanged between them, the whole of the correspondence must be looked at It is not permissible to stop at one particular point and say that there was a concluded agreement, when the subsequent correspondence might disclose that the letters relied on were merely part of an incomplete negotiation In support of this contention Sir Tek Chand relies upon the decision of the House of Lords in the well-known case of *Hussey* v *Horne-Payne*[1] We do not think that the principle of law enunciated in that case, and about the correctness of which there could hardly be any doubt, is of any assistance to the appellants In *Hussey* v *Horne-Payne*[1], there was an action for specific performance of a contract for sale of land. To prove the contract in accordance with the requirements of the Statute of Frauds, the plaintiff relied on two letters which seemingly concluded a contract of the sale in the sense that the property to be sold was specified and the price to be paid as well as the names of the vendor and purchaser were mentioned It transpired from the evidence that in the previous negotiations there was a verbal suggestion by one of the parties which was acquiesced in by the other that the purchase money should be paid by instalments What these instalments would be were left to be settled later on There was subsequent correspondence between the parties in the matter of fixing the instalments, but before any final decision could be reached, one of the parties died It was held that, in these circumstances, there was no completed agreement between the parties which could be specifically enforced. Lord Cairns in course of his judgment observed as follows

"We have here the appellant himself telling us that the two original letters, which, if you took them alone without any knowledge supplied to you of the other facts of the case, might lead you to

1 (1879) 4 A C 311

think that they represented and amounted to a complete and concluded agreement, yet really were not a complete and concluded agreement, that there were to be other terms which at that time had not been agreed upon, that efforts were made afterwards to settle those other terms, and that these efforts did not result in a settlement of these other terms The consequence therefore of the whole is, that it appears to me not only that there is no note in writing, according to the Statute of Frauds, of that which was a completed agreement between the parties, but that there was in point of fact no completed agreement between the parties "

This decision cannot possibly help the appellant Here we have not to spell out a contract from a bundle of letters According to the evidence of Bhuramull which stands uncontradicted and has been accepted as correct by both the Courts below, there was an oral agreement finally concluded between the parties, acting through their representatives at the interview in Calcutta on 1st of January, 1941. The terms of this contract, according to the plaintiffs, are those set out in the letter of P. D Himatsingka & Co , dated the 2nd of January, 1941, which were confirmed by Khaitan & Co , and on behalf of the plaintiffs by their letter addressed to Himatsingka on the day following. What Sir Tek Chand attempts to show is, that by this letter Khaitan & Co wanted to introduce certain new terms in the contract which were not mentioned in the letter of P. D Himatsingka There were further correspondence and negotiations between the parties since then and as the parties were not *ad idem* on these terms no concluded contract could possibly come into existence We do not think there is any substance in this contention. Khaitan & Co addressed their letter of 2nd/3rd January, 1941, to P D Himatsingka & Co , in the following manner :

" Dear Sirs,

Adverting to your letter No B-24 of the 2nd instant addressed to your clients, please note that we have been instructed to confirm the arrangement therein referred to We wish to make clear the following points which have also been arranged "

Then followed eight clauses which set out the different terms upon which the parties, according to this letter, had already come to an agreement It is admitted that there are two new matters in this letter which did not find a place in the letter of P. D Himatsingka & Co , and with regard to which there was no agreement between the parties before One of these relates to the claim against Mirless Watson & Co , and the other to the liability of the parties regarding the stamp duty to be paid on the transfer deeds Regarding the claims against Mirless Watson & Co , it appears from a letter of Himatsingka, dated 8th January, 1941, that although there was no express reference to this matter in any previous negotiation, it was implied in the agreement that the purchasers would get all the benefits of the vendors appertaining to the shares and interests transferred by them and consequently the benefits of this claim also would go to the purchasers This point, therefore, is of no importance and it cannot be said that the parties were not *ad idem* on this point As regards stamp duty, it is not disputed that there was no previous talk between the parties on this point, though ordinarily and as a matter of law in case of transfer of shares it is the vendor by whom the stamp duty is payable It must be held on the evidence adduced in this case that on the question of stamp duty there was no agreement between the parties on the 1st of January, 1941, and they did not intend to make it a term of the bargain at all Khaitan & Co were apparently labouring under a mistake when they stated in the letter mentioned above that it was already arranged that the stamp duty was payable by the clients of M/s Himatsingka This being the position, the question arises whether or not there was a concluded agreement between the parties on the 1st of January, 1941 In our opinion, the answer would clearly be in the affirmative In *Hussey* v *Hornepayne*[1], it was established by oral evidence as well as from the subsequent correspondence between the parties that all the terms of the contract were not contained in the two letters on the basis of which the action was brought The parties intended that the instalments in which the purchase money was to be paid should be an essential part of the bargain and yet there was no agreement on this point either prior or subsequent to the two letters upon which the contract was founded In

1. (1879) 4 A C 311.

the case before us, it must be taken that nothing was proposed or mentioned at the time when the contract was entered into, regarding the payment of stamp duty on the deeds of transfer It was not an essential part of the bargain nor was it intended to be so There was agreement between the parties on the terms which are necessary in law to constitute a contract of sale and there was agreement on other terms as well which they themselves considered material The question of stamp duty was not one of the terms of the agreement and if Khaitan & Co mistakenly and quite unnecessarily introduced this matter in the letter referred to above, that cannot affect the completed agreement already arrived at

If after a contract is concluded and its terms settled further negotiations are started with regard to new matters, that would not prevent full effect being given to the contract already existing, unless it is established as a fact that the contract was rescinded or varied with the consent of both the parties or that both parties treated it as incomplete and inconclusive Once completed, the contract can be got rid of only with the concurrence of both parties Sir Tek Chand did not make any serious attempt to show that the contract which was entered into on the 1st of January, 1941, was rescinded or re-opened with the consent of both parties subsequently The material evidence, which has been discussed fully in the judgment of Gentle, J , clearly proves that Messrs Khaitans' letters of 2nd/3rd January, 1941, did not affect in any way the agreement in suit Himatsingka, by his letter of 8th January, 1941, definitely told his clients that under the law the seller would be liable to pay the stamp duty on transfer deeds and as the matter was not discussed with the purchasers at any previous stage, it would be difficult to realise the cost from the latter The subsequent refusal of defendant No 1 to comply with the agreement was not on the ground that the agreement had terminated by reason of any new term being sought to be introduced by the purchaser, and there is clear evidence to show that in spite of the letter of Messrs. Khaitan & Co. the defendants 3 and 4 strongly insisted upon the contract being carried out

An attempt was made by Sir Tek Chand to raise a contention on the authority of the English decision in *Bristol, Cardiff, and Swansea Aerated Bread Co.* v *Maggs*[1], where Kay, J , went to the length of saying that if after a contract is concluded, one of the parties starts fresh negotiations with a view to introduce new terms, then even if the subsequent negotiations fail, it would be inequitable to allow the party, who attempted to re-open the contract, to enforce it specifically This view seems manifestly unsound and has been expressly dissented from in later cases ; vide *Bellamy* v *Debenham*[2] and *Perry* v *Suffields*[3] As a matter of fact, the decision is based not on the ground of the contract being incomplete and not final, but on the ground of some equitable estoppel which was deemed to arise by reason of the conduct of the plaintiff Even assuming the decision to be sound, the appellants would get little comfort from it Here the new term sought to be introduced by the plaintiffs' solicitor was only done under a mistake but it had no effect whatsoever in altering the conduct or position of the defendants in any way In these circumstances, the first contention raised by Sir Tek Chand cannot possibly succeed

As regards the second point, the argument of Sir Tek Chand is that in the present case it was the common intention of the parties and condition of the contract that all the defendants, including Badri Prosad, should join in the agreement. As Badri Prosad did not join, no contract in fact came into existence and there could be no liability on the part of any of the other persons, even though they entered into the agreement In support of this contention, the learned counsel relies upon the following statement of law in Halsbury's Laws of England (Second Edition), volume VII, page 72 —

"Where a promise is intended to be made by several persons jointly, if any one of such persons fail to enter into the agreement there is no contract and no liability is incurred by such of them as have entered into the agreement"

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1 (1890) 44 Ch D 616.
2. (1890) 45 Ch D 481.
3. (1916) 2 Ch 187.

We have been referred to a number of decisions, both English and Indian, where this principle has been applied and stress has been laid by the learned counsel upon a passage in the judgment of Sir George Jessel in *Luke* v *South Kensington Hotel Company*[1] where the learned Master of Rolls observed as follows —

> "It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute, and consequently on that ground the deed could not have bound the two"

In a recent pronouncement of the House of Lords in *Naas* v *Westminster Bank, Ltd*[2], it was held that these observations of Sir George Jessel could not rank higher than *obiter* and that the law stated therein is too broad and general to be of any service It is to be noted that Sir George Jessel in this passage speaks of an equitable principle When parties enter into an agreement on the clear understanding that some other person should be a party to it, obviously no perfected contract is possible so long as this other person does not join the agreement This would be the position in law apart from any rule of equity The proposition laid down by Sir George Jessel goes much further than this He speaks of two persons executing a deed on the *faith* that a third will do so and if this is known to the other party, equity will refuse to fasten any liability on the executing parties if the third party does not join in the act It has been pointed out in the judgment of the various Law Lords who decided the case of *Naas* v *Westminster Bank, Ltd*[2], that there is much that is indefinite and vague in the words of the learned Master of Rolls The word "faith" cannot be taken to refer to a mere subjective expectation or intention in the mind of a particular party It must be a matter not of conjecture but of positive proof, and in order that a relief might be claimed in equity, it is necessary to prove that substantial injustice would result if the deed is enforced unconditionally against the executing parties Relief, therefore, could be given in those cases where the strict enforcement of law would lead to the executing parties being saddled with heavier liability than they otherwise would incur or would make the transaction substantially different from what it would have been if all the parties had joined

The law being thus fairly well settled, it is difficult to see how on the findings concurrently arrived at by both the courts below the appellants can make out a case which would enable them to call into aid the principles mentioned above

It cannot be disputed that the plaintiffs all along desired to secure the whole lot of shares that was held by the Pedrona group and it was certainly to their interest to do so, as otherwise the cause of dissension would not be entirely removed The three defendants on their part, when they signed the letter dated the 28th of December, 1940, addressed to Himatsingka, agreed to sell all the 350 shares including the shares held by Badri Prosad.

Whether Gobordhan Das thought rightly or wrongly that he had authority to dispose of the shares standing in the name of his brother as well, is not material for our present purpose All that we can say is this that there is nothing in this letter which would show that it was the intention of the signatories that they would sell their shares and interests to the plaintiffs if and only if Badri Prosad sold his Badri Prosad was not in the picture at all and although Gobordhan Das apparently agreed to sell his shares as well, there is no evidence of any understanding, either express or implied, even amongst the defendants *inter se* that unless Badri Prosad actually came and joined the agreement, the contract would not be perfect or complete. None of the defendants or even their solicitor was examined as a witness in this case and no questions on this point were put to the plaintiffs' witnesses during their cross-examination The letter of 28th December, 1940, if it shows anything shows unmistakably that the vendors were anxious to dispose of their shares by any means possible and they did not care whether the shares were purchased by Khaitans or anybody else The letter of both the appellants written

1 (1879) 11 Ch D 121 at 125. 2 (1940) A.C 366

to Himatsingka on the 5th of January, 1941, practically clinches the matter and proves conclusively that the promise to sell their shares and interests in the business was not in any way dependent upon anybody else's joining with them in the transaction Thus there was no intention on the part of the defendants that the contract would not be binding unless Badri Prosad became a party to it and there has been no suggestion made on behalf of the appellants either here or in the courts below that any injustice would be done to them if they are compelled to perform the agreement which they made On the other hand, as the trial Judge has rightly observed, it would be doing very great injustice to the plaintiffs if the defendants are allowed to resile from the contract. The second contention of the appellants must, therefore, fail

The third point raised by the appellants does not appear to us to be at all sound The argument is that the contract being joint and indivisible, it was not open to the plaintiffs to give up one of the defendants and proceed against the other two In our opinion, section 43 of the Indian Contract Act is a complete answer to this contention Unlike English law the Indian law makes all joint liability, joint and several, in the absence of any agreement to the contrary. It is, therefore, open to the promisee to sue any one or some of the joint promisers and it is no defence to such a suit that all the promisers must have been made parties As the plaintiffs in this case prayed ultimately for specific performance of a part of the contract in the manner contemplated by section 15 of the Specific Relief Act and expressed their readiness to pay the entire consideration for 350 shares, the appellants are not prejudiced in any way

The fourth and the last point is not of any substance. The subject-matter of contract in the present case consists of certain shares in a private limited company and a fractional interest in a partnership business Illustration (iii) under clause (C) of section 12 of the Specific Relief Act clearly shows that when shares are limited in number and are not ordinarily available in the market, it is quite proper to grant a decree for specific performance of a contract for the sale of such shares. Specific performance is undoubtedly a discretionary remedy but we are totally unable to say that the discretion has been wrongly exercised in the present case by the Courts below.

The result is that all the contentions raised by Sir Tek Chand fail and the appeal stands dismissed with costs.

V. S. ——— *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the Supreme Court of East Africa)

PRESENT :—LORD PORTER, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Fatma Binti Hafidh . *Appellant**

v.

The Administrator-General, Zanzibar Protectorate *Respondent.*

Mahomedan Law—Legitimacy—Proof—Admission of paternity—If and when sufficient—Acknowledgment—Requirements of

Where no marriage is shown to exist or where the concubine is not a slave concubine, the mere admission of paternity is not enough for the purpose of affording proof of legitimacy, the treatment must be such as to convey the fact that the child is acknowledged not merely as the offspring of the father but as his legitimate offspring In default of such an acknowledgment the father may merely wish to admit that the child is his but not that it is legitimate or that he intends to make it so

Once however a marriage is established an acknowledgment of paternity is enough

[In this case as the mother of the child could not have become the slave of the father by reason of the Slave Trade (Prohibition) Decree (1890) (East Africa) the admission of paternity was found not sufficient to prove legitimacy]

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*11th April, 1949.

Frank Gahan for Appellant.

Dingle Foot for Respondent.

Their Lordships' Judgment was delivered by

LORD PORTER —This is an appeal from a judgment of the Court of Appeal for Eastern Africa, dated 5th October, 1946, which reversed the judgment of the High Court of Zanzibar given in favour of the appellant and dismissed her action with costs.

The appellant claimed that she was the daughter of Hafidh bin Muhammad el-Busaidi (hereinafter called Hafidh) and of his slave concubine Panya and as such, under the law of the Ibadhi sect of which her parents were members, to be entitled to her share of her father's estate.

Her mother was originally the slave of Hafidh's mother, Binti Juma, and was said to have been given by her as a slave concubine or "suria" to her son.

It is common ground that in order to establish such a claim it must be proved, (1) that the mother was given to the father as a concubine and slave, (2) that by reason of the gift the woman given must have ceased to be the slave of the original owner and have become the slave of the man to whom she was given (3) that she must have been accepted by him as such, (4) that the claimant was the daughter of this union, and (5) that the alleged father must have recognised her as his daughter.

The evidence was conflicting upon all these points, but certain facts were found by the learned Chief Justice of Zanzibar and were in substance accepted by the Appellate Court. In these circumstances their Lordships would naturally follow these findings both because they are concurrent and because they represent the view of the Court which saw and heard the witnesses.

These facts are (1) that Binti Juma had given Panya as his slave concubine to Hafidh, (2) that he had accepted her in that capacity, and (3) that the appellant was the offspring of that union

The learned Chief Justice also found that by his conduct Hafidh had acknowledged the appellant as his daughter but this last finding is not a direct finding of fact but is derived partly from an inference drawn from the facts and partly from the law applicable to the circumstances

As to the law Mr Gahan contended that the appellant would establish her case if an acknowledgment of paternity could legitimately be drawn either from an actual admission or from the facts proved in evidence ; Mr Dingle Foot for the respondent on the other hand maintained that a mere admission of paternity would not be enough, there must be something from which an acknowledgment of the appellant as one of those entitled to share in his estate could be inferred and in any case the acknowledgment must be clear and could not be derived from inconclusive circumstances In regard to these contentions, their Lordships are not prepared to accept the view that anything more than an acknowledgment of paternity is required

It is true that in cases where the question to be determined is whether there has been a marriage between the parents, something more than a mere acknowledgment of paternity is required This principle is clearly stated in the head note to the judgment of the Board delivered by Lord Macnaghten in *Abdool Razack* v *Aga Mahomed Jaffer Bindaneem*[1], in the words

"The Mahomedan doctrine of legitimacy by acknowledgment does not apply to every case of admission of paternity an intention to confer the status of legitimacy must be found or presumed"

But the reason for this doctrine, as has been pointed out in that case and in the other two cases cited to their Lordships, viz , *Ashruffood Owlah Ahmed Hossein Khan* v. *Hyder Hossein Khan*[2] and *Habibur Rahman Chowdhury* v *Altaf Ali Chowdhury*[3],

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1 (1894) 4 M L J 131 L R 21 I A 56 · I L R 21 Cal 666

2 (1866) 11 M I.A 94

3 (1921) 40 M L J 510 . L R. 48 I A 114 : I L R 48 Cal 856 (P C)

is to be found in the possibility under Moslem law of proving the existence of a valid marriage in cases where no ceremony has been performed but evidence is adduced from which it appears that the parties intended to be united in the marriage bond The mere admission of paternity in no way establishes anything but a casual union and more is required to show the existence of the marriage bond if the existence of that bond is to be derived from association alone without any preceding ceremony The father may accept his parenthood without intending to make the child legitimate Once however a marriage is established an acknowledgment of paternity is enough Similarly, in their Lordships' opinion once it is proved that the relationship of master and slave concubine has been proved, a connexion is established which leads to the inference that the child is legitimate if its paternity is acknowledged

Moreover once a marriage is shown to exist or the nexus of master and slave concubine is proved the child's legitimacy may be established by proof of its treatment as the legitimate offspring of its father see *Ashruffood Owlah Ahmed Hossein Khan* v. *Hyder Hossein Khan*[1] On the other hand where no marriage is shown to exist or where the concubine is not a slave concubine, the mere admission of paternity is not enough for the purpose of affording proof of legitimacy, the treatment must be such as to convey the fact that the child is acknowledged not merely as the offspring of the father but as his legitimate offspring In default of such an acknowledgment the father may merely wish to admit that the child is his but not that it is legitimate or that he intends to make it so.

The question of the correct inference to be drawn from the facts is a matter of some difficulty

The evidence from which the Chief Justice drew the inference that the appellant's paternity had been acknowledged by Hafidh appears from a series of findings set out by him in numbered order and in the following terms (1) The plaintiff's mother was given as concubine to her alleged father. (2) The plaintiff's mother and alleged father subsequently cohabited in a house in Zanzibar. (3) The plaintiff was born in the house of the alleged father's mother (4) The plaintiff was not brought up by her mother, but was brought up in the house in which she was born and resided there until her marriage (5) The alleged father paid Rs 50 towards the plaintiff's education (6) The education was of a kind not usually given to the children of slaves (7) The alleged father was present at the plaintiff's marriage. (8) The plaintiff visited her alleged father shortly before his death in hospital All the members of the Appellate Court on the other hand took the view that the facts proved were inadequate to support such an inference

In Sir Norman Whitley, C J 's eyes they fell far short of establishing the necessary degree of probability Sir George Graham Paul, C J, found it impossible to accept the facts proved in evidence sufficient to establish that the plaintiff was the issue of the slave concubinage or that Hafidh in his lifetime acknowledged the appellant as his daughter by Panya. At any rate he found it quite impossible to accept them as proof of the alleged acknowledgment, and Bartley, J, took the same view

Admittedly the facts relied upon are somewhat scanty and the whole position would require careful analysis and consideration if their Lordships thought it necessary to come to a final conclusion on this point

As it is, however, they think that the case can be determined upon another ground and therefore whilst refraining from expressing any opinion upon the the inferences which ought to be drawn they are content to come to a decision upon the assumption that the facts proved in evidence were sufficient to establish an acknowledgment of paternity upon the part of Hafidh

If this assumption be made the immediate issue beween the parties is whether the gift by Binti Juma of Panya as a slave concubine was or was not prohibited

1 (1866) 11 M I A 94

by the law of Zanzibar at the time at which it was made. Some dispute arose in the course of the trial as to when that event took place and as to the law applicable but the learned Chief Justice of Zanzibar has found upon the evidence that the gift was made at a time not later than 1907 and therefore before the Slavery Decree of 1909 Their Lordships see no reason for differing from this conclusion.

Admittedly in these circumstances the law applicable is the Slave Trade (Prohibition) Decree of 1st August, 1890 That Decree is in the following terms :

3 " We declare that, subject to the conditions stated below, all slaves lawfully possessed on this date by our subjects shall remain with their owners as at present Their status shall be unchanged "

4 " We absolutely prohibit from this date all exchange, sale or purchase of slaves, domestic or otherwise There shall be no traffic whatever in slaves of any description Any houses heretofore kept for traffic in domestic slaves by slavebrokers shall be for ever closed and any person found acting as a broker for the exchange or sale of slaves shall be liable, under our orders, to severe punishment, and to be deported from our dominions Any Arab or other of our subjects hereafter found exchanging, purchasing, obtaining or selling domestic or other slaves shall be liable under our orders to severe punishment, to deportation, and the forfeiture of all his slaves Any house in which traffic of any kind in any description of slave may take place shall be forfeited "

5 " Slaves may be inherited at the death of their owner only by the lawful children of the deceased If the owner leaves no such children, his slaves shall, *ipso facto*, become free on the death of their owner "

9 " Every slave shall be entitled, as a right, at any time henceforth to purchase his freedom at a just and reasonable tariff to be fixed by ourselves and our Arab subjects The purchase money on our order shall be paid by the slave to his owner before a Kathi, who shall at once furnish the slave with a paper of freedom, and such freed slaves shall receive our special protection against ill-treatment This protection shall also be specially extended to all slaves who may gain their freedom under any of the provisions of this Decree "

In conformity with the provisions of Cl 3 of that Decree all slaves then lawfully possessed remained the property of their owners and their status was unchanged. The question at issue is a different one, *viz*, what (if any) rights of disposition were retained by the owner after the promulgation of the Decree.

For the appellant it was contended that only commercial dealings were affected, that gifts certainly and possibly even the private exchange or transference of slaves from one owner to another were not prohibited In this contention the overriding consideration was the use of the word " traffic " in the second and last sentences of Cl. 4 It was the business houses used for slave broking which were to be closed and those who used them for that purpose who were to be subject to the penalties imposed It would be odd, said the supporters of this view, if the private gift from one subject of Zanzibar to another should suddenly become illegal and the giver and receiver liable to the threatened penalties including the possible forfeiture of all their slaves. If such a result was intended clear words should have been used. No doubt these arguments merit careful consideration, but in their Lordships' opinion they must be rejected The Decree was promulgated as one of the steps leading ultimately to the total abolition of slavery No minimum penalty was prescribed and in order to mitigate its immediate harshness, owners were left with the slaves which they then possessed, but any profit to be obtained from dealing with them was in terms prohibited Their Lordships see no reason for limiting the effect of the clause so as to make it apply to commercial transactions only. They think its wording applies to all transactions and find support for this view in Cl 5 which allows slaves to be inherited by lawful children, but if there are no such children sets the slave free

Their Lordships cannot accept the view that this provision could be defeated by means of a gift of his slaves made by an owner upon the approach of death or when he had reached an advanced age If it were so, the whole provision that slaves are to be freed on the death of their master, unless they pass to his lawful children, might be defeated by a gift to any one before the master's decease.

Upon this point their Lordships agree with the views of the learned trial Judge and Sir George Graham Paul, and for the reasons they have given with all respect differ from those of Sir Norman Whitley

There remains, however, for consideration the difficulty felt by the Chief Justice of Zanzibar that though the giving of the slave might be illegal, yet the respondent, who stood in the shoes of Hafidh, could not take advantage of an act of illegality in which the latter was fully and deliberately implicated

In their Lordships' opinion this approach to the question is to regard the matter as if it were merely a contract or dealing between two persons and they alone were implicated In the view of the Board so to treat the matter is to forget that the decision depends not upon contract but upon status It is accepted by both parties that the appellant's legitimacy or legitimation cannot be established unless her mother became the slave of Hafidh as well as his concubine. It is not enough that she was his concubine and the appellant the daughter of that union, unless she also legally ceased to be the slave of Binti Juma and became the slave of Hafidh If then the decree of 1890 prohibited her passing from the one to the other she never could become the slave of Hafidh and one of the necessary precedents to the success of the appellant's case is lacking.

In so regarding the matter their Lordships find themselves in agreement with the Chief Justice of Tanganyika and do not find it necessary to express an opinion upon the soundness of the further reason which led him to the same conclusion, *viz*, that the dispute in question did not concern the administration as representing the deceased man, but as representing his legitimate children

Whatever may be the true view as to this and the other matters left undetermined, their Lordships are of opinion that Panya never became the slave of Hafidh and therefore the appellant cannot succeed in this appeal They will humbly advise His Majesty that it should be dismissed with costs

Solicitors for Appellant *Messrs. Charles Russell & Co*

Solicitors for Respondent *Messrs Burchells.*

K S ——— *Appeal dismissed.*

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Canada)

PRESENT —VISCOUNT SIMON, LORD PORTER, LORD DU PARCQ AND LORD MACDERMOTT

William Yachuk and another . *Appellants* *

v.

The Oliver Blais Co , Ltd . *Respondent*

Tort—Negligence—Employee selling petrol to infants—Explosion caused by the infants playing with lighted torches soaked in the petrol—Injury to infants—Liability—Contributory negligence—If available as defence

To put a highly inflammable substance into the hands of a small boy is to subject him to temptation and the risk of injury and this is no less true if the boy has resorted to deceit in order to overcome the supplier's scruples The child's deceit can afford no excuse to the supplier when it is found that the story told was such as to arouse, rather than allay, suspicion in the mind of a reasonable man

Lynch v *Nurdin*, (1841) L R 1 O B 30 at p 38, applied

The defendants' employee sold a small quantity of gasoline to a boy of nine years of age on his saying that it was required for his mother's motor car which was stuck down the street But the boy really wanted and used the gasoline for playing a red Indian scene with torches and was injured in the explosion caused

Held, the defendants were liable for damages In the circumstances the boy could not be found guilty of contributory negligence

Messrs Kenneth Diplock and *Quintin Hog* for Appellants.

Mr Frank Gahan for Respondent.

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* 11th April, 1949

This Lordships' Judgment was delivered by

LORD DU PARCQ —William Yachuk, an infant who sued by his father as next friend, and Tony Yachuk (the father suing in his own right) were plaintiffs, and the Oliver Blais Company, Limited, was defendant, in an action begun in January, 1943, in the Supreme Court of Ontario. Two other defendants who were also sued are no longer concerned in the proceedings, and no further reference need be made to them The plaintiff's claim was for damages for negligence and breach of statutory duty Of the alleged breach of statutory duty all that need now be said is that no argument was addressed to their Lordships in support of that head of the claim The negligence alleged consisted in supplying the infant plaintiff, then a child of nine years of age, with a small quantity of gasoline with the result that he suffered injury, and his father was put to expense. The first hearing of the action was abortive, as a new trial was ordered on appeal The case was ultimately tried by Urquhart, J , who, for reasons which are now irrelevant, discharged a jury before whom the hearing had begun, and proceeded to hear and determine the case without their assistance The learned Judge found that there was negligence on the part of the defendant Company, and that its negligence was a cause of the injuries which the infant plaintiff had sustained. He futher found that there was contributory negligence on the part of the infant plaintiff He assessed the damages at $ 8000 in respect of the infant plaintiff and $ 2712·75 in respect of the adult plaintiff, but inasmuch as he regarded the infant plaintiff as " seventy five per cent responsible " for his own injuries, he apportioned the damages, as between the defendant Company and each of the plaintiffs, in proportion to the degree of negligence so found It was therefore adjudged that the infant plaintiff should recover $ 2000 and his father $ 678·19 The question whether the terms of the Negligence Act (R S O No 1937, C 115) could justify, on any view of the facts, this reduction of the damages awarded to the father does not appear to have been argued before the learned Judge It was answered in the affirmative by two Judges of the Supreme Court of Canada. As will appear, no other Judge had occasion to pronounce on it, and their Lordships have not found it necessary to consider it

The plaintiffs appealed, and the defendant cross-appealed, to the Court of Appeal for Ontario A Judgment, with which Robertson, C J O and Roach, J A , expressed their agreement, was delivered by McRuer, J A The appeal of the plaintiffs was allowed, the Court holding that the defence of contributory negligence failed. The cross-appeal was dismissed The order of the Court was that judgment should be entered for the full amounts at which Urquhart J , had assessed the damages, without deduction.

From this order the defendant appealed to the Supreme Court of Canada. Of the five Judges who heard the appeal, two, the Chief Justice of Canada and Kerwin, J , were of opinion that the appeal should be allowed and the action dismissed, holding that negligence could not be imputed to the defendant's salesman. The other three (Hudson, Rand and Estey, JJ) were all agreed that there was negligence on the part of the defendant's salesman, but whereas Hudson and Estey, JJ , thought that the trial Judge was right in his finding of contributory negligence, and in reducing the damages accordingly, Rand, J , agreed with the decision of the Court of Appeal for Ontario. In the result an order was made restoring the judgment of Urquhart, J.

This result satisfied neither plaintiffs nor defendant, and each side sought and obtained leave to appeal to His Majesty in Council, the defendant by way of cross-appeal

It is now necessary to set out in a little detail the relevant facts as they were found by the learned Judge at the trial. In the afternoon of 31st July, 1940, the infant plaintiff, who was accompanied by a younger brother then aged seven, went to the respondent's gasoline station in Kirkland Lake. A youth named Black, who was employed by the respondent, was then serving customers. The boys

bought from him five cents worth of gasoline It appears that the five cents were paid to Black by the younger boy but " the transaction " (the learned Judge found " was with the larger boy " who twice told Black that he wanted the gasoline to put in his mother's car which " was stuck down the street " Black who had been instructed that the gasoline in the pumps contained lead and ought not to be used for dry cleaning, then asked whether it was to be used for dry cleaning. The infant plaintiff replied that it was not and repeated that it was needed for his mother's car Black repeated his question and received the same reply The boys had provided themselves with a lard pail with a closely fitting, but removable, lid and Black, not without "real doubts and misgivings as to the propriety of his sale " (which in the learned Judge's view were justified) supplied them with about a pint of gasoline, half filling the pail That Black had doubts was indicated both by his question about dry cleaning and by the fact that before the boys had gone beyond recall he told the assistant manager about the sale and said " That's all right isn't it ?" The learned Judge attached importance to the fact that the gasoline was not supplied in a " safety container," but in a receptacle which he found to be unsafe

The story which the infant plaintiff told to Black was untrue The boys' mother was in fact ill in bed The five cents had been provided by her for the purchase of a confection known as chocolate milk The boys wanted the gasoline in order to make use of it in a game in which they proposed to play the part of Red Indians and to enact a scene which they had witnessed in a moving picture. For this purpose torches were required, and it had occurred to them that by soaking in gasoline some bulrushes which they had gathered and setting them alight with matches, satisfactory torches might be made They had failed to obtain the necessary gasoline from another station in the neighbourhood, where it had been refused at first because they brought with them a glass container, and later, when they arrived with the lard pail, because (the learned Judge thought) " they told a different story on this occasion " It was after the latter rebuff that they visited the defendant's station and were successful.

The sequel may be told in the learned Judge's own words

> " The boys took the pail of gasoline with which they started out in the general direction in which they had indicated that their mother's car was stranded They went to a lane, out of sight of the gas station and some distance away from it The infant plaintiff then sent his brother to the house for the bulrushes and some matches, and, when the brother returned, the infant plaintiff dipped one of the bulrushes in the pail of gasoline and handed the dripping bulrush to the smaller brother and then lighted it The bulrush in the brother's hand flared up and he, being frightened, tried to beat it out on the ground At that time, the boys were standing about four feet apeart with the pail of gasoline open, midway between them The gasoline in the pail, the boys say, caught fire from the bulrush with a swishing sound, although they say that when the bulrush was beaten on the ground there were no sparks "

The unhappy result was that " the infant plaintiff was most painfully and seriously burned."

On these facts the learned Judge found :

> " That under all the circumstances of the case, Black should have reasonably anticipated that the gasoline might be used for a dangerous purpose by these two young lads "

and held that his negligence contributed to cause the injuries which the infant plaintiff suffered

As appears from the summary of the proceedings at the beginning of this judgment, all the Courts in Canada have concurred in these findings, although the Courts of Appeal for Ontario went further, holding that contributory negligence could not be imputed to the infant plaintiff and that his injuries must be attributed solely to the negligence of the defendant It would be contrary to the well-known rule of practice by which their Lordships are guided to reject these concurrent findings of fact In their Lordships' opinion, it is hopeless to contend that there was not evidence to support the findings Not all the reasons given for them by the learned Judge seem to their Lordships to be equally convincing, but the evidence

taken as a whole in their view fully substantiates the conclusion at which both the Judge and the two appellate Courts in Canada arrived on these matters The rule as to concurrent findings is none the less applicable when the decision of a Court is not unanimous see *Robins* v *National Trust Co* [1], *Srimati Bibhabati Devi* v *Kumar Ramendra Narayan Roy*[2]

It was contended on behalf of the defendant, at their Lordships' bar, as it had been, without success, at the trial, that assuming its employee to have been negligent the subsequent acts of the infant plaintiff were the real cause of his injuries, and were an intervening cause, or *novus actus interveniens*, to which alone those injuries should be ascribed Alternatively the defendant relied on the finding of the learned Judge supported as it was by the judgment of the Supreme Court of Canada, that there was contributory negligence on the part of the infant plaintiff

The latter of these submissions accords with the judgment under appeal, and it is convenient to deal with it at once The negligence of the defendant consisted in putting into the hands of a small boy a dangerous substance with which a reasonable man, taking thought would have foreseen that the child was likely to do himself an injury The fact that the boy told an untruth in order to persuade Black to give him the gasoline, a fact on which the defendant's counsel much relied, cannot avail the defendant in view of the learned Judge's finding that Black's doubts as to the propriety of the sale were justified To put a highly inflammable substance into the hands of a small boy is to subject him to temptation and the risk of injury and this is no less true if the boy has resorted to deceit in order to overcome the supplier's scruples The child's deceit can afford no excuse to the supplier when it is found that the story told was such as to arouse, rather than allay, suspicion in the mind of a reasonable man In the circumstances, therefore, their Lordships think that McRuer, J A , was right in applying to this case the principle stated by Lord Denman, C J , in *Lynch* v *Nurdin*[3]

> " The most blamable carelessness of this servant having tempted the child, he (the defendant) ought not to reproach the child with yielding to that temptation He has been the real and only cause of the mischief He has been deficient in ordinary care , the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them His misconduct bears no proportion to that of the defendant which produced it "

The negligence of the defendant's servant in the present case may call for less severe condemnation than these words express the principle which they embody is none the less applicable.

Urquhart, J , was led to his finding of contributory negligence by the view which he formed as to the special characteristics of the infant plaintiff He found that the boy was " mentally alert " and " bright ", and said of him :

> " He would be quite capable of being guilty of contributory negligence in the abstract and also in respect of the handling of gasoline and gasoline fires He knew the dangers of matches His father had gasoline in his workshop which was attached to the house The (infant) plaintiff admitted that he had before the occurrence watched gasoline in his father's torch and had been with his father on a job or two, had seen his father lighting his torch and knew that there was gasoline in it, and had been told by his father to keep away from the torch His father would not allow the children into the workshop " (in which he worked as a plumber)
>
> " I have no doubt," the learned judge added, " that the boy fully appreciated that gasoline was a dangerous substance, and had considerable knowledge that it burned in no ordinary manner "

It was contended on behalf of the plaintiffs that the learned Judge's findings were illogical and inconsistent Black was negligent because he ought to have recognised that a boy of the age of the infant plaintiff not only lacked knowledge and experience, but was likely to have mischievous propensities.

These defects being characteristic of the normal boy, it was impossible (so ran the argument) to impute to this boy, whatever exceptional training or

1 (1927) A C 515 at 517 (1946) A C 508 at 521 (P C)
2 (1946) 2 M L J 442 L R 73 I A 246
3 (1841) 1 Q B 30 at 38

experience he might have had and however reckless he might appear to have been, any failure to take reasonable care for his own safety In other words, he could not be found guilty of contributory negligence

Their Lordships do not find it necessary to decide whether there is a necessary inconsistency, in all cases in which the defendant owes a duty to show special care in his dealings with a child, in a finding of negligence by the defendant coupled with one of contributory negligence by an infant plaintiff If the evidence had shown that the infant plaintiff in the present case had in fact greater knowledge of the dangerous properties of gasoline than would be imputed normally to a child of his age, a more debatable question would have arisen A careful examination of the evidence has satisfied their Lordships that the boy had no knowledge of the peculiarly dangerous quality of gasoline He knew, no doubt, than an object soaked in gasoline could be ignited with a match He did not know, and there is no evidence that he had ever been told, that gasoline was a volatile liquid capable of producing a highly inflammable vapour likely to burst into flame if heat were brought near it He knew (he said in his evidence) that "it would burn like a match . after you strike it" His father said that he had never warned him about gasoline, because he did not think that a boy could buy it The boy himself said, what is likely enough, that his father had told him to keep away from his gasoline torch, but that he was "pretty sure" that neither of his parents had ever warned him "to be careful with gasoline" On the evidence it is, in their Lordships' view, impossible to regard him as any more capable of taking care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be In the words of Denman, C J, although he may be said to have acted "without prudence or thought", he "showed these qualities in as great a degree as he could be expected to possess them" It is a fair inference from the evidence that it was the very property of gasoline which he neither knew, nor could be expected to know, which brought about his misadventure Their Lordships are accordingly of opinion, in agreement with the Court of Appeal for Ontario, that on the facts of this case the finding of contributory negligence cannot be supported

It follows from what their Lordships have already said that the attempt to attribute the disaster which happened solely to the acts of the infant plaintiff must fail. That defence cannot indeed be maintained in the light of the concurrent findings of fact in this case, for when once the negligence of the defendant's servant has been found to have contributed to cause damage to the plaintiff, it is impossible to say that a new cause has intervened so as to relieve the defendant of all responsibility for the evil consequences which followed his wrongful act Their Lordships will add, however, that even without regard to the rule of practice as to concurrent findings they would have had no difficulty in arriving at the same conclusion However the case is put, the answer made by McRuer, J A, in the Court of Appeal for Ontario seems to their Lordships to be conclusive in the light of the evidence :

"If one gives to a child an explosive substance, and the child, with a limited knowledge in respect to the likely effect of the explosion, is tempted to meddle with it to his injury, it cannot be said in answer to a claim on behalf of the child that he did meddle to his own injury, or that he was tempted to do that which a child of his years might reasonably be expected to do"

Their Lordships will humbly advise His Majesty that the plaintiffs' appeal should be allowed, the judgment and order of the Supreme Court of Canada set aside, the judgment and order of the Court of Appeal for Ontario of 19th December, 1944, restored, and the cross-appeal of the defendant dismissed The defendant must pay the plaintiffs' costs of the appeal to the Supreme Court of Canada and of the appeal and cross-appeal to His Majesty in Council.

Solicitors for Appellants *Messrs Ridsdale & Son.*

Solicitors for Respondents . *Messrs Lawrence Jones & Co*

K S. *Appeal allowed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras)

PRESENT.—LORD SIMONDS, LORD RADCLIFFE AND SIR MALCOLM MACNAGHTEN.

Sha Shivraj Gopalji — *Appellant* *

v.

Edappakath Ayissa Bi and others — *Respondents*

Civil Procedure Code (*V of* 1908), *section* 11—Res judicata—*Property of Mappilla tarwad held not liable to attachment in execution in earlier suit—Subsequent execution petition claiming that debtors had shares in the same property under Mappilla Marumakkattayam Act* (1938) (*Madras Act XVII of* 1939)—*Barred by* res judicata

Where in a suit to which the decree-holder was a party it has been held that the property of a Mappilla tarwad of which the judgment-debtors were members was not liable to attachment and the execution petition is dismissed it is not open to an assignee of the decree from the original decree-holder to claim in a fresh execution petition that the judgment-debtors were entitled to a share in the properties under the provisions of the Mappilla Marumakkattayam Act and ask for attachment of the debtors' rights in the property Such a claim is barred by *res judicata* as that is a point which the decree holder could have raised in the earlier proceedings but failed to do so

Cecil Havers and *P. V Subba Rao* for Appellant

Respondents *Ex parte*

Their Lordships' Judgment was delivered by

LORD SIMONDS —In this appeal, which is brought from a judgment and order of the High Court of Judicature at Madras setting aside a judgment and order of the Court of the Subordinate Judge of Cochin, the appellant claims that he is entitled to proceed in execution against certain properties of the respondents under circumstances which must be somewhat fully set out

The respondents are Mappilla Mohammadans of Malabar in the Province of Madras and are governed by the Marumakkattayam law under which descent is traced in the female line Their joint family like that of the local Hindus is known as a tarwad and the branches as the tavazhi Formerly the members of a tarwad had only a right of maintenance and could not enforce a partition of the family properties, but under the Mappilla Marumakkattayam Act, 1938 (Madras Act XVII of 1939), they can obtain a share of the properties by partition or alternatively have the tarwad properties registered as impartible.

The effect of the Act upon the property of a tavazhi is a question of difficulty upon which for reasons that will appear it is unnecessary for their Lordships to express any opinion

On 24th February, 1930, one Subbayya Ayyar in a suit brought in the Court of the Subordinate Judge of Cochin against the respondents and one Kunhammad Kutti Haji, since deceased, obtained a decree against them for Rs. 12,436 with interest and costs In the course of the suits, Subbayya Ayyar obtained an order for attachment of the immoveable properties of the respondents, which notwithstanding their objection was subsequently confirmed by the Subordinate Judge.

Thereupon certain members of the family of the respondents put in petitions in the suit praying that the attachment might be raised on the ground that the respondents had no saleable rights in the attached properties. Upon these petitions, they obtained no relief but were (in the terms of the note which is before their Lordships) "referred to an original suit". Accordingly the respondents with other members of their family brought a fresh suit against Subbayya Ayyar in the same Court claiming that the properties in question were not liable to be attached or sold in execution of the decree in the first suit The straight issue was thus raised, the defendant Subbayya Ayyar contending that the properties belonged absolutely to the respondents, while the plaintiffs, who included the present

* P.C Appeal No 93 of 1947 — 28th July, 1949.

respondents, contended that they belonged to a tavazhi, of which the respondents and others were members, and were not liable to be attached

In this suit the contention of the respondents and their co-plaintiffs was upheld by the Subordinate Judge of Cochin and his decision was affirmed by the judgment, dated 2nd March, 1938, of the High Court at Madras Thus there was a clear decision in a suit to which Subbayya Ayyar, through whom, as will appear, the appellant claims, and the respondents were parties, that the properties in question were not liable to attachment

On 25th September, 1919 (?), under circumstances which have not been made clear but, as is not to be disputed, for valuable consideration, the appellant obtained an assignment of the decree in the original suit from Subbayya Ayyar, and, having done so, on 26th January, 1940, filed an execution petition in the Court of the Subordinate Judge of Cochin for recognition of the assignment of the decree in his favour and for attachment of the rents and profits of the same immoveable properties belonging, as he alleged, to the respondents To this they objected, contending that the petition was barred by the judgment of the High Court of Madras of 2nd March, 1938 It had there been decided, they said, that the properties belonged to a certain tavazhi and could not be attached, and it followed that the rents and profits of the same properties could not be attached Upon this petition the Subordinate Judge on 16th September, 1940, made an order recognising the assignment of the decree but rejecting the prayer for attachment for the reasons given by the respondents From this order the appellant appealed to the High Court and before that Court for the first time relied on the provisions of the Mappilla Marumakkattayam Act, 1938, by virtue of which, as he alleged, the respondents had separate interests in the properties The High Court, which consisted of Sir Lionel Leach, C J and Lakshmana Rao, J , after observing that the Subordinate Judge had rightly dismissed the application, upon the new point made this comment .

"The learned counsel for the appellant has however attempted to advance a new case He says that under the provisions of the Mappilla Marumakkattayam Act, 1938, he has the right to attach and bring to sale the shares of the respondents in the tavazhi properties In the Court below no mention was made of this Act and in the memorandum of appeal there is no mention of it We are not prepared to allow the appellant to set up a fresh case To do so would be most unfair to the respondents."

It appears that counsel for the appellant had asked to be allowed to withdraw that application for execution and file a fresh one As to this the Court said

"The provisions of Order 23, Civil Procedure Code, do not apply to such applications, but whether the applicant is in law entitled to file a new application is another matter The question will be decided if and when such an application is made."

Accordingly the High Court by order of 28th October, 1942, dismissed the appeal

Thus there was, as it appears to their Lordships, a second clear judicial decision in proceedings, to which the present appellant and respondents were parties, that the properties in question were not liable to attachment.

The appellant, however, did not give up hope and on 12th January, 1943, filed a fresh petition in the Court of the Subordinate Judge praying for the attachment of the right, title and interest of the respondents in the properties He relied on the provisions of the Act of 1938 to which reference has been made To this petition the respondents objected They claimed that the matter was *res judicata* between the parties and set up other defences based on the Act of 1938 On 18th July, 1944, the Subordinate Judge passed a decretal order allowing the attachment of the right, title and interest of the respondents in the properties After noticing that the plea of *res judicata* had not been pressed but observing that in any case it was not a valid plea, inasmuch as the liability of the properies to attachment under the Act of 1938 had been raised for the first time in the High Court in 1942, which did not decide the question but left it for future decision, the learned Judge proceeded to examine the position created by the Act and came to the conclusion

that under and by virtue of its provisions the respondents had the right to sever their share of tavazhi property and accordingly had an interest which could be attached by a creditor

From this order the respondents appealed to the High Court of Madras and that Court on 9th January, 1946, allowed the appeal and set aside the order of the Subordinate Judge The judgment of the Court, which consisted of Horwill and Koman, JJ was based solely on the ground that the plea of *res judicata* was a valid one Taking the view, from which their Lordships do not dissent, that the plea, being a plea in law, was open in the appellate Court, though it had not been pressed in the lower Court, the learned Judges expressed the opinion that it succeeded

" No doubt " they said " the ground now urged that the assignee-decree-holder could proceed against the tavazhi properties under the Mappilla Marumakkattayam Act was not dealt with on merits in those previous proceedings, but that is a point which the appellant could have raised in his petition in those proceedings and he failed to do so We are of opinion therefore that the dismissal of the execution petition filed in 1940 operates as *res judicata* in the present case "

With these observations their Lordships fully concur The Act of 1938 had come into operation (if that is a relevant fact) before the earlier petition was filed. Through his own default the appellant did not raise whatever plea he could found upon it until it was too late to do so Apart from the provisions of section 11, Civil Procedure Code, it would be contrary to principle (see *Ram Kirpal Shukul* v. *Rup Kuari*[1], to allow him in fresh proceedings to renew the same claim *viz*, that the properties in question were properties of the respondents liable to attachment or, as he would now put it, that the respondents had severable interests in the properties which are liable to attachment, merely because he neglected at the proper stage in previous proceedings to support that claim by an argument of which he now wishes to avail himself Upon this ground, therefore their Lordships would dismiss this appeal, and it is not necessary for them to examine or pronounce any opinion upon the question, which seems to them by no means free from difficulty, what is the nature of the respondents' interest in the properties in question in view of the provisions of the 1938 Act and the course which has been taken under it to have the tarwad, of which the tavazhi appears to form part, registered as impartible. They would be reluctant in any case to express any views upon such a matter without the assistance of the High Court

In the circumstances it is sufficient to say that in their opinion this appeal cannot be sustained and they will humbly advise His Majesty accordingly The respondents have not appeared before their Lordships' Board but the appellant must pay such costs, if any as they have incurred in the appeal.

Solicitors for the Appellant . *Chapman Walkers*

Respondents *ex parte.*

K S ——— *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras)

PRESENT —LORD OAKSEY, LORD REID, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

Sree Meenakshi Mills, Ltd *Appellant* *

v

Provincial Textile Commissioner, Madras *Respondent*

Specific Relief Act (I of 1877), Section 45—Acts called in question taking place beyond the Original Jurisdiction of High Court—No Jurisdiction to give relief

Cotton Cloth and Yarn (Control) Order 1945—Clause 18-B (1) (b)—" Delivery "—Includes bailment of yarn for conversion into cloth and return—Power of Textile Commissioner to prohibit " delivery " of yarn and seize such yarn delivered in contravention of prohibition

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1 (1883) L R 11 I A 37 I L R 6 All 269 (P C)

P C Appeal No 6 of 1948. 13th July, 1949

The scope of Cotton Cloth and Yarn (Control), Order 1945 is very wide It relates to both dealers and manufacturers in their dealings with themselves or with outside persons, the object of directions issued under Clause 18-B being the proper distribution of cloth or yarn of a specified description The operation of that clause is not limited to dealings with the outside public only. The object of Clause 18-B is to prohibit *delivery* of cloth or yarn to any person, including delivery to a bailee Accordingly delivery of yarn by a mill to outside handloom weavers for being woven into cloth and returned to the mill will fall within clause 18-B (1) (*b*) of the Control Order

Where the yarn so delivered in contravention of the Textile Commissioner's order has been seized by the Provincial Textile Commissioner outside its Original Civil Jurisdiction the High Court has no jurisdiction to give relief under section 45 of the Specific Relief Act in respect of such seizures though the Textile Commissioner may have his office within the limits of the Ordinary Original Civil jurisdiction of the High Court

Sir Valentine Holmes, P V Subba Row and *A Rahman* for Appellant.

Sir Andrew Clark for Respondent

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR —This is an appeal by special leave from a judgment and order of the High Court of Judicature at Madras in its Civil Appellate Jurisdiction, dated 23rd April, 1946, which affirmed a judgment and order of the said High Court in its Original Civil Jurisdiction, dated 29th March, 1946

The appeal arises out of an application to the High Court of Madras made by the appellant, the Sree Meenakshi Mills Limited, under section 45, Specific Relief Act, 1877, against the respondent, the Provincial Textile Commissioner, Madras It concerns the validity of certain seizures made by the respondent of yarn belonging to the appellant

The material provisions of section 45, Specific Relief Act, are as follows :

"45 Any of the High Courts of Judicature at Fort William, Madras and Bombay may make an order requiring any specific act to be done or forborne, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or temporary nature, . . . provided

(*a*) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act,

(*b*) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character . ,

(*c*) that in the opinion of the High Court such doing or forbearing is consonant to right and justice,

(*d*) that the applicant has no other specific and adequate legal remedy, and

(*e*) that the remedy given by the order applied for will be complete

Nothing in this section shall be deemed to authorise any High Court—

* * * * * *

(*h*) to make any order which is otherwise expressly excluded by any law for the time being in force"

The application came to be made in the following circumstances :

The appellant is a limited liability company and carries on cotton-spinning and weaving business in Madura It spins yarn and weaves it into cloth with about 80 handlooms installed in the mill premises These not being sufficient to weave all the yarn produced by the mill, the services of handloom weavers outside the mill are engaged by the appellant Of these outside weavers, some carry on business in the neighbourhood of Madura, and others in the neighbourhood of Rajapalayam, about 60 miles distant from Madura The appellant hands over to these weavers extra yarn produced at the mills in order that it may be woven into cloth by the said weavers for the appellant and be brought back to the mills as finished cloth The outside weavers are paid piece rates, i e, according to the quantity of cloth which they produce The transaction between the appellant and outside weavers is not a transaction of sale or a transaction in which the property in the yarn passes to the persons to whom it is entrusted Both the yarn and the cloth made out of it belong to the appellant It is common case that the transaction is one of bailment of the yarn made under a contract by which outside weavers

undertake to do certain work in relation to the yarn so bailed The business has been carried on by the appellant in this manner since 1944

On 20th February, 1946, the respondent issued an order under clauses 18-B (1) (*b*), Cotton Cloth and Yarn (Control) Order, 1945—hereinafter referred to as "Control Order"—directing the appellant to confine the delivery of yarn to three categories of persons, namely Licensed yarn dealers (in accordance with . . clause 18-A of the Control Order) (*b*) To consumers who purchased yarn directly from the appellant during the basic period 1940-42 (*c*) Persons working the appellant's handlooms erected in the appellant's spinning mill at Madura.

Clauses 18-A and 18-B of the Control Order are as follows

" 18-A (1) No manufacturer shall, save in accordance with a general or special permission of the Textile Commissioner or in compliance with a direction given under clause 18-B—

(*a*) sell or agree to sell cloth or yarn to any person who—

(*i*) is not a licensed dealer under the rules framed in this behalf by the Provincial Government, and·

(*ii*) did not as a dealer buy any cloth or yarn from him at any time during the years 1940, 1941 and 1942,

(*b*) during any quarter deliver to any dealer, whether in pursuance of a pre-existing contract or otherwise, cloth or yarn in excess of his quota determined under sub-clause (2)

(2) For the purposes of sub-clause (1) (*b*), a dealer's quota of cloth shall bear to the value of the total deliveries of cloth made to all dealers during the quarter by the manufacturer concerned the same proportion as the value of the total deliveries of cloth made to that dealer during the years 1940, 1941 and 1942 bore to the value of the total deliveries made to all dealers during the same years by the same manufacturer, and a dealer's quota of yarn shall be similarly determined

(3) Every manufacturer shall maintain a register of contracts and deliveries and shall submit returns in such form and at such time as the Textile Commissioner may prescribe

18-B (1) The Textile Commissioner may, with a view to securing a proper distribution of cloth or yarn or with a view to securing compliance with this order, direct any manufacturer or dealer, or any class of manufacturers or dealers—

(*a*) to sell to such persons such quantities of cloth or yarn as the Textile Commissioner may specify,

(*b*) not to sell or deliver cloth or yarn of a specified description except to such person or persons and subject to such conditions as the Textile Commissioner may specify,

(*c*) to furnish such returns or other information relating to his or their undertaking, and in such manner, as the Textile Commissioner may specify, and may issue such further instruction as he thinks fit regarding the manner in which the direction is to be carried out

(2) Every manufacturer or dealer shall comply with the directions and instructions given under sub-clause (1) "

It will be observed that the order passed under 18-B (1) in effect prohibits the appellant from delivering yarn to owners of handlooms outside the mill premises. Despite the prohibition the appellant continued to deliver yarn to such owners in order (as already mentioned) that they might turn the yarn into cloth and bring the article back to the mills The respondent considered this to be an infringement of his order of 20th February, 1946, and seized certain quantities of yarn which had been delivered to the outside weavers

In the above-mentioned circumstances the appellant filed the petition under section 45, Specific Relief Act (already mentioned) in the High Court of Madras for directions to the respondent

" (1) to desist from seizing yarn supplied by the appellant to the weavers at or around Madura and Rajapalayam for the purpose of converting the yarn into cloth, (2) to restore to the applicant yarn already seized, (3) to forbear from seizing yarn that might be entrusted to the weavers by the applicant in the usual course of business according to the practice obtaining for conversion of yarn into cloth and for costs "

As may be seen from the affidavits filed, the main contention of the appellant was that the object of the delivery of yarn to the outside weavers was not to transfer property to them, but was only for the purpose of weaving the yarn into cloth, in other words, the delivery was by way of bailment, which would not be delivery which can be prohibited by an order issued by the Textile Control Officer.

It was contended on behalf of the respondent that he was within his rights in issuing the order and that the delivery of yarn by the appellant to outside weavers fell within its scope It was also contended, that the application was not maintainable under section 45, Specific Relief Act, and that the appellant was not entitled to any relief under it.

Kunhi Raman J, upheld the contentions of the respondent and dismissed the petition. The learned Judge held that the word "deliver" in clause 18-B (1) (*b*) must be understood in its ordinary sense in the absence of a special notification to the contrary, and if it is understood in this sense it would include delivery of any nature that can be controlled by the Textile Commissioner He also held that the Court had no jurisdiction to give relief to the appellant under section 45, Specific Relief Act as the seizures called into question were made beyond the limits of the Ordinary Original Civil Jurisdiction of the High Court, and further, that even if an order in favour of the appellant was made, it would prove futile as it could be frustrated by a positive direction made under sub-clause (*a*) of clause 18-B (1).

On appeal, the learned Chief Justice and Lakshmana Rao, J, held that the delivery of yarn by the appellant was in contravention of the respondent's order and dismissed the appeal The learned Judges did not consider the other grounds dealt with by Kunhi Raman, J

Two questions arise for determination before the Board These are (1) does the delivery of yarn to outside handloom weavers in the present case fall within clause 18-B (1) (*b*) of the Control Order? (2) Is the application out of which the present appeal arises maintainable under section 45, Specific Relief Act?

Question No. 1—The word "deliver" used in clause 18-B (1) (*b*) has not been defined anywhere in the Control Order. In the absence of any special explanation of the term limiting its meaning it must be understood in its ordinary sense of handing over of possession which would include delivery of possession to a bailee. If so understood there is no doubt that the delivery of yarn in the present case can be controlled by the respondent The learned counsel for the appellant, Sir Valentine Holmes, however, argues that the respondent acting under clause 18-B (1) (*b*) can control only the delivery of yarn on alienation, and not delivery to a bailee as in the present case, who cannot claim property in the yarn delivered to him by the appellant In this connection, their Lordships' attention was drawn to the meaning of the term "delivery" given in Benjamin on Sale, 7th edition, page 711, where the following statement occurs

> "There is no branch of the law of sale more confusing than that of delivery The word is unfortunately used in very different senses —(1) The word delivery is sometimes used with reference to the passing of the property in the chattel, sometimes to the change of its possession, in a word it is used in turn to denote transfer of title or transfer of possession"

(Reference was also made to Pollock and Wright on Possession in Common Law, p 58)

The learned counsel contends that the word "deliver" used in the clause indicates passing of property, *i e*, transfer of title in the article delivered, in other words, the clause would apply only to a delivery by which property passes in the article. To use his own words, by the use of the word "deliver",

> "it is not intended to cover a case where the property delivered is to be turned into cloth and brought back to its owner"

According to the learned counsel, the order made by the respondent could only affect the delivery of an article which "you may have sold but not delivered". If so interpreted, the order may prove useless and of no practical value, for the circumstances may be such that the officer seizing the yarn may not be able to decide whether it has been sold or not. Their Lordships are not prepared to accept such an interpretation of the term If the ordinary meaning of the term is to be cut down in any manner there must be some indication of that intention in the Control Order. Their Lordships have been taken through the various provisions of the Control Order but have not been able to get any help from them

in support of the appellant's contention which would restrict the usual meaning of the term There is nothing in the Control Order which requires the word "deliver" to be construed in a way different from its usual meaning

On the other hand the policy underlying the issue of orders under clause 18-B makes it clear that the word "deliver" used in clause (1) (*b*) has to be understood in its ordinary broad sense of handing over possession, otherwise it will be impossible "to secure a proper distribution of cloth or yarn" of the specified description, which is stated clearly to be the object of the orders passed under that clause

It was argued on behalf of the appellant that the delivery contemplated under 18-B (1) (*b*) relates only to delivery to the outside public, and not delivery to outside weavers who are bailees, as in the present case The scope of the Control Order is very wide It relates to both dealers and manufacturers (these terms are defined in clause (*c*) of the Control Order), in their dealings with themselves or with outside persons, the object of the directions issued under clause 18-B, as already stated, being the proper distribution of cloth or yarn of a specified description. Their Lordships do not think that the operation of the clause is limited to dealings with the outside public only, as contended for by the appellant The object aimed at by the clause will not be secured if the scope of the Order is so limited

It may be pointed out that clauses 18-A and 18-B are not to be read together. Clause 18-A relates only to "manufacturers" in their relation with the "dealers" and concerns itself with prohibition of sale of cloth or yarn, whereas clause 18-B is wider in its scope as its object is to prohibit *delivery* of cloth or yarn to any person, including delivery to a bailee

In their Lordships' view, question No 1 should be answered in the affirmative.

The next question relates to the maintainability of the application under the Specific Relief Act

The scope of the provisions of section 45 restricts the jurisdiction of the High Court of Madras to make an order "requiring any specific act to be done or foreborne within the local limirs of its Ordinary Original Civil Jurisdiction". In the present case the appellant desired the Court to direct the respondent to desist from seizing the yarn supplied or that might be entrusted to the weavers at or around Madura or Rajapalayam and to "restore the applicant the yarn already seized" Both Madura and Rajapalayam are outside the local limits of the Ordinary Original Civil Jurisdiction of the Madras High Court It is not shown that the yarn seized was brouhgt to Madras It must be presumed that the yarn still remains in Madura, where it was seized It is clear that all the reliefs asked for relate to acts done or to be done outside the limits of the Ordinary Original Civil Jurisdiction of the High Court It was held in *Inspector of Municipal Councils and Local Boards, Madras* v *Venkatanarasimham*[1], that

"The jurisdiction of the High Court under section 45, Specific Relief Act, is confined to acts done on to be done within the limits of its Ordinary Original Civil Jurisdiction The High Court has, therefore, no jurisdiction to issue an injunction prohibiting the Inspector of Municipal Councils and Local Boards from issuing a circular to and interfering with the functions of, District Election Officers who perform their functions in the mufassal"

The reasoning of the learned Judges of the High Court with reference to the act complained against in that case appears from the following extract of the judgment

"It appears that the Inspector has his office in Madras, and we may infer that his circular was issued from his office in Madras But the interference by that circular with the functions of the District Election Officers, which the order purported to prohibit, could never take place within the limits of the Ordinary Original Civil Jurisdiction of this Court, because, as is admitted, District Election Officers perform their functions in the mufassal, outside the limits of the Ordinary Original Civil Jurisdiction of this Court"

In the present case, on the same reasoning, though the respondent may have his office in Madras within the limits of the Ordinary Original Civil Jurisdiction of

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1 (1933) 66 M L.J 233

the High Court, it is clear that the act with reference to which relief was asked took place outside the limits of the Ordinary Original Civil Jurisdiction of the High Court It therefore follows that the application under section 45, Specific Relief Act, is incompetent and should on that ground alone be dismissed.

In the circumstances, it is not necessary to discuss the further question whether, even if an order was made in favour of the appellant, it would be frustrated by a positive direction made under sub-clause (*a*) of clause 18-B (1), *i e*, in other words, whether the proviso (*e*) to section 45, Specific Relief Act, would be a bar to the granting of the relief asked for in the application

For the above reasons their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs

Solicitors for Appellant *T L Wilson & Co.*

Solicitors for Respondent *Solicitor, High Commissioner for India*

K S. *Appeal dismissed*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras [1])

PRESENT :—LORD PORTER, LORD MACDERMOTT, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT.

Kumbham Lakshmanna and others *Appellants* *

v.

Tangirala Venkateswarlu and others . *Respondents.*

Inams—Minor inam—Suit by inamdar to eject a tenant—Burden of proving right to evict

In a suit by a holder of a minor inam to eject the tenants from the holding, the burden is on the plaintiff to make out a right to evict by proving that the grant included both the melwaram and the kudiwaram interests or that the tenants or their predecessors were let into possession by the inamdar under a terminable lease and where the evidence is not conclusive the suit must fail as the burden on the plaintiff is not discharged

Authorities considered

Venkateswarlu v *Lakshmanna*, (1944) 1 M L J 160, reversed

J. M R Jayakar and *L. E H. Fellows* for Appellants

P V Subba Row and *J E Moses* for Respondents

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR —This is an appeal from a judgment and decree of the High Court of Judicature at Madras [1], dated 28th September, 1943, which reversed a judgment and decree of the Subordinate Judge of Masulipatam, dated 6th September. 1941, and allowed the plaintiff's suit with costs

The appellants before the Board were defendants 1 to 30, and will, hereinafter, be referred to as the " defendants " Respondent 1 was the sole plaintiff in the suit. He will be referred to hereinafter as the " plaintiff " The other respondents were defendants, and are said to have changed sides and now joined respondent 1

The appeal arises out of a suit instituted by the plaintiff, an inamdar (holder of an inam), to eject a large number of cultivating ryots of lands, 20 28 acres in extent, situated in the village of Lellagaruvu, in the taluk of Bandar, Kistna District.

Inam is a well-known word of " arabic " origin which means reward or favour The word came into use after the Muhammadan conquest In ancient days, grants of land, or revenue, were made by Hindu sovereigns to individuals, particular families, or communities for various purposes, or to religious institutions,

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1. (1944) 1 M L J 160

* 14th June, 1949.

for their upkeep These were known as "Manyams" The practice was continued by the Muhammadan rulers, and later, by the East India Company also, till it was discontinued in the earlier years of the 19th century, as a result of instructions received from the Directors of the Company Thenceforward, gifts of land were granted only in special cases, the ordinary cases being provided for by the grant of money pensions

Inams in the Presidency of Madras are of two kinds, first, those where the proprietary right in the soil and the right to the Government share of the revenue derivable from land coalesce in the same individual, and secondly, those where the proprietary or occupancy right is vested in one or more individuals, whilst the Government share of the revenue has been granted to another (para 71, Mr. W T Blair's report on the operations of the Inam Commission, dated 30th October, 1869)

"An inam holding may be of a field only, or a village or a tract of several villages" (Land Systems of British India by Baden Powell, Vol III, p. 140). Grants consisting of a whole village or more than one village are technically called major inams to distinguish them from minor inams which are grants of something less than a village (See *Secretary of State* v *Thinnappa Chettiar*[1]) The suit inam being only a small portion of a village is a minor inam and is mentioned as such, in Exhibit N

In para 4 of his well-known report Mr Blair thus describes the origin of the minor inams

"During the period of anarchy which followed the overthrow of the Native dynasties and which continued, though in a less degree, after the establishment of the Mohammadan rule in Southern India, the power of granting inams was assumed by various petty chiefs, officers of Government, and others, who alienated the revenues to a considerable extent Of such origin are most of the minor inams granted by the Zamindars, by the various faujdars and even by renters in the Northern Circars, and those given by the numerous poligars of the Ceded Districts and the southern province of the Presidency"

Two questions arise for decision in this appeal; (1) Whether in a suit by a holder of a minor inam to eject the tenants from the holding, the burden is on the plaintiff to make out a right to evict by proving that the grant included both the melvaram and the kudivaram interests or that the tenants or their predecessors were let into possession by the inamdar under a terminable lease, or whether the burden is on the tenants to prove that they have occupancy rights (2) Whichever way the burden lies, whether the burden has been discharged in the present case by the party on whom it lies.

The first is a question of law, and the second is mainly a question of fact

The suit inam was granted to one Putcha Viswanadham Bhotlu as personal inam by one Bhanojee Suryaprakasa Rao in the year 1677, at a time when the Moghuls were exercising authority over the country in which the land is situated. The grantor was obviously not a sovereign ruler The inam is described as "Bhatta-Vritti" inam which means an inam granted for the support of the Brahmins. The grantee was a "non-resident *vaidiki* Brahman" who lived "in Dantaloor in Guntur District" The grant is lost and has not been produced

In 1808, the Putcha family transferred half of the inam to the Tangirala family whose successor in title is the plaintiff By two transfers in 1912 and 1913, the Putcha family conveyed the remaining half of the inam to Tangirala Narasimha, the father of the plaintiff As a result of these transfers, the Tangirala family owned as inamdar the entire extent of the inam which had been originally granted to the Putcha family

The plaintiff alleged in his plaint that the village was uninhabited and overgrown with shrubs and bushes in which animals moved about, that his predecessors in title obtained both melvaram and kudivaram rights under the grant, that the

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1 (1943) 2 M L J 382. L R 70 I A 112 (P C)

land gradually became fit for cultivation, that registered leases had been executed by defendants in 1908, and in various subsequent years, containing admissions of the plaintiff's rights, and that as the present owner of the land, he is entitled to eject the defendants

The defendants denied that the land was waste land, and averred that the Putcha people had only melvaram right under the grant, and that they (the defendants) were in possession of the land from time immemorial enjoying the kudivaram right. They also stated that the statements referred to by the plaintiff, contained in some of the lease deeds, were not binding on them as they were illiterates, and were executed by them without knowledge of their contents

It may be stated at once that though the Subordinate Judge has described the suit land as a wild tract " overgrown with shrubs and bushes where animals like deer were roaming about " there is no evidence to show that it was waste land and no reference was made to it, either in the High Court or in the arguments before the Board Their Lordships are not therefore called upon to consider the recognised inference that may be drawn—as pointed out in judgments—regarding the existence of the melvaram and kudivaram rights in favour of the inamdar who claims proprietorship over such land

The trial Court raised a number of issues of which only the following are now material

" 1 Whether the plaintiff has right to eject the defendants from the suit land ?

4 Whether the defendants have acquired occupancy rights otherwise than under the Madras Estates Land Act ?"

Issue (1) in its legal aspect, involves preliminarily a consideration of the question regarding the burden of proof which their Lordships have already set out at the beginning of the judgment In its evidentiary aspect it merges into Issue (4)

Before stating the findings of the Courts, it will be advantageous to refer briefly to a few decisions of the Board which have a direct bearing on Issue 1, as the evidence has been discussed by the Courts in India in the light thrown by those decisions on the question of the burden of proof *i e*, on the question whether the burden lies on the plaintiff to prove he has the right to eject the defendants, or whether it lies on the defendants to prove that they have occupancy rights After stating the facts, all the judgments start with a discussion of these cases

It is scarcely necessary to mention that kudivaram and melvaram interests comprise the entire proprietary interests in the land Their Lordships have pointed out that kudivaram represents a cultivator's share in the produce of land held by him as distinguished from the landlord's share received by him as rent which is designated as melvaram. Kudivaram interest is generally understood as meaning a permanent right to occupy the land. Shortly stated, for a long time the Courts in Madras took the view that an inam grant conveyed to the grantee only the melvaram interest in the land In *Suryanarayana* v *Patanna*[1], the Board held that there is no such presumption This view was affirmed in *Upadrashta Venkata Sastrulu* v *Divi Sheetaramudu*[2] in which their Lordships held that when the question arose each case must be considered on its own facts. These decisions of the Board were differently understood by different Division Benches of the High Court In certain cases, it was held that both the melvaram and the kudivaram interests passed to the grantee unless the contrary was shown , while in others it was held that there was no such presumption according to the Privy Council decisions In the Full Bench decision in *Muthu Goundan* v *Perumal Iyen*[3], it was held that underlying the exposition of law by their Lordships there was an initial presumption of law in favour of the grant of both varams which would mean that in a suit in ejectment by the Inamdar against a tenant the onus of proving that he has

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1 (1918) 36 M L J 585 L R 45 I A 209 I L R 43 Mad 166 (P C) I L R 41 Mad 1012 (P.C)
2 (1919) 37 M L J 42 . L.R. 46 I A 123
3 (1921) 40 M L J 429 I L R 44 Mad. 588 (F.B).

permanent right of occupancy lay on the tenant The Full Bench decision was expressly overruled in *Chidambara Sivaprakasa Pandara Sannidhigal* v *Veerama Reddi*[1], in which their Lordships stated there is no such presumption and that each case must be dealt with on its facts which would mean that the burden lay on the plaintiff of proving his case Then came the much discussed decision of the Board in *Nainapillai Marakayai* v *Ramanathan Chettiar*[2], in which the judgment contained the statement

> " It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant "

The decision in *Chidambara Sivaprakasa Pandarasannidhigal* v *Veerama Reddi*[1] was not referred to, in the decision in *Nainapillai Markayar* v *Ramanathan Chettiar*[2] It began to be argued in India that there is a conflict between the two decisions respecting the rule as to the burden of proof applicable to suits in ejectment, and that their Lordships in *Nainapillai Marakayar* v *Ramanathan Chettiar*[2], have abandoned their previous view as indicated in the decision in *Chidambara Sivaprakasa Pandarasannidhigal* v *Veerama Reddi*[1], and held that in a suit for ejectment brought by an Inamdar who claimed both the varams in the land, the burden of proving that he has rights of occupancy lay on the tenant.

In *Zamindar of Parlakimedi* v *Ramayya*[3], decided by Phillips and Madhavan Nair, JJ, the inamdar (the plaintiff) claimed that the grant to him consisted of both the varams and he relied on the decision in *Nainapillai Marakayar* v *Ramanathan Chettiar*[2], as throwing the burden of proving that they had permanent rights of occupancy upon the defendants (ryots) The Court held that that was not the effect of the decision in *Nainapillai Marakayar* v *Ramanathan Chettiar*[2]. In two separate and concurring judgments it was pointed out that the so-called conflict between the two decisions of the Board did not exist if the facts of the decision in *Nainapillai Marakayar* v *Ramanathan Chettiar*[2], are correctly understood, and that the decision in that case by which the burden of proving occupancy rights is thrown on the tenant " is only applicable in cases where the Inamdar is proved or admitted to be the owner of the land itself" (*see* the judgment of Phillips, J, at p 514). Thus understood, the decision did not contravene the principle that in a suit for ejectment the burden lies on the Inamdar as plaintiff to prove his right to evict and was in conformity with the decision in *Chidambara Sivaprakasa Pandara Sannadhigal* v *Veerama Reddi*[1]

In *Ayyangars* v *Periakaruppa Thevan*[4], decided three years later, and without reference to the decision in *Zamindar of Parlakimedi* v *Ramayya*[3], which was apparently not cited to them, the learned Judges, Wallace and Odgers, JJ., were inclined to hold that the decision in *Nainapillai Marakayar* v *Ramanathan Chettiyar*[2], being later in point of time was binding on them and that

> " it laid down that the onus therefore rests upon the defendants to show that they possess such right of occupancy in their holdings as will prevail against the plaintiffs' *prima facie* right to eject " (*See* the judgment of Wallace, J)

At a later stage, their Lordships will deal with the above cases more fully, and will also refer to other cases which have a bearing on the question

To resume the narrative, the trial Court held on Issue (1) that the suit being one in ejectment the onus of proving that he has the right to eject the defendants lay on the plaintiff Considering the evidence from this standpoint the Court held on Issues, (1) and (4) that the plaintiff has no right to eject the defendants from the suit lands, and that the defendants have acquired occupancy rights even otherwise than under the Madras Estates Land Act The plaintiff's suit was accordingly dismissed with costs

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1 (1922) 43 M L J 640 L R 49 I A 286 I L R 45 Mad 586 (P C)
I L R 47 Mad 337 (P C)
2 (1923) 46 M L J 546 L R 51 I A 83
3 (1926) 51 M L J 510
4 (1929) 30 L W. 583

The appeal against the judgment of the trial Court was heard by Krishnaswamy Ayyangar and Horwill, JJ

After noticing the decisions mentioned above, Krishnaswamy Ayyangar, J, stated "there is thus a definite conflict of decision between two Division Benches of this Court" regarding the interpretation of the decision of the Board in *Nainapillai Marakayar* v *Ramanathan Chettiar*[1] But the learned Judge did not express his opinion as to which view is right He allowed the appeal after a consideration of the evidence adduced by the parties, holding "that the tenants have failed to make out that they have any occupancy rights in the land" Apparently the learned Judge's view was that the burden of proving that they had occupancy rights lay on the tenants.

Horwill, J, differed from Krishnaswamy Ayyangar, J., on the question of onus, and held that he was bound to follow the decision in *Zamindar of Parlakimedi* v. *Ramayya*[2], where it was held that the burden lies on the Inamdar as plaintiff to prove his right to eject In that view, he held that the plaintiff has failed to discharge the burden and that the appeal should be dismissed

He also stated that if the burden lay on the defendant to prove that the grantee was not given both the varams

"it would perhaps be difficult to say that the facts that the two families have been in enjoyment of the land from time immemorial and have had their partitions recognised by the Inamdars, and that the grant was made to a non-resident Brahmin, would be sufficient to discharge that onus"

He also added, that if the case can be dispoed of, without considering on which side the burden lies, on the evidence which he thought was "not sufficient for the suit to be disposed of in this way," he was of opinion

"that the three circumstances referred to immediately above are entitled to more weight than the admissions (assuming that the tenants knew the contents of the muchilikas) of ignorant and illiterate ryots"

As there was thus a difference of opinion between the two learned Judges they stated under clause 36 of the Letters Patent the following points (already quoted at the commencement) of law and fact:

"(1) Whether in a suit by a holder of a minor inam to eject the tenants from the holding, the burden is on the plaintiff to make out a right to evict by proving that the grant included both the melvaram and the kudivaram interests or that the tenahts or their predecessors were let into possession by the Inamdar under a terminable lease or whether the burden is on the tenants to prove that they have occupancy rights

(3) Whichever way the burden lies, whether the burden has been discharged in the present case by the party on whom it lies"

and the case was posted for disposal before King, J, who held, as will appear from the extract of his judgment quoted below, that the burden of proof lay on the tenant, which appears to have been the opinion of Krishnaswamy Ayyangar, J, also as he allowed the appeal on the ground that the tenant had not discharged the burden of proof

After referring to the various judgments noticed above the learned Judge concluded his judgment as follows

"Now the question for me to decide is whether *Nainapillai Marakayar* v *Ramanathan Chettiar*[1] is binding upon this Court in the present case or not Mr Govindarajachari in a very able argument for the appellant contends that, whatever may be the practical difficulties involved in applying one or other of the two Privy Council Decisions, there is no fundamental inconsistency between them *Nainapillai Marakayar* v *Ramanathan Chettiar*[1] deals with the wider issue raised by a claim to rights of permanent occupancy, *Chidambara Sivapraka a Pandara Sannidhigal* v *Veerama Reddi*[3], deals with the narrower issue of the establishment of such rights by proof of one particular fact, *viz*, the subject-matter of the original grant to the Inamdar The two issues may sometimes in practice be co-extensive, but they are not necessarily so, as it is always open to a ryot to prove, if he can, that he has acquired a right of permanent occupancy otherwise than by proving that his landlord had no original title to the kudivaram I see no reason why this argument should not be accepted

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1 (1923) 46 M L J 546 L R 51 I A 83 I L R 47 Mad 337 (P C)

2 (1926) 51 M L J 510

3 (1922) 43 M L J 640 L R 49 I A 286: I L R 45 Mad 586 (P C)

From the view of *Nainapillai Marakayar* v *Ramanathan Chettiar*[1], taken by the learned Judges in *Zamindar of Parlakimedi* v *Ramayya*[2], I must express my most respectful dissent From the way in which the judgment in *Nainapillai Marakayar* v *Ramanathan Chettiar*[1], is constructed and from the manner in which the paragraphs follow each other it seems to my mind beyond dispute that their Lordships have dealt with the *whole* of the evidence from the point of view of the necessity for the ryots positively to prove their claim to occupancy rights Their Lordships state on p 344 as a matter not disputed that the ryots were tenants of the temple They admitted that the temple had the melvaram rights, and claimed the kudivaram rights for themselves Immediately after that statement of the issue in the case comes the broad and general proposition that a ' tenant ' of lands in India ' must prove a right of permanent tenancy which he claims No doubt their Lordships go on to cite in support of this proposition two previous decisions of the Privy Council which are distinguishable from the case of an inam grant before them, but in their Para 6 they do state, most definitely, that they will consider whether the defendants *have proved* that they had rights of permanent occupancy under the Madras Estates Land Act, which can mean on the facts of that case only whether they have proved that the lands which they were cultivating were part of an estate, which again can mean only whether in those lands the melvaram alone was granted to the Inamdar If their Lordships meant the doctrine as to burden of proof which they laid down in their Para 4 to apply only to cases where the landlord's title to both varams was already admitted or proved, then that paragraph was bound logically to come not before but after the decision of their Lordships on the evidence as to the terms of the grant Whether *Nainapillai Marakayar* v *Ramanathan Chettiar*[1], be held inconsistent with earlier Privy Council decisions or not, I cannot resist the conclusion that the proposition of law in Para 4 is a general proposition of law which must be applied to a case such as the one now before me The juxtaposition of Paras 3 and 4, and the language of the sixth show clearly that a tenant who admits a melvaram right in his landlord and claims an occupancy right in himself must prove that right and that the Privy Council had not excluded such a tanant from the expression ' tenant of lands in India '

I hold accordingly on the first of the points for my decision that the burden in the present case lay upon the defendants

The second point now requires no more than a very brief discussion It is common ground in this case that on the evidence adduced the defendants have failed to discharge the burden, and both learned Judges who have heard the appeal agree that this is so I accordingly find formally that the defendants have failed to discharge the burden which lay upon them

In the result this appeal must be allowed . . with costs throughout "

The case was certified to be a fit one for appeal to His Majesty in Council under section 109 (c), Civil Procedure Code, by the learned Chief Justice and Lakshmana Rao, J They stated in their order

" There is undoubtedly a serious conflict of opinion with regard to the effect of these two judgments of their Lordships (already mentioned) and the question involved is of great public importance as such suits as the present one are not uncommon "

Their Lordships will first deal with the question of the burden of proof, and then consider whether the burden on whichever party it lies has been discharged by that party

The onus of proof in ejectment suits brought against the tenants in zamindary and inam lands turns upon the nature of the relationship between the landlord and the tenant The controversy in early days which was very acute centred round the question whether the tenant was a tenant from year to year as strictly understood, or whether he was a co-owner of the land with the landlord according to the customary law of the country, he owning the kudivaram, and the landlord, owning the melvaram interest in the land In *Secretary of State* v *Virarayan*[3], it was observed by Turner, C J , and Muttuswami Ayyar, J , that according to what is termed " the Hindu Common Law," " a right to the possession of land is acquired by the first person who makes a beneficial use of the soil " The same learned Judges pointed out in *Siva Subramanya* v *Secretary of State*[4] that " Manu and other Hindu writers have rested private property on occupation as owner " In *Venkatanarasimha Naidu* v *Dandamudi Kotayya*[5], it was pointed out that there is no substantial analogy between an English tenant and an Indian ryot for the simple reason that the rights of the ryots in most cases came into existence not under any letting by the Government of the day or its assignees, the zamindars, but independently of them This view was fully developed in the well-known case of *Cheekati Zamindar* v.

1 (1923) 46 M L J 546 L R 51 I A 83 I L R 47 Mad 337 (P C)
2 (1926) 51 M L J 510
3 (1885) I L R 9 Mad 175
4 (1888) I L R 9 Mad 285
5 (1897) 7 M L J 251 I L R 20 Mad. 299

Ranasooru Dhora[1] It was also pointed out in *Venkatanarasimha Naidu* v *Dandamudi Kotayya*[2],

"that the interest in the land is divided into the two main heads, of the kudivaram interest and the melvaram interest, and that the holder of the kudivaram right, far from being a tenant of the holder of the melvaram right, is really a co-owner with him The kudivaram right originated in priority of effective occupation and benefical use of the soil, and the claim of the Government and the assignees of Government was always, in these parts, to a share in the produce raised by the ryots" [See *Narayana Ayyangar* v *Orr*[3]]

The controversy as between the zamindar and his tenants was settled by section 6, Madras Estates Land Act (Act I of 1908) which declares

"Subject to the provisions of this Act, every ryot now in possession or who shall hereafter be admitted by a landholder to possession of ryoti land not being old waste situated in the estate of such landholder shall have a permanent right of occupancy in his holding "

but, having regard to the definition of an "estate" in S. 3 (2) (*d*) of the Act, in a case where an Inamdar sues a ryot in ejectment the question still arises whether the Inamdar owns the kudivaram as well as the melvaram when objection is raised by the defendant that the land forms an "estate" within the meaning of the Act and a Civil Court has no jurisdiction to deal with the case S 3 (2) (*d*) of the Act is as follows

"any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed or recognised by the British Government, or any separated part of such village"

It may be mentioned here that minor inams do not fall within the purview of the Madras Estates Land Act The question just adverted to arises in the case of minor Inamdars also—as in the present case—where rights of occupancy are claimed by the ryots—apart from the Act

How the question should be settled when disputes arises between the Inamdar and the tenants has been decided by the decisions of the Board—already referred to, in another connection—but before referring to them again, attention may be drawn to a few enactments which dealt with the ascertainment of the title of the Inamdars to the lands claimed to be held by them in inam

The Permanent Settlement Regulation (Regulation XXV of 1802), which, generally stated, dealt with the permanency of the tenure of the zemindars in their estates was passed on 13th July, 1802 By section 4 of the Regulation, inams were exempted from its scope by excluding them from the assets on which permanent settlement was based On the same date, the Regulation XXXI of 1802 (subsequently repealed by Madras Act II of 1869) was passed dealing with inams, for enacting rules:

"for the better ascertainment of titles of persons holding or claiming to hold, lands exempted from the payment of revenue to Government under grants not being 'Badshahi' or Royal and for fixing an assessment on such lands "

By section 15 of the Regulation the Collectors were required to keep a register of the inams One of such registers is Oakes Inam register noticed by the Privy Council in *Suryanarayana* v *Patanna*[4]. Various measures followed the passing of this Regulation but nothing effective was done to settle the validity of the titles of the Inamdars till 1859, when the question of examining their titles was taken by the Inam Commission As a result of its deliberations various Acts—Madras Acts IV of 1862, IV of 1866, and VIII of 1869—were passed The history of these enactments, into which it is not necessary to enquire, is fully dealt with by Sir George Rankin in *Secretary of State for India* v *Srimatho Vidhya Sri Varada Thirta Swamigal*[5]. Attention may however be drawn to the following provision of Madras Act VIII of 1869, which enacted

1 (1899) I L R 23 Mad 318
2 (1897) 7 M L J 251 I L R 20 Mad 299
3 (1902) 12 M L J 449 I L R 26 Mad 252
4 (1918) 36 M L J 585 L R 45 I A 209 I L R 41 Mad 1012 (P C)
5 (1942) 2 M L J 367 L R 69 I A 22 at 39. I L R 1942 Mad 893 (P.C).

"Nothing contained in any title deed heretofore issued to any inamholder shall be deemed to define, limit, infringe or destroy the rights of any description of holders or occupiers of the lands from which any inam is derived or drawn, or to affect the interests of any person other than the inamholder named in the title deed, and nothing contained in Madras Act IV of 1862, or in Madras Act of 1866, shall be deemed to confer on any inamholder any right to land which he would not otherwise possess"

The decision of the Board in *Suryanarayana* v *Patanna*[1] and the decisions that followed expounded the principle that should be applied in determining the nature of the respective rights of the inamdar and the tenants of the land from which the inam was drawn That principle as already pointed out is that there is no presumption in law that the grant of an inam conveyed only the melvaram and that when the question of the respective rights of the parties in the land arises for decision each case should be decided on its own merits without reference to any presumption in law regarding the existence of those rights in either of the parties. None of the Privy Council cases dealt *expressly* with a minor inam but it is not disputed that the same principle would apply to the minor inams also where the rights are claimed apart from the Act In such cases, Courts have to find out whether the inamdar has proprietary interests in the land, from the whole circumstances relating to the holding, "so far as these can be ascertained," such as—to mention a few—the terms of the grant when the deed is available, long possession, the course of dealing between the inamdar and the tenant, dealing with the land by the tenant, etc

Originally, the zemindars and the inamdars were placed in the same position as assignees of Government revenue. The place of the cultivating ryots in the agricultural economy of Southern India is thus described in a Proceeding of the Board of Revenue of Fort St George (Madras), dated 5th January, 1818:

"The universally distinguishing character, as well as the chief privilege of this class of people, is their exclusive right to the hereditary possession and usufruct of the soil, so long as they render a certain portion of the produce of the land, in kind or money, as public revenue, and whether rendered in service, in money, or in kind, and whether paid to rajas jaghirdars, zemindars, poligars, mootahdars, shrotriyamdars, inamdars or Government officers, such as tahsildars, amildars, amins, or tannadars, the payments which have always been made by the ryot are universally termed and considered the dues of the Government"

The Board in *Chidambara Sivaprakasa Pandara Sannidhigal* v. *Veerama Reddi*[2], quoted the above well-known statement apparently with approval but left it without any comment, obviously because it had been already decided by the Board in *Suryanarayana* v *Patanna*[1] that in an ejectment suit brought by an inamdar against the cultivating ryot no presumption in law exists that the grant conveyed only the melvaram, and the decision was accepted as not open to any question

Their Lordships will now proceed to consider how the question as to the onus of proof raised in the first question before the Board should be decided when the merits of the case are examined, without any reference to the supposed presumption in law that an inam grant conveys only melvaram rights which has now been held not to exist Admittedly, no question strictly relating to onus of proof as such, arose for decision in *Suryanarayana* v *Patanna*[1] That case only dealt with the presumption in law as regards the nature of the interest that exists in lands granted in inam In that case, the ryots claimed rights of permanent occupancy under section 3 (2) (*d*), Madras Estates Land Act They contended that the grant to the agraharamdar (the subject-matter of the suit was an agraharam village) was of the land revenue alone and relied on a presumption that such a grant was so restricted. The Madras High Court in *Suryanarayana* v. *Patanna*[3] held that

"The presumption is that an inamdar, like a zemindar, is not the owner of the kudivaram right," and that "the presumption is the same whether the grant of the inam was by Government or by a zemindar"

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1 (1918) 36 M L J 585 L R 45 I A 209 I L R 45 Mad 586 (P C). I L R 41 Mad 1012 (P C)

2 (1922) 43 M L J 640 L R 49 I A 286.

3 (1913) 26 M L J 99 I L R 38 Mad 608

It was pointed out that the rule would apply whether the inam is a major inam or a minor inam in a village

In appeal that decision was set aside by the Board in *Suryanarayana* v *Pattanna*[1] in which it was held that

" There is no presumption in law that the grant of an inam by a Native Ruler prior to British Rule conveyed only the melvaram (Revenue due to the State) "

The subsequent decisions of the Board in *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu*[2] affirmed and developed the above rule by adding to it another rule, *viz*, that

" Each case must therefore be considered on its own facts , and in order to ascertain the effect of the grant resort must be had to the terms of the grant itself and to the whole circumstances so far as they can now be ascertained "

The question of onus was first pointedly referred to by the Board in *Chidambara Sivaprakasa Pandara Sannidhigal* v *Veerama Reddi*[3], where after referring to the above cases it was pointed out that

" When the entire evidence on both sides is once before the Court the debate as to onus is purely academical "

and the Board referred to the decision in *Sethuratnam Aiyar* v *Venkatachala Goundan*[4], where, with reference to the facts of that case, it was stated that :

" The controversy had passed the stage at which discussion as to the burden of proof was pertinent , the relevant facts were before the Court, and all that remained for decision was what inference should be drawn from them "

Observations to the same effect were made in *Mohammad Aslam Khan* v *Feroze Shah*[5], though not a case between landlord and tenant, where Sir Lancelot Sanderson said

" A question was raised as to the party upon whom the onus in respect of this matter rested Their Lordships do not consider it necessary to enter upon a discussion of the question of onus, because the whole of the evidence in the case is before them and they have no difficulty in arriving at a conclusion in respect thereof "

Where no difficulty arises in arriving at a conclusion, as in the cases abovementioned, the question respecting the onus recedes into the background but where the Court finds it difficult to make up its mind the question comes to the foreground and becomes the deciding factor In *Yellappa Ramappa* v *Tippanna*[6], Lord Shaw said

" In any case *onus probandi* applies to a situation in which the mind of the Judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion. It does happen that as a case proceeds the onus may shift from time to time "

What is called the burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as " shifting ". The burden of proof on the pleadings never shifts, it always remains constant [see *Pickup* v *Thames Insurance Co* [7]] These two aspects of the burden of proof are embodied in sections 101 and 102 respectively of the Indian Evidence Act, section 101 states :

" Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person "

Section 102 states

" The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side "

1 (1918) 36 M L J 585 L R 45 I A 209 I L R. 41 Mad 1012 (P C)
2 (1919) 37 M L J 42 L R 46 I A 123 I L R 43 Mad 166 (P C)
3 (1922) 43 M L J 640 L R 49 I A 286 I L R 45 Mad. 586 (P C)
4. (1920) 38 M L J 476 L R. 47 I A 76 . I L R 43 Mad 567 (P C)
5 (1932) 63 M L J 694 L R 59 I A 386: I L R 13 Lah 687 (P C)
6 (1928) 56 M L J 287 L R 56 I A 13 : I L R 53 Bom 213 (P C)
7 (1878) 3 Q B D. 594

This section shows that the initial burden of proving a *prima facie* case in his favour is cast on the plaintiff, when he gives such evidence as will support a *prima facie* case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff As the case continues to develop, the onus may shift back again to the plaintiff It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other. When after the entire evidence is adduced, the tribunal feels it cannot make up its mind as to which of the versions is true, it will hold that the party on whom the burden lies has not discharged the burden, but if it has on the evidence no difficulty in arriving at a definite conclusion, then the burden of proof on the pleadings recedes into the background

How the above rules relating to onus operate in a case is thus described by Lord Dunedin in *Robins* v. *National Trust Co*, *Ltd* [1]:

"Their Lordships cannot help thinking that the appellant takes rather a wrong view of what is truly the function of the question of onus in such cases Onus is always on a person who asserts a proposition or fact which is not self-evident To assert that a man who is alive was born requires no proof The onus is not on the person making the assertion, because it is self-evident that he had been born But to assert that he was born on a certain date, if the date is material, requires proof, the onus is on the person making the assertion Now, in conducting any inquiry, the determining tribunal, be it Judge or jury, will often find that the onus is sometimes on the side of one contending party, sometimes on the side of the other, or as it is often expressed, that in certain circumstances the onus shifts But onus as a determining factor of the whole case can only arise if the tribunal finds the evidence *pro* and *con* so evenly balanced that it can come to no such conclusion Then the onus will determine the matter But if the tribunal, after hearing and weighing the evidence, comes to a determinate conclusion, the onus has nothing to do with it, and need not be further considered"

Their Lordships may here observe that in shifting the burden from one side to the other by adducing evidence, parties may rely on presumptions in law, which are really inferences of fact, in place of actual facts If there was a presumption in law that an inamdar was the owner of both kudivaram and melvaram interests in the land then he could rely on that presumption to discharge the initial burden of proof that lay on him to prove his title to eject In this sense the presumptions arising from law are connected with the question of onus of proof

It is settled law that in a suit for ejectment the burden of proof lies on the plaintiff to show that he has a right to eject the defendant before the onus is shifted to the defendant to prove that he has a right of permanent occupancy Their Lordships have now to see whether this rule has been departed from in the decision in *Nainapillai Marakayar* v *Ramanathan Chettiar* [2] In that decision, as already pointed out, Sir John Edge said

"It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant"

In the present case relying on the above statement, King, J, has—as already stated—held that since the defendants claimed a right of permanent occupancy in the lands the onus of proving that they had such right lay on them and that since they failed to prove that they had such right, the plaintiff is entitled to eject them—no matter whether he (the plaintiff) has proved that he has such a right

In *Nainapillai Marakayar* v *Ramanathan Chettiar* [2], their Lordships stated as follows, in paragraphs 3 and 4, the facts of the case, and the principle mentioned above, referring to two decisions on which that principle was based

"The lands in respect of which a decree of ejectment has been made in each suit are part of the village of Mangal in Tanjore, and are part of the endowed property of the temple It is not disputed that the defendants were tenants of the temple of lands to which the suits relate, nor is it now disputed that they received notices to quit The defendants admit that the *melvaram* rights in the property in question are vested in the temple, but their case is that the *kudivaram* rights in that property are vested in them and never were vested in the temple, and they claim that they have permanent rights

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1 (1927) A C 515 at 520 I L R 47 Mad 337 (P C)
2. (1923) 46 M L J 546 L R 51 I A. 83

of occupancy in the lands under section 6 of Madras Act I of 1908, and also independently of that Act " (Paragraph 3)

" It cannot now be doubted that when a tenant of lands in India, in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant In *Secretary of State for India in Council* v *Luchmeswar Singh*[1], it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants, who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus ; and in *Seturatnam Aiyer* v *Venkatachala Goundan*[2], in a suit by landlords for the ejectment of the defendants from lands in a *ryotwari* district in Madras, the giving of notice to quit not being disputed, it was held that the onus of proving that the defendants had rights of permanent occupancy was upon them " (Paragraph 4)

Instead of making the presumption that the landlord is the absolute owner of the land and dealing with the case on that assumption their Lordships proceeded to consider the terms of the grant, and after finding that the melvaram and kudivaram interests in the land were at some time granted to the temple, they began to consider

" whether the defendants have proved that they, or those through whom they claim title as occupiers of the lands in suit, obtained at any time a right of permanent occupancy in the lands "

This being their method of approach to the case it seems to their Lordships that as pointed out in *Zamindar of Parlakimedi* v. *Ramayya*[3],

" when the principle above mentioned was laid down . the words ' tenant of lands ' must mean ' tenant of lands belonging to his landlord ', that is to say, that the landlord has a right not merely to the *melvaram* but to the land itself In this view the two judgments *Chidambara Sivaprakasa Pandara Sannidhigal* v *Veerama Reddi*[4] and *Nainapillai Marakayar* v *Ramanathan Chettiar*[5] are not inconsistent "

A close examination of the *two decisions relied on* by their Lordships in support of the principle stated by them, and *also of the facts of the case* as dealt with by them, show clearly that the usual rule as to the burden of proof in an ejectment suit has not been in any way departed from by their Lordships

In *Secretary of State for India in Council* v *Luchmeswar Singh*[1],—the first case relied on by their Lordships . . . they state thus .

" The Government undoubtedly are tenants of the Darbhanga Raj It is for them to show why the landlord may not recover . If we could not find out the origin of these things, there would be strength in that argument But as the origin of them is known the argument loses its force "

In the above case the Government who had been let into possession of a village by a Raja for a limited purpose claimed a permanent right of occupancy It was rightly held that a person let into possession should prove that he had a permanent right of occupancy

In *Seturatnam Aiyar* v *Venkatachala Goundan*[2], which dealt with a dispute between a pattadar and a ryot in a ryotwari tract, Sir Lawrence Jenkins observed as follows ·

" The plaintiff's title was conceded, and the notice by which he purported to terminate the defendants' tenancy was not disputed It was also admitted that the defendants held under, if not from, the plaintiff To resist the plaintiff's claim the defendants set up a permanent tenancy or an occupancy right in themselves. If this was not established then the defendants must fail, and to adopt the language of section 101, Evidence Act, as the defendants were bound to prove the existence of their permanent tenancy or occupancy right, the burden of proof as to it lay on them "

In the above cases, it was either admitted or found as a fact that the tenants had been let into possession by the landlord who was the absolute owner When the tenant claims rights of occupancy in such circumstances their Lordships, in *Nainapillai Marakayar* v *Ramanathan Chettiar*[5], laid down the principle that the burden will be on him to prove that he has such rights.

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1 (1888) L R 16 I A 6 I L R 16 Cal. 223 (P C)
2 (1919) 38 M L J 476 L R 47 I A 76 I L R. 43 Mad 567 (P C).
3. (1926) 51 M.L.J. 510.
4 (1922) 43 M L J 640 L R 49 I A 286 : I L R 45 Mad 586 (P C)
5 (1923) 46 M.L J. 546 L R 51 I A 83 I L R 47 Mad. 337 (P C)

Read in the light of the above cases the decision in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[1] by which the burden of proving occupancy right was thrown on the defendant did not enunciate any rule as to burden of proof inconsistent with the decisions in *Chidambara Sivaprakasa Pandara Sannidhigal* v. *Veerama Reddi*[2].

In this connection it may be stated that it is not correct to say, as was boldly argued, that a ryotwari pattadar has no proprietorship in the land he holds under the Government In his Land Systems of British India, Baden-Powell gives the following definition of the ryotwari system ·

"A system of land revenue administration in which there is no middleman or landlord over the individual ryots, who are severally liable for the land revenue assessment on the holding "

Again, quoting from the Settlement Manual from Madras, he describes the ryotwari system as follows

" Under the ryotwari system every registered holder of land is recognised as its proprietor He is at liberty to sub-let his property or to transfer it by gift, sale or mortgage He cannot be ejected by Government so long as he pays the fixed assessment, and has the option of (annually) increasing or diminishing his holding or of entirely abandoning it The ryot under this system is virtually a proprietor under a simple and perfect title, and has all the benefits of a perfect lease without its responsibilities "

In this system of land holding

" it may be assumed that the Pattadar is the owner of the kudivaram right, as opposed to the melvaram right which is vested in the Government " *Veeranan Ambalam* v *Annaswami Aiyar*[3]

The settlement by the Government under the ryotwari system was with the actual cultivator , under Regulation XXV of 1802, it was with the zemindar, who had the right of receiving rent from persons who were in occupations of lands. It is familiar knowledge that pattadars under the ryotwari system let out the land for cultivation to under-ryots When such under-ryots claim rights of occupancy the burden of proving that they have such rights would necessarily be on them. It was in connection with the claims made by such ryots that the Board observed in *Setuiratnam Aiyar* v *Venkatachala Goundan*[4], that

" Permanence is not a universal and integral incident of an under-ryot's holding , if claimed, it must be established This may be done by proving a custom, a contract, or a title, and possibly by other means "

Language very similar to the above was used in similar Madras cases in describing the claim of an under-ryot in ryotwari land In *Cheekati Zamindar* v *Ranasooru Dhora*[5], Subramania Ayyar, J., referred to a decision by Collins, C J and Muttusami Ayyar, J , in which the position of under-ryot in ryotwari land was thus described :

" Admittedly the village in suit is a taraf village of which the temple is the registered proprietor entitled to both the melvaram and the mirasvaram as against the appellant This being so the claim of an occupancy right as overriding the proprietor's right to cultivate his own land is of a special character, and as such, it is one which the party seeking to derogate from the ordinary incidents of property is bound to establish Ordinarily the mirasidar or proprietor in a taraf village has the right of cultivation also and he is therefore at liberty to arrange for it from time to time either by granting leases or letting it to purakudies for varam or under what is usually called the pannai system by means of labourers who are paid wages in grain "

Subramania Ayyar, J , added

" In other words, the view of the learned Judges was that permanent holdings under ryotwar proprietors being unusual and exceptional, the onus is on the party setting up such a special kind of holding "

The cases which arise between ryotwari pattadars and their under-ryots are not in point in disputes between inamdars and cultivating ryots

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1 (1923) 46 M L J 546 L R 51 I A 83 I L R 47 Mad 337 (P C)
2 (1922) 43 M L J 640 L R 49 I A 286 I L R 45 Mad 586 (P.C)
3 (1911) 21 M L J 345
4 (1920) 38 M L J 476 · L R. 47 I.A 76 I L R. 43 Mad. 567 (P C).
5 (1899) I L R 23 Mad 318.

The principle of the burden of proof laid down in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[1], when read in the light of the facts of the case also, does not appear to contravene the rule that in a suit for ejectment the initial burden lies on the plaintiff to prove that he has the title to immediate possession The lands in respect of which a decree in ejectment was sought were the endowed property of a temple It is stated in para 3 of the judgment that "it is not disputed that the defendants were tenants of the temple" The tenants were let into possession under muchilikas executed by them (p 354) After referring to the muchilikas their Lordships state significantly that

"In 1870 Sir C H Scotland, C J, held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him"

Lower down they state :

"No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands"

The above references show in what light the position of the tenant was regarded by their Lordships in the rule stated by them in *Nainapillai Marakayar* v *Ramanathan Chettiar*[1]

To summarise The decisions above discussed, and the facts of the case show clearly that the word "tenant" in the principle stated by their Lordships in *Nainapillai Marakayar* v *Ramanathan Chettiar*[1], should be read as explained in *Zamindar of Parlakimedi* v *Ramayya*[2], in the stricter sense of persons who had been let into possession by a landlord The term does not apply to tenants in the looser sense of the word as those in cultivation of land, the origin of whose rights is not known

The view expressed in *Zamindar of Parlakimedi* v *Ramayya*[2], as regards the scope of a decision in *Nainapillai Marakayar* v. *Ramanathan Chettiar*[1], was accepted by Pandrang Row and Venkataramana Rao, JJ, in *Jagannatha Pillai* v. *Ramanathan Chettiar*[3] and again by Venkataramana Rao, J, in *Lakshmana Reddiar* v. *Ellinganaickenpatty Kumara Koil*[4]. The learned Judges differed from the decision in *Ayyangars* v *Periakaruppa Thevan*[5], relied on by King, J, as containing the correct interpretation of the rule stated in *Nainapillai Marakayar* v *Ramanathan Chettiar*[1]

In *Basiruddin Sarkar* v *Sahebulla Pramanik*[6], Mukerji and Mallik, JJ, took the same view of the Privy Council decision as in *Zamindar of Parlakimedi* v *Ramayya*[2]. The learned Judges observed

"In an action in ejectment one of the things that the plaintiff must prove is his title to immediate possession This is a proposition as old as the hills In a case where the defendants' tenancy is admitted—an admission that involves the admission of the defendants' right to be in possession—the plaintiff must necessarily establish as to how he is entitled to possession, in other words, how the tenancy has come to an end"

After referring to the two decisions of the Board in *Sethuratnam Ayyar* v. *Venkatachala Goundan*[7], and *Nainapillai Marakayar* v *Ramanathan Chettiar*[1], they stated as follows :

"In my opinion, the decisions of the Judicial Committee do not indicate that their Lordships ever intended to depart from these elementary rules In both the cases, the plaintiff's title to the lands was conceded, and notices by which the defendants' tenancies were terminated were not disputed In neither case had any grant been alleged, asserted, or admitted on behalf of the plaintiff, but inasmuch as the defendants had been in occupation on payment of rent, a tenancy from year to year terminable on notice was all that was conceded"

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1 (1923) 46 M L J 546 L R 51 I A 83 I L R 47 Mad 337 (P C)
2 (1926) 51 M L J 510.
3 (1938) M W N 1284
4 (1938) 1 M L J 634: I.L R 1938 Mad 888
5 (1929) 30 L W 583
6 (1927) 32 C W N 160
7 (1919) 38 M L J 476 · L R 47 I A 76 : I L R 43 Mad 567 (P C).

Before proceeding further, one more case—already referred to—remains to be discussed In *Ayyangars* v. *Periakaruppa Thevan*[1], the plaintiffs were grantees of ryotwari lands That decision was passed in Letters Patent appeal by Wallace and Odgers, JJ , reversing the decision of Phillips, J , who held, as already pointed out—following his own decision—in *Zamindar of Parlakimedi* v. *Ramayya*[2], that the words " tenant of land " in the principle stated in *Nainapillai Marakayar* v *Ramanathan Chettiar*[3], must mean tenant of lands belonging to his landlord The latter decision does not seem to have been cited before them The apparent conflict between the decision in *Chidambara Sivaprakasa Pandara Sannidhigal* v *Veerama Reddi*[4] and *Nainapillai Marakayar* v *Ramanathan Chettiar*[3] is noted by the learned Judges but was ignored on the ground that the latest decision binds the Court and that decision must be followed The entire judgment is not before their Lordships, but from the extract given in the judgment of the High Court, the ground on which the decision was based seems to be fairly clear Wallace, J , who delivered the leading judgment, after stating that one who admits that he is a kudivaramdar admits also that he is a tenant of the melvaramdar, observed

" That being so, the defendants (tenants) by their admission that they pay melvaram to the plaintiffs admit that they are tenants of the plaintiffs On that relationship the plaintiffs have a *prima facie* right to eject them, and as the Privy Council has laid down the onus therefore rests on the defendants to show that they possess such right of occupancy in their holdings as will prevail against the plaintiff's *prima facie* right to eject "

This reasoning is open to two objections In the first place, it ignores the true conception of the relationship between landlord and tenant in India in lands held under inamdars, zamindars and such proprietors, well described by Subramania Ayyar, J , in *Venkatanarasimha Naidu* v *Dandamudi Kotayya*[5], wherein, after pointing out that there is no substantial analogy between English tenants and Indian ryots and citing the following passage regarding the nature of the rights of the ryots in India in the Presidency of Madras already quoted by their Lordships

" Whether rendered in service, in money or in kind and whether paid to rajas, jagirdars, zamindars, poligars, mutadars, shrotriyamdars, inamdars or to Government officers, such as tahsildars, amildars, amins or thanadars, the payments which have always been made are universally deemed the dues of Government "

observed as follows .

" To treat such a payment by cultivators to zamindars as ' rent ' in the strict sense of the term and to imply therefrom the relation of landlord and tenant so as to let in the presumption of law that a tenancy in general is one from yar to year, would be to introduce a mischievous fiction destructive of the right of great numbers of the cultivating classes in this province who have held possession of their lands from generation to generation "

Further comment on the above observation is needless It may be mentioned that the passage quoted above which—as already stated—is from the proceedings of the Board of Revenue, dated 5th January, 1818, was referred to in *Chidambara Sivaprakasa Pandara Sannidhigal* v *Veerama Reddi*[4], with approval by their Lordships as correctly describing the position of cultivating ryots in the agricultural economy of Southern India

Secondly, it also ignores the principle laid down by the Board that when an inamdar comes to Court alleging that he owns both the warams, no presumption can be drawn in his favour or against him, but that the whole case should be decided on its own merits without resorting to any presumption

King, J , after referring to the previous decisions, dissented from the view of *Nainapillai Marakayar* v *Ramanathan Chettiar*[3] taken in *Zamindar of Parlakimedi* v. *Ramayya*[2] and concluded saying that :

" Whether 47 Madras (*Nainapillai Marakayar* v *Ramanathan Chettiar*[3], be held inconsistent with earlier Privy Council decisions or not"

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1 (1929) 30 L W 583
2 (1926) 51 M L J 510
3 (1923) 46 M.L J 546 L R 51 I A 83 I L.R 47 Mad. 337 (P C)
4 (1922) 43 M L J 640 L R 49 I A 286 I L R 45 Mad 586 (P.C)
5 (1897) 7 M L J 251 I L R 20 Mad 299.

he is satisfied that the structure of the judgment in *Nainapillai Marakayar* v *Ramanathan Chettiar*[1] leads to the conclusion that the proposition of law as regards the burden of proof stated therein is a general proposition Their Lordships have already dealt with the previous decisions They need only add, with respect to the learned Judge, that the judgment of their Lordships in *Nainapillai Marakayar* v *Ramanathan Chettiar*[1] read *as a whole* does not in their view support the conclusion arrived at by him

After a consideration of the decisions brought to their notice their Lordships hold that in the circumstances mentioned in the first point arising in this appeal, for the reasons mentioned above the burden of making out a right to evict the defendants in the suit lies on the plaintiff

Their Lordships will now proceed to consider whether, on the evidence in the case, the burden has been discharged

The evidence given by the parties is somewhat scanty. Generally stated the plaintiff supported his case by his own testimony, the testimony of two witnesses, very brief indeed, one lease deed R, dated 1908, other lease deeds, S series and T series, extracts from the inam fair registers and other registers, and notices sent to the defendants some of which had been refused by them. S series consist of lease deeds S to S-5, each of which had been executed for five years commencing from 1913, and S 6 to S 13, each of which was for ten years commencing from 1918. These were renewals of the time-expired five year leases T series were each dated 1932

The defendant examined two witnesses, one of whom was defendant 1 They mainly relied on their immemorial cultivation of the suit lands, spoken to even by the plaintiff's witnesses They also stated that they were illiterate, and the lease deeds were not read over to them

Both sides also relied on general circumstances relating to the holding as throwing light on the nature of their respective rights in the land

It was conceded by both parties in the Courts in India that the extracts from the various registers filed by the plaintiff do not throw any light on the question whether the grant was of one waram only or of both warams In support of his claim the plaintiff mainly relied on certain stereotyped statements made by the defendants in the various lease deeds executed by them No lease prior to the year 1908 has been filed The terms of the lease deed R, are non-committal and are of such a nature as has been held not to contain any admission that the ryots have no rights to the kudivaram interests in the land Terms appearing in S to S-5 deeds, such as " The land belongs to you and has been in your enjoyment with absolute rights " " If I fail to deliver rent on due date, I shall pay the value of the paddy in arrears " "At the expiry of the terms in the khath, I shall deliver up possession of the land " do not necessarily show that the landlord owns kudivaram rights ; nor are they necessarily inconsistent with the defendants' claim to possess occupancy rights There is no statement in any one of them that the landlord is entitled to eject the executants, nor is there any evidence that anyone ever quitted the lands in his possession Another statement that " you have delivered possession of the land to me ' which would, if true, be valuable, is unfounded, as there is no evidence of any kind to show that the landlord at any time put the ryots in possession of the land More important than the above, *if they can be acted upon* are the statements in some of the renewed leases S-6, S-8, S-11, S-12, S-13, wherein the executants say that the landlord has " melvaram and kudivaram interests " in the land These specific statements, absent in the previous leases, appear, for the first time in the renewed leases The ryots are admittedly illiterate ; there is force in the observation of Horwill, J , that " it is always difficult for poor and ignorant ryots to fight an inamdar in a matter of this kind " In estimating the value of the stipulations and admissions made by tenants in the written muchilikas executed by them, cautionary observations repeatedly made by learned

1 (1923) 46 M L J 546 L R. 51 I A 83 I L R 47 Mad 337 (P C)

Judges should always be kept in mind Dealing with registered leases executed by tenants ranging from 1903 to 1911, it was observed in *Peravalli Kotayya* v *Ponnapalli Ramakrishnayya*[1]

"It is a well-known fact that the zamindars and inamdars anticipating tenancy legislation had been trying by all possible means to deny occupancy rights to the tenants and to prevent acquisition of occupancy rights by the tenants and for that purpose have been taking muchilikas with recitals in and by which the tenants stipulate to surrender possession to the landlord at the end of the term It has always been held that from such a stipulation it is unsafe to presume absence of occupancy rights in the tenant The value of these leases will also be much discountenanced if it is proved that the tenants from whom these leases were taken were in occupation of the said lands on the dates of the said leases "

Admittedly the defendants were in possession of the land when they executed the leases in question The practice resorted to by zemindars of taking muchilikas from tenants negativing the existence of occupancy rights is thus referred to by Wallis, C J. (as he then was) in an earlier decision, *Zamindar of Chellapalli* v. *Rayalapati*[2]

"In this connection it is to be borne in mind that numerous instances have come before the Court in which subsequent to the decision of the *Chockalinga's case*[3] zamindars succeeded in inserting in pattas and muchilikas terms negativing the existence of occupancy right "

In the above case the claim of the zemindar to treat certain lands as his "private land" based on the admissions to that effect contained in the muchilikas executed by tenants was negatived

Their Lordships cannot neglect the consideration that a ryot, so long as he is not evicted, might be prepared to sign anything, and that the evidential value of such a contract should be judged accordingly

Their Lordships will only add that this attitude might be modified if such statements in the leases were supported by other circumstances which—as they will show presently—do not exist in this case After careful consideration their Lordships think it is unsafe to act upon the statements and admissions contained in the S series lease deeds. In considering the evidence as a whole, these have not sufficient weight to rebut the presumptions in favour of the defendants arising from the other circumstances in the case

Coming to T series (extracts from registered khaths) executed by the tenants, reliance is placed on T-1 to T-6 which refer to the full kudivaram and melvaram rights obtained by the plaintiff from the Inam Commissioners under inam title deeds It is well known that it was not within the scope of the duties of the Inam Commissioners to define the relations between the landlords and their tenants. Reference may here be made to the Madras Act IV of 1869 (already quoted) which was specially enacted by the Legislature to make it clear that nothing contained in any title deed issued to a land owner by Inam Commissioners .

"shall be deemed to define or limit or destroy the rights of any description of landholders or occupiers of land from which inam is derived . "

Further, it does not appear that all the defendants on record have executed lease deeds like the T series deeds Their Lordships were informed in answer to a question that the deeds filed relate only to 6 defendants, one of whom the executant of T-5 is the father of 3 others who are minors Whether the others have executed similar deeds is not known However this may be, it follows from what has been already stated that these deeds are ineffective in supporting the claim of the plaintiff

The oral testimony of the plaintiff's witnesses and the other documents do not advance the plaintiff's case

Circumstances of a general nature relating to the holding relied on as throwing light on the nature of the plaintiff's rights in the land are not many, and the inferences deducible therefrom are not sufficiently convincing

1 (1937) 2 M L J 573 at 587 341
2 (1914) 27 M L J 718 I L R 39 Mad 3 (1871) 6 M H C R 164

In the course of his discussion of the question whether the tenants have made out that they have any occupancy rights in the land, Krishnaswami Ayyangar, J, refers to circumstances which in his view are destructive of the tenant's rights. Their Lordships think that these circumstances might in another setting be taken in the plaintiff s favour but in the present instance they do not, in their Lordships' view, support his claim The learned Judge says

"Considering the nature of the khaths executed by the tenants the provision contained in them for the payment by the inamdar of charges for the repairs of the ridges, the fact that the rents have been raised from time to time and the fact that there is no proof of dealings by the tenants by sales, mortgages or otherwise it seems to me that the only reasonable inference is that the tenants have failed to make out that they have any occupancy right in the land"

The provision contained in the khaths for the payment of charges by the inamdar stands on the same footing as the other provisions in the khaths which their Lordships have already considered In addition, it may be pointed out there is no reliable evidence that the landlord has paid for any repairs, (See para 22 of the Subordinate Judge's judgment) As regards the payment of increased rent Horwill, J, observes

"The learned Subordinate Judge has held that the rent paid by the tenants has always been the same and that although in muchilikas from 1913 onwards the tenants agreed to pay increased rent, yet they never in fact paid it Although this can be spelt out of the oral evidence and may be true, this is not at all clear from the documentary evidence"

Krishnaswami Ayyangar, J., apparently accepted the payment of increased rent as proved. Accepting the evidence that increased rent has been paid by some tenants, its importance has to be considered along with the other circumstances of the case, when such payments are made by cultivators whose families have been in possession of land from time immemorial they may well be attributed to a desire on their part to cling to the land of their ancestors at all costs Illiterates as they are, they may not have realised that such payments may be used against them to force them out of the land at some future date There is no evidence that rents have been increased in the case of all the tenants or that the increased amounts were paid by more than a few What is important is that no tenant has been at any time ejected from his land In such circumstances the payment of increased rents loses much of its force as a factor for consideration Dealing with property by the tenants by sales or mortgages, if proved, will be indicative of the existence of kudivaram interest in them If the tenants had no need to raise money, by mortgaging or selling the property, proofs will not exist of such dealings with the property, but what is *important for the present purpose* is that from the absence of such dealings, no inference can be drawn in support of the plaintiff's claim

The circumstances in favour of the defendants in considering the evidence as a whole are, (1) the grant was to a non-resident Brahmin ; (2) none but the members of the two families who constitute the entire body of the cultivating tenants has been in possession of such lands ; and (3) various partitions and consequent divisions of the property that have taken place have been recognised by the Inamdar.

Although there is no longer any presumption that a grant to a non-resident Brahmin is of the melvaram only, their Lordships say in *Seethayya* v *Somayajulu*[1]

"The Brahmins represented by the grantee were learned Brahmins apparently not resident in the village granted but resident about two miles away This circumstance by itself is by no means conclusive At the same time, it appears to their Lordships to make it more probable that the grant was *in the nature of an endowment of revenue rather than of land for the purposes of cultivation*" (The italics are by their Lordships)

The learned Judge Horwill, J, applies the above observation of their Lordships to the present case by making the following significant remarks.

"It might be possible for a person resident only two miles away to attend to cultivation, but it would have been quite impracticable for any one living in Dantaloor in Guntur district in 1677 to have done so"

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1 (1929) 56 M L J 730 L R 56 I A 146. I L R 52 Mad 453 (P C.).

Their Lordships agree with the above view.

As observed in the course of this judgment, the suit land has been in the possession of the families of the defendants for a long time; and there is no evidence that they derived possession from the Inamdar. Partitions of the property have been made by the families of the defendants without objection from the plaintiff or his predecessors which would show that they were allowed to treat the property as their own. There is reference in the Subordinate Judge's judgment to one Chintayya who "gifted his share to his son-in-law M. Ramayya" and this Ramayya executed a khath S. 13 in favour of a member of the Tangirala family (plaintiff's predecessor). This would show that there was even a transfer to an outsider, though a relation, recognised by the Inamdar. The *neutralising effect* of all these factors has not been given any weight in the consideration of the evidence by Krishnaswami Ayyangar, J.

On the evidence that has been placed before them, which is not conclusive, their Lordships are not satisfied that the plaintiff on whom the burden lies to prove that he has a title to evict the defendants, has discharged his burden.

For the above reasons, their Lordships will humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside with costs, the decree of the Subordinate Judge of Masulipatam restored and the plaintiff's suit dismissed. The respondents must pay the costs of this appeal.

Solicitors for Appellant: *Messrs. Douglas Grant & Co.*

Solicitors for Respondents: *Messrs. Lambert and White.*

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MACK.

Salma Bi ... *Petitioner**

v.

Mohammed Ebrahim Sahib ... *Respondent.*

Civil Procedure Code (V of 1908), *section* 132 (1)—*Muslim purdah ladies if entitled to claim exemption from personal appearance in Court as of right.*

The time has come when section 132 (1), Civil Procedure Code, should be given a fresh judicial interpretation to accord with the customs and manners of the country which have greatly changed. As customs and manners stand to-day no Muslim lady or purdanashin lady has an absolute right to claim exemption from personal appearance in Court. It does not mean that no purdanashin lady should be examined on commission. Whether or not this should be done would depend upon the facts of each case, the position of the lady in the litigation, the nature of the evidence she has to give and the circumstances in which she is placed.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Tanjore, dated 22nd November, 1948 in I. A. No. 854 of 1948, in O. S. No. 257 of 1948.

G. R. Jagadisan for Petitioner.

Respondent not represented.

The Court delivered the following:

JUDGMENT.—The petition raises an interesting question of the scope of section 132 of the Civil Procedure Code and the extent to which purdhanashin ladies and in particular Muslim ladies are exempt from personal appearance in Court. The learned District Munsif of Tanjore, Sri S. Natarajan, dismissed a petition by one Salma Bi who filed a suit in which she prayed for the divorce of her husband under Act IX of 1939, for the examination of herself and some of her witnesses who like her were stated to be gosha ladies on commission. The District Munsif observed that every allegation which can possibly be put forth in a suit for divorce had been set forth in the plaint. The cogent reason he gave for dismissing the petition was that the Court would lose the valuable opportunity of personally hearing the evidence of the plaintiff and her witnesses and watching their demea-

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*C. R. P. No. 1729 of 1948. 11th August, 1949.

nour The respondent who is the husband sought to be divorced makes no appearance on this petition

The learned advocate for the petitioner has argued the position at length, and cited before me authorities from the year 1899 to support his contention that under section 132 of the Civil Procedure Code all Muslim women and purdhanashin ladies can claim an absolute right for exemption from personal appearance in Court Section 132 (1) reads as follows

> " Women who, according to the customs and manners of the country, ought not to be compelled to appear in public shall be exempt from personal appearance in Court "

The earliest decision placed before me of the year 1899 is *Mohesh Chunder Addy* v *Manick Lall Addy*[1] by Travelyan and Stanley, JJ , of the Calcutta High Court In allowing the application for the examination of a Hindu lady on commission Travelyan, J , made the following observation

> " On the materials before me, I think I shall be erring on the right side if I refuse to take away from her the privilege she is entitled to "

The ground on which the privilege was sought to be taken away was the fact that the Hindu lady had appeared in Court in 1884, where she was examined in a palki as a result of which she was outcasted Stanley, J , expressed himself averse to granting commissions for the examination of witnesses not merely on account of expenses but also of their unsatisfactoriness. As he has observed

> " the laws of evidence are often not adhered to, and the advantage of *viva voce* examination before the Court is lost".

He however agreed that in that particular case a commission should be issued for the examination of the Hindu lady on commission without compelling her personal appearance in Court

The next decision in chronological sequence placed before me is *Vallia Nachiar* v *A K R M M Maiyappa Chetti*[2], by Srinivasa Ayyangar, J , in the year 1925 There the view was taken that a gosha lady who is not allowed to appear in Court or in public places according to the custom of her community cannot be compelled to appear in Court This same view was taken by a learned Bench of the Allahabad High Court in *Sunder Devi* v *Datta Triya Narhai*[3], which laid down that the exemption of purdhanashin ladies from personal appearance in Court granted by section 132 is a right which no Court has power to refuse and applies to parties as well as to witnesses That decision went to the length of holding that the words " personal appearance " under section 132 meant personal attendance in Court The same view has been taken by Cammainde and Ghose, JJ., in *Rahimanessa Bi* v *S K Halim*[4] There is no Bench decision of our own High Court dealing with this matter My attention has been drawn to a decision of 1941 by Edgley, J , in *Kisan Lal Karkorai* v *Purshotham Das Halwasiya*[5] This followed the Bench decision of the Allahabad High Court in substance, and held that a purdhanashin lady should not be compelled to appear in Court personally or even attend Courts although she may have failed to observe the restraints of the pardha system on previous occasions In another case in *Bilasroy Serowjee In re*[6], referred to by the learned District Munsif, Lort Williams, J , took the view that appearance in Court was something different from attendance in Court He made the following observation

> " I think ' appearance ' means that she shall not be compelled to come forth into view or become visible to the public gaze "

It is not easy to differentiate between personal appearance and personal attendance

It is however difficult to be bound in the year 1949 by decisions dating from the year 1899 as regards the interpretation of section 132, Civil Procedure Code, which is essentially based on " the customs and manners of the country ".

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1 (1899) I L R 26 Cal. 650
2 A I R 1925 Mad 905
3 (1933) I L R 55 All 666
4 A I R 1928 Cal 814
5 I L R (1941) 2 Cal 155
6 (1929) I L R 56 Cal 865

As I read section 132 (1) it is not the custom and manners or habits of a particular individual lady which has to be taken into consideration or the customs and manners of a family or a small community but the "customs and manners of the country" as a whole. The Calcutta decision of 1899 in which Travelyan and Stanley, JJ., with obvious reluctance took the view, that purdhanashin women had the right of exemption from personal appearance in Court was based on a state of affairs which is widely different from that that is in existence to-day. Customs and manners of a country are always changing. There can be no doubt that as regards the purdha customs there has been a change which can almost be described as revolutionary during recent years. Judges cannot but take judicial notice of Muslim ladies whose grandmothers lived in purdha appearing in Court as advocates arguing cases with considerable ability. As I read section 132 (1) it was not intended to be a rigid rule lasting for all time or till repealed intended to immobilise particular customs and manners. The interpretation of section 132, as it appears to me, must depend upon the customs and manners of the country as they have evolved at the time Courts are called upon to interpret it It would not be stretching the language of section too far to hold that the framers of the Act visualised a time in the future when the customs and manners of the country would so change that they could not be regarded as in any way a prohibition of appearance in public of purdhanashin ladies or their personal appearance in Court The view that I am inclined to take is that the change in the customs and manners of purdah and purdhanashin ladies has of recent times become so great that the stage has been reached when a Court would be justified in saying that according to the customs and manners of the country women can be compelled to appear personally in Court. In their own interests particularly as in the case of the present petitioner plaintiff seeking relief, it is manifestly desirable that they should make a personal appearance before the Judge trying the case and give their evidence before him. The petitioner in this particular case is taking advantage of progressive and comparatively recent legislation which enables a Muslim lady to obtain a divorce from her husband, relief to which she was not previously entitled I do not desire to handicap her in the prosecution of her suit by her and her witnesses to be examined on commission by following judicial precedents which, with the greatest respect, I must consider to be out of date and no longer binding.

A further consideration is that the state of purdah has itself undergone a considerable change from the hard rigidity of 50 years ago to a comparatively lax state of purdha enforcement In my own experience as District Judge for several years I do not recollect a single instance in which I have allowed the examination of a purdhanashin lady on commission, particularly if she was a plaintiff or defendant, though if satisfied that she was gosha, I took every precaution in Court to see that the Court was cleared of all but the learned advocates and the Court officials when she gave her testimony

In my opinion the time has come when section 132 (1) should be given a fresh judicial interpretation to accord with the customs and manners of the country which have greatly changed, and may be described so far as the custom of purdha is concerned to be in a transitory condition The view that I am inclined to take is as customs and manners of the country stand to-day no Muslim lady or purdhanashin lady has an absolute right to claim exemption from personal appearance in Court I would not go so far as to say that no purdhanashin lady should be examined on commission. Whether or not this should be done would depend upon the facts of each case, the position of the lady in the litigation, the nature of the evidence she has to give and the circumstances in which she is placed. In a matter of this kind when the section itself is based on customs and manners of the country which cannot but change it is extremely difficult to fall back upon judicial precedents when customs and manners in public opinion as regards them were widely different If we judges continue to follow judicial precedents of several years ago in this matter without keeping abreast of changing times we shall be exposing ourselves

to the criticism of being janitars of the purdha system and acting as impediments in the way of the emancipation of women from its confines

The learned District Munsiff in his order referred to the case of In re *Bilasroy Serowjee*[1], and the observations of Lort Williams, J, with which, with respect, I entirely agree that the examination of purdhanashin ladies in Court can always be arranged with the minimum of public appearance I do not think I need give the learned District Munsif any further specific directions in the matter This concession to purdhanashin ladies of examining them in camera is one which can and should be made to them during this period of transition of changing customs and manners There is another type of case in which the appearance of purdha girls is absolutely necessary. I refer to the not infrequent cases in which they are wards of the Court and the Court has often to see them and question them on matters affecting their welfare It would be extremely difficult to allow the extreme position taken by the learned advocate for the petitioner that according to the customs and manners of the country as they exist in 1949 such pudhanashin ladies can claim complete exemption from *any* appearance in Court I see no grounds for *any* interference with the order passed by the learned District Munsiff who has merely adopted the same procedure I have invariably followed while trying suits as a District Judge for many years without, I may say, so far as I can remember, any civil revision petition being filed against my orders disallowing applications for examination of these ladies on commission In the circumstances I make no order as to costs

V S — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SUBBA RAO AND MR JUSTICE SOMASUNDARAM.

Dadi Appala Naidu and others . *Appellants**

v

Kolluru Bhimalingam and others *Respondents*

Transfer of Property Act (IV of 1882), *section* 92—*Distinction between legal and conventional subrogation—Crucial date for application of doctrine of subrogation*

The distinction between legal subrogation and conventional subrogation is that in the case of the former the person having the pre-existing interest discharges the prior mortgage to protect his interest and by meeting an obligation in excess of his liability, whereas in the latter case, he would be discharging only an obligation he had undertaken under a specific agreement (as for instance as a vendee of item of property)

Lakshmi Ammal v *Sankaranarayana Menon*, (1935) 70 M L J 1 I L R 59 Mad 359 (F B), *Subbarayudu* v *Lakshminarasamma*, (1939) 2 M L J 533, *Hira Singh* v *Jai Singh*, I L R 1937 All 880, *Rai Bahadur Bansidhar Dhandania* v *Karoon Mandar*, (1938) I L R 17 Pat 666 and *Kukaram Maruari* v *Muhammad Hossain*. (1935) I L R 62 Cal 677, reviewed

It cannot be said that the crucial date for the application of the doctrine of subrogation is the date of the sale deed whereunder the vendees took upon themselves the obligation to discharge an existing mortgage The foundation of the right to legal subrogation is the equitable principle of re-imbursement and the right will arise only on the discharge of the prior mortgage and not earlier The fact that the vendee had also a puisne mortgage on the date of the sale to him is of no avail where on the date of the discharge of the prior mortgage the puisne mortgage had already been discharged

Appeal against the judgment and decree of Patanjali Sastri, J, dated 25th April, 1947, in S A No 759 of 1945, preferred to the High Court against the decree of the District Court, Vizagapatam, in A S No 53 of 1944, preferred against the decree of the Court of the Subordinate Judge, Vizagapatam, in O S No. 27 of 1942

D. Narasaraju for *D V Reddi Pantulu* for Appellants.

Y. Suryanarayana for Respondents.

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1. (1929) I L R 56 Cal 865

*L P A. No 44 of 1947

26th July, 1949.

The Judgment of the Court was delivered by

Subba Rao, J—This is a Letters Patent Appeal against the judgment of Patanjali Sastri, J., and it raises a question of subrogation.

On 6th August, 1924, one Jagandhara, the husband of the seventh defendant, executed a mortgage deed Ex. D-1 in favour of defendants 2 and 3 in respect of item 4 of Schedule D annexed to the plaint for a sum of Rs. 1,000 On 6th September, 1924, he executed another mortgage deed Ex. P-1 in favour of defendants 4 and 5 in regard to items 1 to 3 for a sum of Rs. 750. He again mortgaged items 1, 3 and 4 to defendants 2 and 3 under Ex D-2 dated 29th June, 1930, for a sum of Rs. 500. On 11th July, 1930, he borrowed another sum of Rs 1,670 and executed a mortgage deed Ex P-2 mortgaging items 1 to 5 On 9th September, 1933, by Ex D-10, defendants 2 and 3 transferred their interest under Ex D-1 to the sixth defendant Under Ex D-11, dated 7th October, 1933, Jagandhara's wife Mahalakshmi, being minor represented by her father, executed a sale deed in favour of defendants 2 and 3 for a sum of Rs 2,500 conveying to them item 4 of the plaint B Schedule The consideration for that sale deed was made up of three items :

(1) Rs 1,710 due under the mortgage deed Ex D-1 which was assigned in favour of the sixth defendant The vendees undertook to pay this amount

(2) The amount of principal and interest due under Ex D-2 executed by the vendor's husband Jagandhara in favour of the vendees, *i e*, defendants 2 and 3

(3) Rs 126-14-0, the amount received in cash

On 31st March, 1934, defendants 2 and 3 filed a statement in E P No. 788 of 1933 wherein they admitted that Ex D-2 was discharged and the property was not subject to the mortgage. On 29th August, 1938, defendants 2 and 3 paid to the sixth defendant the sum due under Ex D-1 and Ex D-1 (*a*) is the endorsement acknowledging the said payment In execution of a simple money decree against the mortgagors, items 1, 2 and 5 were brought to sale and were purchased by defendant 3 on 2nd November, 1934, who, in his turn, sold those properties under Ex D-7 dated 10th September, 1938, to the first defendant. The plaintiff is the assignee of the mortgage rights under Ex P-1 and Ex P-2. He instituted O S. No 27 of 1942 on the file of the Subordinate Judge of Vizagapatam to enforce the two mortgages assigned in his favour Defendants 2 and 3 who became the owners of item 4 claimed to be subrogated to the rights under the prior mortgage Ex. D-1 which they discharged The first defendant claimed in respect of item 1 the right to fall back upon the prior mortgage Ex. D-2 as against Ex P-2 as his vendor, the third defendant, who was the mortgagee of items 1, 3 and 4 under Ex D-2 purchased that item along with items 2 and 5 in the Court sale of November 1934. The learned Subordinate Judge rejected the claims of priority set up by defendants 1, 2 and 3; but the learned District Judge in appeal allowed the two claims. The plaintiff preferred S A. No 759 of 1945 against the decree and judgment of the learned District Judge Patanjali Sastri, J , agreed with the learned Subordinate Judge and set aside the decree of the District Judge. With the leave of the learned Judge the defendants whose claims to priority were rejected, prefer this Letters Patent Appeal.

Mr. Narasaraju, learned counsel for the appellants accepted the conclusion of the learned Judge in regard to item 1 of B Schedule and confined his arguments only to item 4 of the plaint B Schedule He contended that defendants 2 and 3 being the puisne mortgagees of item 4 before they purchased the said item under Ex. D-11 had a pre-existing interest in the mortgaged property, and therefore were entitled to be subrogated under the first paragraph of section 92 of the Transfer of Property Act. The question raised in this appeal depends upon the construction to be put on sections 91 and 92 of the Transfer of Property Act. The material provisions of the said sections read —

"91 Besides the mortgagor, any of the following persons may redeem, or institute a suit for redemption of, the mortgaged property, namely :—

(*a*) any person (other than the mortgagee of the interest sought to be redeemed) who has any interest in or charge upon, the property mortgaged or in or upon the right to redeem the same ,

(*b*) any surety for the payment of the mortgage-debt or any part thereof, or

(*c*) any creditor of the mortgagor who has in a suit for the administration of his estate obtained a decree for sale of the mortgaged property

92 Any of the persons referred to in section 91 (other than the mortgagor) and any co-mortgagor shall, on redeeming property subject to the mortgage, have, so far as regards redemption, foreclosure or sale of such property, the same rights as the mortgagee whose mortgage he redeems may have against the mortgagor or any other mortgagee

The right conferred by this section is called the right of subrogation, and a person acquiring the same is said to be subrogated to the rights of the mortgagee whose mortgage he redeems

A person who has advanced to a mortgagor money with which the mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument, agreed that such person shall be so subrogated . . . . . "

Text-book writers treated the law conveniently under two categories (1) Legal subrogation or subrogation by operation of law, and (2) Conventional subrogation. Sir D F Mulla in his commentary on the Transfer of Property Act broadly states the two principles in the following manner

" (1) Legal subrogation, or subrogation by operation of law arises when a person who has in the property an interest of his own to protect, discharges a prior encumbrance

(2) Subrogation is conventional when there is an agreement express or implied that the person making the payment shall exercise the rights and powers of the original creditor "

There was no comprehensive statement of law of subrogation in the Transfer of Property Act till section 92 was inserted by the amending Act XX of 1929. The first paragraph of section 92 deals with legal subrogation and the third paragraph provides for the conventional subrogation There was a lucid and exhaustive exposition on the interpretation of the provisions of this section by two judgments of this Court : one that of the Full Bench reported in *Lakshmiammal* v *Sankaranarayana Menon*[1] and the other by a Division Bench reported in *Subbarayudu* v. *Lakshminarasamma*[2] It would be redundant if we attempted to re-state the law at any length It would be enough if we extract the principles embodied in those judgments and the judgments of other Courts following these judgments The distinction between paragraphs 1 and 3 of section 92 of the Transfer of Property Act has been succinctly brought out by Varadachariar, J, in *Lakshmiammal* v. *Sankaranarayana Menon*[1] in the following passage .

" There is a well-established distinction between cases in which a person who has a *pre-existing* interest in property pays off a prior charge on that property for the protection of his own interest and cases in which a person acquires an interest in property only by reason of his advancing money to pay off an existing mortgage debt It seems to me that clause 1, section 92 must be held to relate to the first type of cases above referred to and clause 3 to the second type "

Venkataramana Rao, J, states the law to the same effect but in different terms. He says :

" The first clause enunciates no new principle (*vide* section 74 of the Transfer of Property Act, since repealed) It applies to all persons who have an interest in the equity of redemption and are under no personal obligation to discharge prior incumbrances Clause 3 has been enacted to confer a benefit on persons who advance money to discharge an incumbrance only 'if the mortgagee has by a registered instrument agreed that such persons shall be subrogated ' The clause is intended to apply to all persons who acquire an interest in the mortgaged property by advancing moneys to discharge prior incumbrances and there is no warrant for restricting the scope of that clause to persons other than purchasers or mortgagees "

In view of the observations of Venkatasubba Rao and Abdur Rahman, JJ, in *Srinivasulu* v. *Damodaram*[3], throwing considerable doubt on the correctness of the aforesaid observations, Venkataramana Rao, J, had to consider the position in greater detail in his judgment reported in *Subbarayudu* v *Lakshminarasamma*[2]. After exhaustively considering the case-law on the subject, he adhered to the view expressed by him in the Full Bench judgment, *Lakshmiammal* v *Sankaranarayana Menon*[1] At page 544 the learned Judge summarises the law under various aspects which may usefully be referred to.

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1. (1935) 70 M L J 1 . I L R 59 Mad 359 (F B)
2. (1939) 2 M L J 533
3. A I R 1938 Mad 779

In *Hira Singh* v *Jai Singh*[1], Sulaiman, C J , accepts the law as enunciated in the Madras decisions and states it in his own words at page 893 as follows

"Now it is well known that subrogation can arise in two ways · (1) by agreement and (2) by operation of law Paragraph 1 deals with subrogation arising by operation of law and paragraph 3 deals with subrogation by agreement It is necessary that there should be an agreement for subrogation, that the agreement should be in writing and that it should be a registered instrument. It would be impossible to hold that these two paragraphs overlap each other, for paragraph 3 requires certain stringent conditions which are not found in paragraph 1 They must therefore be mutually *exclusive* The basic difference underlying these two paragraphs consists in this that paragraph 1 refers to a person redeeming property and the third paragraph to a person who advances money with which a mortgage is redeemed "

Later on he states

"Where a person himself redeems a mortgage, that is to say, pays the mortgage money out of his own pocket and not merely discharges a contractual liability to make the payment, he is entitled to the rights of subrogation under paragraph 1 if he is one of the persons enumerated in section 91. But where the person does not himself redeem the mortgage, that is to say, does not himself pay the money out of his own pocket in excess of his contractual liability but advances money to a mortgagor and the money is utilised for payment of a prior mortgage, whether the money is actually paid through the hands of the mortgagor or is paid through the hands of the mortgagee. the latter acquires the right of subrogation only if the mortgagor has by a registered instrument agreed that he shall be so subrogated . . He is really not himself redeeming the mortgage but redeeming it as the agent of the mortgagor "

The same view was also expressed by the Patna High Court in *Rai Bahadur Bansidar Dhandania* v *Kairoo Mandar*[2] At page 667, the learned Judges observed :

"The first paragraph of section 92, would undoubtedly have entitled the appellant as purchaser of the equity of redemption to subrogation if he had redeemed the prior mortgages on his own account and independently of any agreement with the mortgagor who is specifically excluded in this paragraph , but the appellant paid off the prior mortgagees with moneys that were left with him for the purpose by the vendors-mortgagors The third paragraph of the section, which it is claimed by the respondent would apply to the appellant, provides that a person who had advanced to a mortgagor money with which a mortgage has been redeemed shall be subrogated to the rights of the mortgagee whose mortgage has been redeemed, if the mortgagor has by a registered instrument agreed that such persons shall be so subrogated . That they were not paid into the hands of the mortgagors is immaterial, for, it was by agreement with them (if not at their instance) and in pursuance of what the learned Judge of this Court has called an express covenant that the appellant actually paid them to the old mortgagees . "

The same view was expressed by the Calcutta High Court in *Mukaram Marwari* v *Muhammad Hossain*[3] Nasim Ali, J , observes .

"It is equally well established on authorities that 'if the debt is the debt of the person who paid it, or is a debt which he has covenanted to pay, his payment of it raises no right of subrogation, but is simply a performance of his own obligation or covenant ' "

Indeed Mr Narasaraju for the appellant not only did not question the aforesaid principles but relied upon them in support of his argument. He contended that when defendants 2 and 3 purchased the property under Ex D-11 on 7th October, 1933, they had a pre-existing interest in the property being the puisne mortgagees under Ex D-2, dated 29th June, 1930, and therefore they would be entitled to the right of subrogation under the first paragraph of section 92. Learned counsel said that the existence of an interest in the property on the date of the sale deed was sufficient and it did not matter whether a prior mortgage was discharged not to protect his interest but only pursuant to an agreement entered into with the vendor If this argument was accepted it would be destructive of the principles on which he purported to rely upon The distinction between legal subrogation and conventional subrogation is that in the case of the former the person having the pre-existing interest discharges the prior mortgage to protect his interest and by meeting an obligation in excess of his liability , whereas in the latter case he would be discharging only an obligation he had undertaken under a specific agreement. Defendants 2 and 3 did not discharge Ex D-1 to protect their interest but because

1 I L R (1937) All 880
2. (1938) I.L R. 17 Pat 666
3 (1935) I L R. 62 Cal 677

of their obligation under the sale deed Ex D-11. The argument of Mr. Narasaraju ignores this distinction and therefore we cannot accept it.

Further the facts of this case disclose that on the date when defendants 2 and 3 discharged Ex. D-1 they had no longer any interest in the mortgaged properties In Ex P-9 as we have already stated defendants 2 and 3 admitted that the mortgage in their favour was discharged even prior to 31st March, 1934. Ex. D-1 (*a*) shows that Ex. D-1 was discharged on the 29th August, 1938. It therefore follows that on the date when the prior mortgage was discharged, they ceased to be puisne mortgagees in view of their unambiguous admission In this view also the contention of Mr Narasaraju has no merits

Learned counsel for the appellants further pressed on us that the crucial date for the application of the doctrine of subrogation is the date of the sale deed whereunder defendants 2 and 3 took upon themselves the obligation to discharge Ex. D-1 and on that date as the puisne mortgage in their favour was subsisting they must be deemed to be persons having a pre-existing interest within the meaning of the Full Bench decision reported in *Lakshmiammal* v *Sankaranarayana Menon*[1]. This argument again is based upon a misapprehension of the principles of legal subrogation. The foundation of the right is the equitable principle of re-imbursement If a person is interested in the payment of money which another is bound by law to pay, and therefore pays it, he is entitled to be re-imbursed by the other. The personal obligation arising nnder the circumstances is embodied in section 69, of the Indian Contract Act and the equitable right of subrogation under section 92 of the Transfer of Property Act Sir D. F. Mulla puts the same principle in the following manner :—

"Subrogation by operation of law rests therefore on the same equity of reimbursement as is enacted in section 69 of the Indian Contract Act"

In either case the right to subrogation or re-imbursement will arise only on the discharge of the prior mortgage and not earlier. We therefore agree with the learned Judge that on the facts of this case, the third paragraph of section 92 applies and the condition laid down therein not having been complied with, the defendants 2 and 3 would not be entitled to be subrogated to the rights of the mortgagee under Exhibit D-1

In the result the appeal is dismissed with costs of the first respondent

K S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE GOVINDA MENON

Saboora Bivi Ammal ... *Petitioner**

v

Julaika Bivi Ammal ... *Respondent*

Civil Procedure Code (V of 1908), Order 26, rule 15—Expenses of the commission—Meaning of

The phrase "expenses of the commission" in ordinary parlance would mean only what the Commissioner has to spend for summoning witnesses and for other incidental expenses relating to the examination of the witnesses before him It is wrong to construe that expression in Order 26, rule 15, Civil Procedure Code, as including the expenses to be defrayed by the opposite party to the one applying for the issue of a commission for proceeding from the locality where the Court is situate to the place where the Commissioner is to function

Observations of Mack, J, in *Abdurahiman Settu* v *Muhammad Kasam Settu,* (1948) 2 M L J. 652, considered to be wide.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the Court of the Subordinate Judge, Kumbakonam, dated 24th February, 1949 and 10th March, 1949, in I A No. 6 of 1949 in O S No 47 of 1947

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1. (1935) 70 M L J 1 : I L R 59 Mad 359 (F B).

*C R P No 444 of 1949 29th July, 1949

K. S Desikam and *T. R Ramachandran* for petitioner.

T S Venkatarama Aiyar for Respondent

The Court delivered the following

JUDGMENT —The learned Subordinate Judge of Kumbakonam has construed the expression " expenses of the commission " in Order XXVI, rule 15 of the Civil Procedure Code as including the expenses to be defrayed by the opposite party to the one applying for the issue of a commission for proceeding from the locality where the court is situate to the place where the commissioner is to function There is no direct authority on the point except the observations of my learned brother, Mack, J , in *Abdurahim Settu* v *Muhammad Kasam Settu*[1], where the learned Judge observes that the " expenses of the commission " can be made to include expenses of the other parties to the litigation and can in suitable cases be ordered to be deposited by the party at whose instance the commission was taken out. It seems to me that this proposition has been very widely stated. The phrase " expenses of the commission " in ordinary parlance would mean only what the commissioner has to spend for summoning witnesses and for other incidental expenses relating to the examination of the witnesses before him. No authority has been placed before me where the words have been construed in such wide terms. Moreover, the Civil Rules of Practice (Rule 82) does not contemplate any such thing and all that the rule says is

" Every application for the issue of a commission shall be supported by an affidavit setting forth the estimated expenses of the commission, and the remuneration, if any, of the proposed commissioner "

If one of the parties desires to travel luxuriously by air or in the first class on board a ship, it cannot be said that such a thing can be included as expenses of the commission In the absence of any direct authority I am not inclined to hold that the word " expenses " would mean that The learned Sub-Judge was of the opinion that the passage money and the railway fare would be Rs. 150 , that cannot be allowed The learned Subordinate Judge directed the deposit of a sum of Rs 250 before the issue of a commission That sum has to be reduced. The petitioner will deposit a sum of Rs 125 in the lower court within one month from to-day The learned Subordinate Judge will decide then as to the person to whom the commission would issue and other necessary matters If the amount is not deposited, the petition will stand dismissed with costs Costs of the revision petition will abide and follow the result of the suit.

V S *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE GOVINDA MENON

Guruswami Goundan and others .. *Appellants**

v

Marappa Goundan and others .. *Respondents*

Hindu Law—Joint family—Renunciation of a father's rights in joint family properties on his being paid maintenance—Validity

Hindu law recognises the relinquishment by a member of a Joint Hindu family of his rights in the joint family properties It would enure for the benefit of all the other members thereof

Venkatapathi Raju v *Venkatanarasimha Raju*, (1936) 71 M L J 558 L R 63 I A 397 I L R. 1937 Mad 1 (P C) and *Subbanna* v, *Balasubba Reddi*, (1945) 1 M L J 140 I L R 1945 Mad. 610 (F B) referred to

The texts envisage only the renunciation of a son and not by the father or grandfather There is no specific text or authority which shows that the father could renounce his rights in joint family property by taking a trifling or something for his means of livelihood If a son can renounce his rights, a father who can compulsorily effect a partition under the Hindu Law, can renounce his rights by an effacement of his own rights either by not taking anything or partitioning the property among the sons after taking maintenance Therefore a renunciation of his rights by a father after agreeing to receive maintenance would be valid

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1 (1948) 2 M L J 652.

*S A. Nos 486 and 487 of 1946 22nd July, 1949.

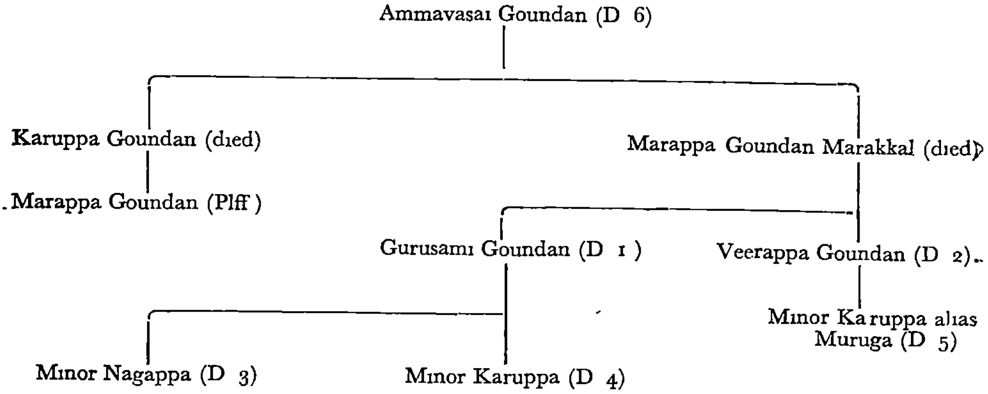
Second Appeals against the decrees of the Court of the Subordinate Judge, Coimbatore, in A S Nos 78 and 86 of 1945 preferred against the decrees of the Court of the District Munsiff, Gobichettipalayam, in O S Nos 398 and 119 of 1943

T M Krishnaswami Aiyar and *P Ramachandra Reddi* for Appellants

K Bashyam, C A Vaidyalingam, T. Venkatadri, T R Srinivasan and *S. Gopalaratnam,* for Respondents.

The Court delivered the following

JUDGMENT —These are connected appeals and can be disposed of by a common judgment. S A No 486 of 1946 arises out of O S No. 398 of 1943 on the file of the court of the District Munsiff of Gobichettipalayam in which the appellants were defendants 1 to 5 The fifth appellant having died pending the second appeal, the sixth appellant was brought on record as his legal representative. The appellants in S A No 487 of 1946 which arises out of O S No 119 of 1943 on the file of the same District Munsiff's Court were the plaintiffs and defendants 2 and 3 in that suit The contesting respondent in both the second appeals is the same individual and he was the plaintiff in O S No 398 of 1943, and the first defendant in O S. No 119 of 1943 In order to appreciate the contentions of the parties, it will be convenient to set out the relation between them as shown in the plaint in O. S. No 398 of 1943 and set out in the judgment of the learned Subordinate Judge in paragraph 12 of his judgment.



O. S. No. 398 of 1943 was filed by the contesting respondent for specific performance of an agreement for partition entered into between him and defendants 1 and 2 therein on the 14th July, 1941, and for possession of the plaint B-1 schedule properties. The contention of the defendants therein was that the agreement was invalid and not binding and that the grandfather of the plaintiff and defendants 1 and 2 (the sixth defendant) had not renounced his right in the joint family properties. The trial Court found that the sixth defendant did not relinquish his share in the joint family properties It also found that the agreement of partition on which the plaintiff based his case, Ex P-2 was invalid and inoperative for various reasons, one of them being the inequality in the division of the properties and therefore O. S. No 398 of 1943 was dismissed With regard to O. S No 119 of 1943, the learned District Munsiff held that it has to be decreed The plaintiff in O.S. No. 398 of 1943 took up the matter in appeal and the learned Subordinate Judge finding that the relinquishment by the sixth defendant was true, and that as between defendants 1 and 2 on the one side and the plaintiff on the other, Exhibit P. 2 was an operative and valid document, decreed the suit in reversal of the decision of the District Munsif.

On the basis that the sixth defendant had not relinquished his share in the family properties, he had sent a registered notice on 27th January, 1942, to his grandsons expressing his intention to divide; and thereafter on 6th February, 1942, he executed a settlement deed in favour of his great grandsons defendants 3 to 5 in O.S.

No. 398 in respect of his one-third share in the plaint properties. On the basis of this settlement, defendants 3 to 5 in O S No 398 filed O S No 119 of 1943 for partition and recovery of possession of the one-third share of their great grand-father settled upon them under Ex. D-1 dated 6th February, 1942 The plaintiff in O S No 398 was the contesting defendant there and he repudiated the alleged settlement on the ground that long prior to that, the settlor, Ammavasai Goundan, had relinquished his share in the family properties As the District Munsif had found that the alleged relinquishment did not take place, he gave effect to the settlement and passed a preliminary decree for partition in favour of the plaintiffs in O S No 119 of 1943 As stated already the plaintiff in O S No 398, who was the first defendant in O S No 119 of 1943, aggrieved by this preliminary decree for partition, filed an appeal in which the same question had to be discussed The appeals against O S Nos 398 and 119 of 1943 were A S Nos 78 and 86 of 1945, respectively They were heard together by the learned Subordinate Judge who allowed both the appeals with the result that O S No 398 was decreed in favour of the plaintiff and O S No 119 was dismissed Hence the two second appeals by the defendants 1 to 5 in O S. No. 398 of 1945 who were the plaintiffs and defendants 2 and 3 in O S No 119 of 1943.

Mr T M Krishnaswami Aiyar appearing for the appellants raised three important points, all of which will be considered seriatim His first argument was that the finding of the learned Subordinate Judge regarding the renunciation by Ammavasai Goundan is unsound and is opposed to law It is further alleged that there is no legal evidence to support the finding The plaintiff in O S. No 398 of 1943 stated in paragraph 5 of his plaint that in or about the year 1932, the sixth defendant (Ammavasai Goundan) agreed to receive a maintenance allowance of four putties of paddy every year for himself and his wife and relinquished all his interest in the family property It was alleged that since that time the plaintiff in O S No 398 as well as defendants 1 and 2 therein and their children alone constituted the joint family of which the plaintiff's deceased father Karuppa Goundan was the manager In their written statement, both defendants 1 and 2 as well as the sixth defendant denied the alleged oral relinquishment, the sixth defendant pleading that he did not renounce his right in the family properties and that it was false to say that he was receiving maintenance His case was that since he was old, and since Karuppa Goundan, his eldest son, was looking after the family affairs, he was living with his daughter in another place, managing her properties. The question therefore was definitely put in issue and considered in great detail by the trial Court under issue No 1 The learned District Munsiff held that since there was no documentary evidence to prove the oral renunciation and the payment of four putties of paddy a year as maintenance, none of the plaintiff's witnesses had any knowledge of the alleged agreement He considered the evidence of P W 1, the plaintiff himself, that prior to twelve years of the date of his giving evidence, the sixth defendant was not given maintenance but was messing in his daughter's house The sixth defendant's wife, the grandmother of the plaintiff, was living in the family house In view of the plaintiff's evidence that no maintenance was given to the sixth defendant prior to 12 years and since the sixth defendant was living in Nallikoundanur, it was incredible that any maintenance was ever given and therefore the sixth defendant would not have relinquished his right. The learned District Munsiff also considered the absence of any mention about the alleged relinquishment in the reply notice Ex P-6 sent by the plaintiff to the sixth defendant's notice Ex P-5 Then he considered the evidentiary value of the registration copy of the partition deed Ex P-1 dated 9th June, 1937 as well as the unregistered deed of agreement of partition Ex P-2 dated 14th July, 1941. The non-inclusion of Ammavasai Goundan in Ex P-1 along with the circumstance that he was an attesting witness in Ex P-2 was considered The trial Court was of opinion that the sixth defendant did not take part in the execution of Ex P-2, nor was he present at the time of its execution The learned Munsiff believed the evidence of the sixth defendant that when he attested Ex P-2

it was not read out to him and when the plaintiff brought it to Nellikoundanur for taking his signature, it was affixed without knowing the contents of the document though the plaintiff stated that the agreement recited two shares which the sixth defendant did not agree to The learned District Munsiff considered the age of the sixth defendant at that time, about 85 or 90 The first defendant's evidence as D W 1 was also considered From these and other documents, the learned District Munsiff concluded that there should have been no renunciation as claimed in the plaint but that the sixth defendant was only living with his daughter to manage her estate and he had no intention, nor did he, by any overt act, agree to renounce his share The learned Subordinate Judge also considered the same evidence in sufficient particularity of detail. In paragraph 13 of his judgment, he considers the evidentiary value of Exs P-1 and P-1 (*a*) and in paragraph 14 he discusses the effect of the attestation in Ex P-2 by the sixth defendant Discussing Exs P-3 and P-4 along with the notices Exs. P-5 and P-6, the learned Judge had to consider the credibility of the sixth defendant's evidence as D W 2. He came to the conclusion that the sixth defendant was not without advice or help, that he could not be easily fooled by the plaintiff to attest a document the contents of which he did not know or he did not care to enquire. The lower appellate Court later on proceeds to consider the oral evidence of P W 1, the plaintiff, as well as the other witness P W. 2 The writer of Ex P-2 was examined as P. W 6 In the succeeding paragraphs, the learned Judge discusses the evidence of the first defendant as D W. 1 and also once more considered the evidence of the sixth defendant as D W 2. After setting out the salient portions of the evidence of the witnesses in the previous paragraphs, in paragraph 19 of the judgment he considered the entire effect of the oral and documentary evidence regarding renunciation. He then found that it is quite likely that the plaintiff and defendants 1 and 2 agreed to pay maintenance to the sixth defendant In the opinion of the learned Judge the sixth defendant was more concerned with his daughter's family in another village and therefore it is not improbable that he would have allowed his sons to divide as between themselves all the joint family properties relinquishing his share in them The effect of the sixth defendant's wife residing in the joint family was also considered and the conclusion was that that fact does not detract from the case of relinquishment of his rights by the sixth defendant in the joint family properties The learned Judge specifically stated that he saw no reason whatever to disbelieve the evidence of the plaintiff's witnesses He emphatically stated that he refused to believe that the sixth defendant blindly signed Ex P-2 without knowing the contents thereof and finally the learned Judge concluded that the renunciation as alleged by the plaintiff is true, though there was no documentary evidence to substantiate it

It is difficult to say that the finding of the learned Judge is not based on evidence. The lower appellate Court has not omitted to consider any portion of the evidence on which the trial Court relied Mr T M Krishnaswami Aiyar invited my attention to various portions of the evidence of P W 1 and the so-called admissions made by him therein He also drew the attention of the Court to the evidence of the sixth defendant examined as D W. 2 Having carefully considered all these materials placed before me, I find it difficult to say that the finding of the learned Subordinate Judge is not based on legal evidence It may be that he should not have believed the evidence of P Ws 1 and 2 It is just possible that another appellate Court might come to a different conclusion and might agree with the trial Court. But that is no reason to say that the finding is vitiated by any error of law which would justify my interference in second appeal I would therefore hold that the learned Subordinate Judge's view regarding renunciation should be accepted.

Then comes the question of law which was mooted during the course of the appellants' arguments which has to be considered in detail The plaintiff's case was, as I have already stated, that the sixth defendant agreed to receive maintenance and renounce his rights in the joint family properties At one stage,

Mr T R Srinivasan appearing for the respondent wanted to contend that the sixth defendant renounced his right in the properties absolutely and the grant of maintenance to him of four putties of paddy as alleged by the plaintiff was not a condition precedent to the renunciation but that it was only a subsequent arrangement by which the descendants of the sixth defendant agreed to give him something. I do not think that that is a proper construction to be put upon the plaintiff's case. It is definitely a case of renunciation of one's rights in joint family properties on condition of being paid maintenance during his life's time. The question then arises whether the Hindu law as administered in our Courts recognises the renunciation of a member's rights in the joint family properties on condition that he is paid something towards maintenance In this case, the person who has renounced his rights is the head of the family, being the ancestor of all the other members No direct case bearing on the subject has been brought to my notice by any of the learned counsel In *Peddayya* v *Ramalingam*[1], Muthuswami Aiyar and Shepherd, JJ, had to consider the effect of the release by one coparcener of his share in the property in favour of another coparcener and not in favour of all the rest of the coparceners and the learned Judges held that such a release is valid relying upon the texts of Manu and Yagnavalkya, to the effect that a coparcener is competent under Hindu law to renounce his share This was followed by Sadasiva Aiyar and Napier, JJ, in *Thangavelu* v *Doraiswami Pillai*[2] where it was held that a gift by a father of all his interest in the family property in favour of his son being supported by natural love and affection can be upheld as a relinquishment They further held that a relinquishment to be effective need not necessarily be supported by consideration, nor need it be in favour of all the remaining coparceners To the same effect is the decision in *Veerammal* v *Kamu Ammal*[3] After the decision of the Privy Council in *Venkatapathi Raju* v *Venkatanarasimha Raju*[4], it was considered that the principle laid down in the aforesaid decisions required re-consideration and therefore the matter came up before the Full Bench in *Subbanna* v *Balasubba Reddi*[5], where, after considering the previous authorities, Leach, C J, in delivering the judgment of the Full Bench held that a member of a joint Hindu family governed by Mitakshara law cannot give his interest in the family estate to one of several coparceners if they remain joint in estate In such circumstances, he can relinquish his interest but the relinquishment operates for the benefit of all the other members It is therefore, clear that the law recognises the relinquishment of a member's rights in the joint family properties which would enure for the benefit of all the other members thereof. Two propositions emerge from these decisions namely (1) that it is competent for a member of a joint Hindu family to renounce, or relinquish, his interest in the joint family properties, and (2) that such renunciation or relinquishment operates in favour of all the remaining members of the coparcenary which, in spite of the renunciation by one member, continues joint and that the number of members alone gets reduced A negative proposition is also established that a member cannot relinquish his share in the properties in favour of any other member but should do it only for the benefit of all the remaining members of the joint family. These decisions were relied upon by the learned counsel for the appellants for contending that a relinquishment should be absolute without any kind of reservation or condition and that if a member purports to give up his rights in the joint family properties reserving a right to maintenance as a condition precedent to his renunciation, such a relinquishment will not be valid It is argued that since the sixth defendant retained a right to receive maintenance at the rate of four putties of paddy from the remaining members of his family, his action in giving up his proprietary rights in the joint family property would not amount to a renunciation and as such he still continues to be a member of the joint family That there cannot be a relinquishment with a reservation to maintenance is not clear from

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1 (1888) I L R. 11 Mad 406
2 (1914) 27 M L J 272.
3 (1915) 2 L W 850
4 (1936) 71 M.L J 558 L R. 63 I.A 397 I L R 1937 Mad 1 (P.C)
5 (1945) 1 M L J 140 · I L R 1945 Mad. 610 (F B)

the decisions mentioned by me above The questions which the Full Bench had to consider were whether a renunciation was possible and whetheri t should be for the benefit of all the remaining members There is no direct authority, as I stated already, on the point and we have to seek guidance for a decision on this question from the original texts themselves.

In J R.Gharpure's "The Collections of Hindu Law Texts, No IX" "Manusmriti with the Bhashya of Bhatta Medhatithi", at page 774 occurs the following —

भ्रातॄणां यस्तु नेहेत धनं शक्तः स्वकर्मणा ।
स निर्भाज्यः स्वकादंशात्किंचिद्दत्त्वोपजीवनम् ॥

This passage in Manu which is the root text on which renunciation is founded has been translated by very eminent authorities "The Institutes of Manu" translated by Sir William Jones, 3rd edition, page 258, Chapter IX, placitum 207, is to the following effect

> "If any one of the brethren has a competence from his own occupation, and wants not the property of his father, he may debar himself from his own share, some trifle being given him as a consideration, to prevent future strife"

In the Sacred Books of the East, edited by F Max Muller, Vol. XXV, at page 375, the same placitum is translated thus ·

> "But if one of the brothers, being able (to maintain himself) by his own occupation, does not desire (a share of the family) property, he may be made separate (by the others) receiving a trifle out of his share to live upon"

J C Ghouse in his "The Principles of Hindu Law", Volume 2, 1st edition, at page 340, says

> "When the son has no desire to take his share of the paternal wealth from his own ability to acquire wealth, the father should separate him by giving him what little he may accept"

At page 97 of the same book "The Mitakshara, Chapter 1, section 11, paragraph 12, the following passage occurs

> "To one who is himself able to earn wealth, and who is not desirous of sharing his father's goods, anything whatsoever, though not valuable may be given, and the separation or division may be thus completed by the father , so that the children, or other heirs, of that son may have no future claim of inheritance"

The question is how far these texts can be applied and it depends upon the meaning to be put on the last passage in the Manu's text, "Kimchiduthathvopajeevanam" In Sir William Jones' translation, it appears as if the word "Upajeevanam" is translated as consideration, whereas Max Muller's is to the effect "to live upon". In the translation of Smriti Chandrika, at page 340 of Ghouse's book no separate expression appears for this Mr Bhashyam contends that the word should be translated as "maintenance" I would unhesitatingly accept the meaning given to the word as "*something to live upon*" as found in Max Muller's translation.

From the above original texts it is clear that a junior member of a joint Hindu family can renounce his rights in the family properties after being given something for his means of livelihood But the authorities presuppose that such a person should be able to maintain himself by his own exertions. Mayne's Hindu Law, 10th edition, page 565, article 454, contains the following

> "Separation of a coparcener may be effected by renunciation of his interest in the family property. Yagnavalkya says 'The separation of one, who is able to support himself and is not desirous of partition, may be compelled by giving him some trifle' The Mitakshara states 'The male issues of a coparcener who renounces also loses their claim' But this can apply only to after born sons unless at the time of renunciation, his sons and grandsons are adults and consent to it The giving of a trifle is only as a token and is not essential"

To the same effect is the law stated in the Principles of Hindu Law by Mullah at page 315.

Apararka's Commentary on Yagnavalkya is also to the same effect :

> "The separation of one who is able to support himself and is not desirous of participation (may be completed) by giving some trifle"

All these authorities envisage only the renunciation by a son and not by the father or grandfather who happens to be the head of the family as in the present case. No specific text or authority showing that the father could renounce his rights in joint family property by taking a trifling or something for his means of livelihood has been cited But Mr. Bhashyam argues that it is open to the father to make a division of the property among his sons, either by taking a share himself or by giving up his rights If he decides to renounce his share on condition of being paid maintenance every year, it must be understood that he was effecting a partition among his descendants and cutting himself off. According to the texts cited above, if a son can renounce his rights, it stands to reason that the father, who can compulsorily effect a partition under the Hindu Law, can renounce his rights, after taking something for maintenance This kind of renunciation can be interpreted in various ways It may be a gift by the father of his share to the sons ; it may amount to an alienation of his share , or an effacement of his rights But since the Full Bench decision in *Subbanna* v. *Balasubba Reddi*[1] has held that an alienation or a gift of his share is not possible, the only way in which his action can be properly construed is either as an effacement of his own rights by not taking anything or partitioning the property among the sons after taking maintenance Whether his right to maintenance can be construed as a charge on the family property does not arise for consideration here If the sons regularly give him the maintenance, the question of a charge does not arise, and therefore whether a charge exists or not need not be considered It seems to me therefore that the renunciation of his rights in property by the sixth defendant after agreeing to receive maintenance of four putties of paddy every year for his livelihood is valid and therefore the sixth defendant has no longer any share in the property which can be settled upon defendants 3 to 5 The partition ought to be in equal shares between the plaintiff on the one side and defendants 1 to 5 on the other

The next question that has been argued by Mr T M Krishnaswami Aiyar is that in the partition agreement which is sought to be specifically enforced, the properties set apart are unequal with very much of a weightage in favour of the plaintiff. The learned District Munsiff discussed the matter in great detail in paragraphs 19 to 21 of his judgment The learned appellate Judge's consideration of the question was rather brief and scanty as is evident from paragraph 20 of his judgment I would certainly have called for a finding on that aspect but for the fact that whatever may be said with regard to such inequality when we consider he shares of defendants 3 to 5, the partition agreement is binding between the plaintiff on the one hand and defendants 1 and 2 on the other The learned Subordinate Judge has left open the question as to whether it is binding on defendants 3 to 5 as unnecessary for the disposal of his suit That being so it will be unnecessary at this stage to call for a finding

Defendants 3 to 5 are at liberty to question the correctness of the partition in separate proceedings

The above discussion disposes of all the points that have been raised in both the second appeals and since I agree with the learned Subordinate Judge that the sixth defendant has renounced his share in the properties after getting a maintenance of four putties of paddy a year and such renunciation is valid under the law, the second appeals fail and are dismissed. In the circumstances of the case, I direct that both the parties do bear their own costs in this Court The dismissal of O. S. No 119 of 1943, will not prevent the plaintiffs there from bringing a regular suit for partition of their legitimate share of the family properties. Leave refused.

V S. ——— *Appeals dismissed.*

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1. (1945) 1 M.L.J. 140 : I.L.R 1945 Mad. 610 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Bammidi Nagula *alias* Nagula . *Petitioner* *

v.

A. V. Bhanoji Row . *Respondent*

Civil Procedure Code (V of 1908), *section* 115—*Scope—Election Commissioner under rules framed under Madras District Municipalities Act (V of* 1920)—*Is* persona designata *not subject to revisional jurisdiction of High Court*

The rules under the Madras District Municipalities Act (V of 1920) framed under G O. No 1609 L A, dated 4th May, 1940, provide that an Election Commissioner exercising jurisdiction under the rules shall be deemed to exercise such jurisdiction as a *persona designata* and not in his capacity as a Judge of the Court over which he presides It is also provided that his orders shall be final. Accordingly a petition under section 115 of the Code of Civil Procedure to revise his order does not lie.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Principal Subordinate Judge, and Election Commissioner, Vizagapatam, dated 25th September, 1948, in O P. No 52 of 1947.

L S Veeraraghava Aiyar for Petitioner

P Somasundaram for Respondent

The Court delivered the following

JUDGMENT —This is a revision petition against the order dismissing the election petition filed by the petitioner before Sri T Srirangam Naidu who was the Subordinate Judge of Vizagapatam and Election Commissioner The petition was filed for a declaration that the election of the respondent was void and for a declaration that the petitioner had been duly elected The grounds on which the petition was filed were (1) that the respondent was disqualified for election as Councillor under clause (2) of section 49 of the Madras District Muncipalities Act in asmuchas he is a partner and director of the General Engineering and Trading Corporation, Ltd, Vizagapatam, interested in a subsisting contract with the Municipal Council, Vizagapatam, (2) that he was also disqualified under section 49 (2) of the Madras District Municipalities Act since the respondent being a hereditary member of the Managing Committee of the Mrs A V N College is the Official Superior of the Sitting Councillor Sri V Sambamurthy Somayaji, who is a lecturer in that college, and (3) that the election of the respondent was void, as an offence falling under Chapter IX-A of the Indian Penal Code was committed with the connivance of the respondent or his agent who actively abetted the commission of the offence by one Saketi Moses who applied for a ballot paper falsely personating Chintagunta Moses The learned Subordinate Judge, who was the Election Commissioner, held against the petitioner on all these points and dismissed the petition The petitioner has now applied for revising that order under section 115 of the Civil Procedure Code

A Preliminary objection is taken that the petition does not lie because under the rules framed for the decision of the election disputes under the Madras District Municipalities Act, 1920, an election Commissioner exercising Jurisdiction under these rules shall be deemed to exercise such jurisdiction as a *persona designata* and not in his capacity as a Judge of the Court over which he presides. The rules referred to were framed under G O. No 1609 L.A, dated 4th May, 1940. The proviso to rule 2 states that an Election Commissioner exercising Jurisdiction under these rules shall be deemed to exercise such Jurisdiction as a *persona designata* and not in his capacity as a Judge of the Court over which he presides Further under sub-clause (3) of Rule II, the order of the Election Commissioner under sub-rules (1) and (2) shall be final, that is, any adjudication which the Election Commissioner makes on an enquiry as to the validity of the election shall be final under the rules. Prior to the framing of these rules, the Full Bench in the case

*C R P No 1623 of 1948. 26th July, 1949.

reported in *Parthasarathi Naidu* v *Koteswara Rao*[1], held with reference to a petition under the Local Boards Act that

"A District or Subordinate Judge in deciding an election petition presented before him under the Rules issued by the Local Government under the Local Boards Act, 1920, is acting not merely as a *persona designata*, but as a Court in the exercise of its ordinary jurisdiction extended for that purpose, consequently the High Court is competent to exercise its powers of revision over decisions in election petitions"

But in the rules then framed by the Local Government there was no corresponding provision as the one we find under the rules framed by G O 1609 L A, dated 4th May, 1940 This Full Bench decision was referred to in a later case reported in *Athimoolam Servai* v *Gopalakrishna Kone*[2] That was a case under the District Municipalities Act where, following the Full Bench decision, Jackson, J, held that a Sub-Judge holding the election enquiry was not a *persona designata* and that his order could be interfered with in revision But the learned Judge observed :

"If the Government had intended the election enquiry to be held by a *persona designata*, they could easily have recast the rule to put this beyond all doubt as soon as their original drafting had been interpreted in a contrary sense"

There was no rule then like the one which is now under consideration Now that a rule has been framed that an election commissioner shall be deemed to exercise such jurisdiction as a *persona designata* and not in his capacity as Judge of the Court over which he presides, it is for consideration whether the High Court could under section 115, Civil Procedure Code, interfere in revision The language of section 115 is clear and it says that the High Court may call for the records of any case which has been decided by any *Court* subordinate to that Court and in which no appeal lies thereto The reference is only to a Court, not even to a judge and much less to a *persona designata* In view of the wording of section 115 and in view of the clear language of the rule, I do not think that it is competent for the petitioner to agitate this question in a revision petition under section 115, Civil Procedure Code

The learned counsel for the petitioner argues that notwithstanding the rule, this Court has the power to interfere in a case of this kind I am unable to agree with this contention He referred me to the Full Bench decision in *Arjun Rautara* v *Maharaja Krishna Chandra Gajapati Narayan Deo*[3] That was a case under the Orissa Tenancy Act where the Rent Suit Deputy Collector dismissed the suit for recovery of arrear mutation fee and interest due upon a sale deed holding that the Revenue Court had no jurisdiction to entertain it An appeal from the dismissal of the suit in fact lay to the District Judge but was wrongly filed before and entertained by the Collector The question was whether the High Court under section 115, Civil Procedure Code, had jurisdiction to revise the Collector's order It was held that the High Court had Jurisdiction to revise the Collector's *order* It was further held that the word "final" in section 204 (2) merely indicates that there is no right of appeal But this decision is not of assistance in deciding the point at issue whether in the face of a specific rule framed in pursuance of the rule-making power given to the Local Government under section 303 of the District Municipalities Act, it could be held that the election commissioner is a Court whose decision would be interfered with in revision under section 115 of the Civil Procedure Code I hold that the petition is not competent and that it should be dismissed with costs

K S *Petition dismissed.*

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1. (1923) 46 M.L J 201 I L R. 47 Mad. 369 (F B)
2. (1927) 54 M L J 269
3. (1941) I.L R 20 Pat 1 (F.B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE SATYANARAYANA RAO

Gulam Rasool Saheb . *Appellant* *

v

Hamida Bibi .. *Respondent*

Transfer of Property Act (IV of 1882), *section* 52 *and Civil Procedure Code (V of* 1908), *section* 47—*Sale in execution of decree on mortgage executed prior to partition suit in which the same property also was in suit—If affected by doctrine of* lis pendens—*Decree-holder-purchaser, if representative of the judgment-debtor for purposes of section* 47, *Civil Procedure Code*

The doctrine of *lis pendens* should not be extended to cover an involuntary alienation in execution of a mortgage decree where the mortgage was prior to the suit relied on as operating to affect the rights of the parties under the provisions of section 52 of the Transfer of Property Act The rights of the auction-purchaser date back to the date of mortgage

Such an auction-purchaser is not really a representative of the mortgagor for the purposes of section 47, Civil Procedure Code, and therefore an application by the decree-holder in the subsequent suit under S 47 Civil Procedure Code, to remove the obstruction of such an auction-purchaser would not be maintainable

Natesan Chettiar v *Subbunarayana Iyer*, (1944) 2 M L J. 374 I L R 1945 Mad 578, Foll.

Appeal against the order of the District Court, Trichinopoly, dated 29th November, 1946, in A S No 452 of 1945 (E A. No 132 of 1945 in E P No 414 of 1944 in O S. No. 26 of 1925, Sub-Court, Trichinopoly)

S. Ramachandra Aiyar for Appellant

T V Ramanatha Aiyar for Respondent

The Court delivered the following

JUDGMENT —This is an appeal against the order of the learned District Judge of Trichinopoly, who on appeal from the order of the Subordinate Judge allowed the plaintiff's application for removal of obstruction by the appellant in this civil miscellaneous second appeal and delivery of possession.

The property in dispute and other properties belonged to one Haji Muhammad Ibrahim who died on 17th December, 1912. After his death, there was a partition on the 15th January, 1916, between the two sons of Haji Muhammad, *i e*, Peer Muhammad and Sulaiman and in that partition Peer Muhammad got for his share the suit property On the 23rd June, 1921, Peer Muhammad settled the property now in dispute on his wife Rahiman Bibi. On the 11th September, 1922, Rahiman Bibi mortgaged the property to one Sikkandar, the father of the present appellant In the year 1924, a suit for partition was filed by the two daughters of Haji Muhammad impleading the other sharers as defendants and Rahiman Bibi was impleaded as the sixth defendant. There was a preliminary decree in that suit on the 15th August, 1929, which was confirmed on appeal on the 4th April, 1934, and a final decree was passed on the 6th January, 1937 While these partition proceedings were going on, Sikkandar, the mortgagee, instituted the suit (O S No 135 of 1929) on foot of his mortgage to which he impleaded as parties the original mortgagor and also the heirs of Haji Muhammad who were subsequently given up as they claimed the suit property by a title paramount There was a decree, however, against the mortgagor and ultimately after a final decree, the property was sold and was purchased on the 2nd November, 1932, by the decree-holder, the mortgagee, and the property was duly delivered to him through Court on the 14th October, 1933.

After all this, the person to whose share the property now in dispute fell in the partition in pursuance of the final decree in O S No 26 of 1925, applied in E P No 414 of 1944 for delivery of possession It may be mentioned that in the partition in pursuance of the final decree in the present suit, the property was not allotted to Rahiman Bibi but to some other sharer When this Execution Petition No 414 of 1944 was filed and the petitioner went to obtain delivery of

* A A A O No 37 of 1947. 22nd July, 1949.

possession of the property, there was obstruction by the present appellant to the delivery with the result the respondent filed an application in the Subordinate Judge's Court for removing the obstruction and for delivery of possession of the property freed from the obstruction of the appellant The petition was filed under section 47, Civil Procedure Code The present appellant, who was the respondent in the counter-statement filed by him raised various contentions the chief of which was that the application was not maintainable under section 47, Civil Procedure Code, as he was not a party to the suit O S No 26 of 1925, in which a partition decree was passed This objection was upheld by the learned Subordinate Judge and the application was dismissed On appeal the learned District Judge reversed the decision of the Subordinate Judge and allowed the petition Hence this second appeal.

The only question that has to be considered in this civil miscellaneous second appeal is whether the application of the respondent under section 47, Civil Procedure Code, is maintainable or not. The mortgage in favour of the appellant was long prior to the partition suit and he was not impleaded as a party to the partition suit Rahman Bibi alone was impleaded as the sixth defendant in that suit and the purchase by the appellant in pursuance of his mortgage decree was no doubt during the pendency of the partition proceedings. It was contended on behalf of the respondent here and also in the courts below that the purchase by the appellant is affected by the doctrine of *lis pendens* and that therefore he is not entitled to resist the application of the respondent for delivery of possession If the mortgage in favour of Sikkandar was during the pendency of the partition suit and the Court sale was also during the pendency of that suit, no doubt, the principle of the decision of the Privy Council in *Parmeshari Din* v *Ram Charan*[1] would apply and the appellant would not be permitted to rely upon the rights which he had acquired under the Court sale This Court has consistently taken the view that the doctrine of *lis pendens* should not be extended to cover an involuntary alienation in execution of a mortgage decree where the mortgage was prior to the suit relied on as operating to affect the rights of the parties under the provisions of section 52 of the Transfer of Property Act. It is needless to refer to all the cases on the point as they have been considered in *Natesan Chettiar* v *Subbunarayana Ayyar*[2] The effect of this line of decisions, in my opinion, is really to date back the rights of the purchaser in execution of the mortgage decree to the date of the mortgage. The foundation of the decision of our Court in *Chinnasami Padayachi* v *Dharmalinga Padayachi*[3] is the decision of the Calcutta High Court in *Har Pershad Lal* v *Dal Mardan Singh*[4] At page 905 the principle is stated thus

> "Much argument has been spent on the doctrine of *lis pendens*, the plaintiff's contention being that the defendants having purchased the property under a decree in a suit instituted subsequent to the suit by his assignor and during the pendency of the suit, are bound by its result It seems to me, however, the argument has not much force The defendants are not purchasers in ordinary execution They purchased under a decree for sale on their own mortgage They took the property in the same condition as it stood at the date of the mortgage to them Their title, therefore, dated back *Syed Emam Montozuddeen Muhammad* v *Raj Coomar Das*[5] So did the plaintiff's title as regards the mortgage to his assignor The title of each relates back to the date of the mortgage under which the claim is made"

If this is the correct principle on which the decisions of our Court are based, I find it very difficult to conclude that the auction-purchaser is really a representative of Rahiman Bibi, the original mortgagor, and that this application falls within section 47, Civil Procedure Code. In my opinion, the view taken by the learned Subordinate Judge on this question is correct though he was not justified in dismissing the application altogether. He ought to have given permission to the petitioner to convert the application into a suit and should have proceeded with the trial of the suit

The result is, the appeal should be allowed, the orders of the Courts below should be set aside and the application remanded to the first Court with a liberty

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1 (1937) 2 M L J 359 (P C)
2 (1944) 2 M L J 374 I L R 1945 Mad 578.
3. (1932) 63 M L J 394 I L R. 56 Mad 115.
4 (1905) I L R 32 Cal 891
5 (1875) 23 W R 187

to the respondent in this appeal to pay the court-fee payable on this application treating it as a plaint and for converting it into a plaint within one month after the date of the receipt of the records by the lower Court. The appellant is entitled to his costs throughout No leave

V.S *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR JUSTICE VISWANATHA SASTRI

Subba Naicker ... *Appellant* *

v

Nallammal and others ... *Respondents*

Hindu Women's Rights to Property Act (XVII of 1937), section 3 and The Madras Hindu Women's Rights to Property (Extension to Agricultural Land) Act (XXVI of 1947)—Coparcener dying intestate in June, 1942—Widow claiming partition under the Act—Produce of agricultural land cultivated and harvested after death of husband—Widow if entitled to a share

A coparcener died in June, 1942, and his widow instituted a suit against his brother for partition and separate possession of a half share in the family properties basing her claim on the rights conferred upon her by the Hindu Women's Rights to Property Act, 1937

Held The Hindu Women's Right to Property Act though amended by the Madras Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1947, applied only to agricultural property of a Hindu dying intestate after the 26th November, 1946 As in the present case the coparcener died in June, 1942 the rights in the agricultural lands are governed by the ordinary Hindu law and not by the Act of 1937

Accordingly the deceased coparcener's rights in the agricultural lands survived to his brother who thereafter became the sole and exclusive owner of the lands The produce of such lands thereafter belonged to the surviving coparcener and the widow is not entitled to claim a share in it The right of survivorship or succession must be determined as on the date of the death of the husband of the widow and not as on the date of the institution of the suit for partition by her

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in O S No 24 of 1943

S V Venugopalachari and *V Meenakshisundaram* for Appellant

V Ramaswami Aiyar for Respondents

The Judgment of the Court was delivered by

Satyanarayana Rao, J—This is an appeal by the first defendant against the preliminary decree for partition passed by the learned Subordinate Judge in O S. No 24 of 1943 It is unnecessary to set out the facts of the case elaborately and it will be sufficient to confine the facts in so far as they are relevant to the disposal of the contentions that have been raised in this appeal The first defendant and one Krishnaswami Naicker were brothers being members of an undivided Hindu joint family The family owned properties specified in the various schedules attached to the plaint Krishnaswami Naicker died in June, 1942, leaving behind him the plaintiff, his widow and an unmarried daughter, the second defendant. The widow instituted the present suit for partition and separate possession of a half share in the family properties basing her claim on the rights conferred upon her by the Hindu Women's Rights to Property Act, 1937 It has now been finally decided by the Federal Court that this Act as it then stood does not operate to regulate succession to agricultural land in the Governors' Provinces and also that it does not operate to regulate devolution by survivorship of such agricultural land. This Act so far as this Presidency is concerned was amended by the Madras Hindu Women's Rights to Property (Extension to Agricultural Land) Act, 1947 (Madras Act XXVI of 1947) The amending Act does not help the plaintiff in respect of the agricultural lands involved in this suit as the amending Act applies only to the property of a Hindu dying intestate after the 26th November, 1946 As

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* Appeal No 100 of 1946. 15th July, 1949.

Krishnaswami Naicker died in June, 1942, the rights in the agricultural lands are governed by the ordinary Hindu law and not by the Act of 1937.

The learned Subordinate Judge decreed the claim of the plaintiff in respect of the non-agricultural property, but disallowed the claim with regard to the agricultural lands In this appeal by the first defendant the main and the most important question that was raised on his behalf by his learned advocate relates to the share decreed in favour of the plaintiff by the learned Subordinate Judge in items 1, 2, 17 and 18 of Schedule II to the plaint These items represent the produce of the land cultivated and harvested after the death of Krishnaswami Naicker. That is the finding of the learned Subordinate Judge and has not been seriously challenged before us The learned Subordinate Judge decreed a share in these items on the ground that the rights to property should be determined as on the date on which the plaintiff claimed a share by instituting the present suit for partition of the items and not as on the date of the death of her husband Under the Act, as it would be seen from the language of section 3 (2) the right is created in favour of the widow of a deceased coparcener in the property governed by the Act, her interest being the same as that of her husband As it has now been finally settled by the Federal Court that the Act does not apply to agricultural land in the Governors' Provinces, it must be taken that when Krishnaswami died in June, 1942, his interest in the agricultural land survived to the other coparcener, namely, the first defendant and that thereafter he became the sole and exclusive owner of the agricultural lands The produce of the lands thereafter belongs exclusively to the first defendant If on the date of the death of her husband the plaintiff had acquired no interest in the agricultural lands by virtue of the provisions of the Act, it is difficult to see how she could claim a share in the produce of the lands which upon the death of her husband became the sole and exclusive property of the first defendant The right of succession or of survivorship must be determined as on the date of the death of the husband of the plaintiff and not as on the date of the institution of this suit for partition If no interest in the agricultural lands devolved on the widow, *i e*, the plaintiff, on the death of Krishnaswami Naicker in the income that subsequently accrued from such property the plaintiff gets no share or interest The reasoning therefore of the learned Judge on the basis of which he granted the decree for partition of these items of the second schedule to the plaint seems to us to be entirely wrong Some light is thrown on this question by the decision of the Federal Court in *Mst Prakash Kaur* v *Mst Udham Kaur*[1], though the question was not specifically raised in the form in which it arises for consideration before us In that case one Harnam Singh obtained possession of certain "agricultural lands" as a mortgagee. The mortgage contained no covenant to pay Harnam Singh died leaving behind him surviving a widow and a predeceased son's widow The mortgage was redeemed after his death and the widow received the entire amount due under the mortgage. The son's widow thereafter claimed a half share in the mortgage money and instituted a suit to recover that share from the widow or in the alternative from the legal representatives of the mortgagor She based her claim on section 3 of the Hindu Women's Rights to Property Act, 1937 The main question that was considered in that case by the Federal Court was whether the expression "agricultural land" occurring in entry 21 of List II of the VII Schedule of the Government of India Act, 1935, included also rights in agricultural land and whether a mortgage of the description which was then in dispute before the Federal Court could be deemed to be agricultural land within the meaning of that list It was held by the Federal Court that the expression "agricultural land" included also a limited right such as that of a mortgage particularly when there was no covenant to pay and the only means by which the debt could be discharged was by remaining in possession of the lands and to receive the rents and profits until the mortgage money was repaid to the mortgagee The contention, however, that the money that was collected after the death of Harnam Singh by his widow became property

1 (1947) 1 M L J 127 : 1946 F L J. 110

in which the son's widow acquired an interest under the provisions of section 3 of the Act was not raised and if the argument that the rights should be determined as on the date of partition was permissible—even if it was not raised—their Lordships of the Federal Court would not have omitted to consider and give effect to it. However, on the plain language of section 3 of the Act we have no hesitation in holding that the rights should be determined whether claimed by succession or survivorship as on the date of the death of the husband of the plaintiff and not on the date of the partition suit If as stated above by reason of the death of Krishnaswami Naicker no interest devolved on the widow, the plaintiff, in the agricultural lands, under the ordinary Hindu law which continues to operate the first defendant acquired the entire rights in the agricultural lands by survivorship and the income of such lands would also partake the same character The Act merely modified the right of succession and survivorship of Hindu law to the extent to which it is indicated in the Act It does not abrogate and repeal the Hindu law relating to succession and survivorship In this view we think that the learned Subordinate Judge was wrong in allowing a share to the plaintiff in those items We think therefore that the decree of the learned Subordinate Judge should be modified by excluding those items from partition

The next question for consideration is whether the house, item No 2 of Schedule I is the exclusive property of the first defendant The learned Subordinate Judge on the evidence before him found that the first defendant failed to establish that the house which stands in his name and which was purchased in 1939 was acquired without the aid of the joint family funds. He was the manager of the family and was receiving rents and profits of the joint family property The burden is entirely upon him to show by clear and cogent evidence that the property was acquired by his separate funds The first defendant failed to discharge the burden that lies on him and we think that the finding of the learned Subordinate Judge on this question is correct and must be upheld It was faintly argued that the provision of Rs 2,000 for the marriage expenses of the second defendant is too high. In view of the fact that at least Rs 1,000 would be required for jewels and another Rs 1,000 for other expenses, on the evidence in the case it is difficult to agree with this contention We think that the provision made by the learned Subordinate Judge for the marriage expenses of the second defendant is reasonable and does not call for interference by this Court

There is also another contention relating to the pledge of jewels and it is alleged that the pledge really belongs to the sixth defendant The sixth defendant himself has not appealed against the finding of the learned Subordinate Judge and the case of the first defendant rests entirely upon the oral testimony of himself and of the sixth defendant For reasons given by the learned Subordinate Judge in paragraph 26 of the judgment we see no reason to differ *from* his conclusion on the point We think therefore that this contention also must be disallowed

In the result the appeal is allowed to the extent of directing the exclusion of items 1, 2, 17 and 18 of Schedule II to the plaint from partition The rest of the appeal is dismissed The parties will pay and receive proportionate costs

The direction regarding payment of Rs 2,000 for the marriage expenses of the second defendant should, we think, be modified by directing the first defendant to pay the amount to the mother soon after the marriage of the second defendant is fixed

K S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE SUBBA RAO AND MR. JUSTICE SOMASUNDARAM.

Budaraju Venkatarathna Rao (since deceased) and others *Appellants* *

v

Budaraju Venkatasubbiah and others . *Respondents*

Hindu Law—Joint family—Suit for partition by one collateral branch against father and sons—Father representing his sons and their sons—Birth of sons to one of the sons after filing of partition suit—Execution of decree obtained in the partition suit—Suit by the sons subsequently for their share—Execution of decree in the previous suit whether can be had against shares of the branch which was not eo nomine *made parties*

B and his sons instituted a suit in 1924 against the 1st defendant and his sons for partition and possession of their joint family properties and also for accounts pertaining to their share The first defendant to the suit was one *H*, the second defendant was his son *R* and the other defendants were the other sons of *H* The suit was decreed as prayed for Under the decree a sum was directed to be paid to plaintiffs by 1st and 2nd defendants The plaintiffs also obtained a charge on the shares of defendants 1 and 2 The appellants herein are the sons of *R*, the second defendant, born subsequent to the partition suit Pending the suit, the 7th and 8th defendants filed a separate suit of 1931 for partition and for possession of two-third share of their father's one-fourth share of the joint family properties and obtained a decree in 1935 In execution of the decree in the earlier suit of 1924 the plaintiffs filed an application for sale of immoveable properties that were allotted to the share of the appellants and their grandfather *H* The appellants contested on the ground that the decree of 1924 against their father and grandfather could not be executed against them as they were not parties to the suit and as they obtained a decree in their suit of 1931, prior to the passing of a decree in the suit of 1924 The lower Court rejected the contention and directed execution On appeal,

Held, following the Full Bench decision in *Venkatanarayana* v *Somaraju*, (1937) 2 M L J 251 : I L R 1937 Mad 880 (F B), that in the previous suit of 1924, *R*, obviously represented his branch of the family and as the suit was by one collateral branch of the family against *R* and his sons for partition to which all the sons of *H* were made parties and necessarily *H* represented the entire branch and each branch of his sons in turn represented their sub-branch and that therefore in the circumstances of the case, it should be presumed that the father represented the family and the fact that he was not described as such in the pleadings and that the decree was not specifically passed against the family as such would not make any legal difference in the position *R* represented the appellants in the suit of 1924 and although they were not *eo nomine* parties to the decree, the decree-holders in the suit of 1924 were entitled to proceed against the properties allotted to their share in the partition that was effected between them and their father

Kuppan Chettiar v *Masa Goundan*, (1937) 1 M L J 249 I L R 1937 Mad 1004 , *Official Receiver, Guntur* v. *Seshayya*, (1940) 2 M L J 860 and *Daulat Ram* v *Mehr Chand*, (1887) L R 14 I A 187 : I L R 15 Cal 70 (P C) referred to

Appeal against the order of the Court of the Subordinate Judge, Bapatla, dated 21st April, 1944, in E P No 107 of 1941 in O S No 106 of 1924

K Kotayya for Appellants

K Umamaheswaram and *B S Ramachandra Rao* for Respondents.

The Judgment of the Court was delivered by

Subba Rao, J —This is an appeal against the order of the Subordinate Judge, Bapatla, directing the sale of the properties that fell to the share of the appellants in a partition. The material facts may be briefly stated :

One Budaraju Venkata Subbayya and his sons instituted O S No 106 of 1924 on the file of the Subordinate Judge's Court, Bapatla, against the first defendant and his sons for partition and possession of their half share in the family properties and also for an account and recovery of the amounts pertaining to their share The first defendant to that suit is Budaraju Hanumantha Rao, the second defendant is his son, Ramakoteswara Rao and the other defendants are the other sons of Hanumantha Rao The suit was decreed as prayed for Under the decree a sum of Rs. 4,635-7-9 was directed to be paid by the first and second defendants to the plaintiffs. The plaintiffs also obtained a charge on the shares of the first and the second defendants The appellants are the sons of the second defendant,

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*A A. O No 35 of 1945. 13th July, 1949.

Ramakoteswara Rao They were born subsequent to the filing of the aforesaid suit Pending the suit, the seventh and the eighth defendants filed a suit against their father, grandfather and his sons, O S No 34 of 1931, Sub-Court, Tenali, for partition and for possession of their two-third share out of their father's one-fourth share of the family properties and obtained a decree on 5th September, 1935. In execution of the decree in O S No 106 of 1924, the plaintiffs filed an application for sale of the immoveable properties that were allotted to the shares of the appellants and their grandfather Hanumantha Rao The appellants contested that application mainly on the ground that the decree obtained in O S No 106 of 1924 against their father and grandfather could not be executed against them as they were not parties to that suit and as they obtained a decree in O S No 34 of 1931 for partition prior to the passing of the decree in O S No 106 of 1924 The learned Subordinate Judge rejected their contention and directed the properties to be sold The appellants have preferred the above appeal against that order The 7th respondent in the appeal, that is, the grandfather of the appellants, has filed a memorandum of cross-objections mainly raising the plea of discharge of the decree and also that he was not given notice of re-hearing of the execution application

The learned counsel for the appellants contended that the decree against the father could not be executed against the properties that were allotted to the share of the sons as the sons obtained a decree for partition prior to the decree sought to be executed Decided cases lay down two propositions apparently conflicting but really reconcilable

(i) In execution of a decree obtained against the father after partition of the joint family properties between the father and the son, the decree cannot be executed against the properties that fell to the share of the son even though the said decree was obtained on the basis of a pre-partition debt.

(ii) If the father or the manager represented the family in the litigation and the members of the family were substantially parties to the suit through the manager though not *eo nomine* parties on the record, the decree so obtained can be executed against those who were either actually or constructively parties to the suit

The first proposition is illustrated by a decision reported in *Kuppan Chettiar* v. *Masa Goundan*[1] In that case the creditor obtained a money decree against the father and in execution of that decree proceeded to attach certain properties in the hands of the sons They claimed that the said properties fell to their share under a partition effected between them and their father and that they were not liable to be proceeded against in execution of the decree obtained against the father alone The learned Judges held that as a Hindu father has no power of disposing of property allotted at a genuine partition to the share of the sons, such property is not liable to be proceeded against in execution of a money decree obtained subsequently against the father alone At page 1006 Varadachari, J, observes .

> "In order that properties may be liable to attachment in exec[illegible]n, it must be shown that they either belong to the judgment-debtor or that the judgment-de[illegible]s a disposing power over the properties or their profits which power he may exercise for his [illegible] benefit
>
> It would therefore follow that after a division in status the father's creditor cannot, any more than the official Assignee, claim that the property is saleable by the father and therefore attachable by himself"

The learned Judge also pointed out the well-understood distinction between the creditor's remedy in execution and the creditor's remedy by a separate suit. This decision was considered and accepted as laying down the correct law in the decision in *Official Receiver, Guntur* v *Seshayya*[2] and other cases The second proposition is laid down in the Full Bench decision in *Venkatanarayana* v *Somaraju*[3]. In that case, the father purchased certain properties on behalf of the joint family which were subject to a mortgage The mortgagee brought a suit to enforce the mortgage

1 (1937) 1 M L J 249 I L R 1937 Mad. 1004

2. (1940) 2 M L J 860.

3 (1937) 2 M L J 251 I L R 1937 Mad. 880 (F B).

and obtained a decree against the father alone In execution of the decree, he purchased the property and filed a suit against the father and his sons for recovery of possession of the property so purchased and for mesne profits. The sons raised the plea that they had nothing to do with that property as in a partition that was effected between them and their father, the said property fell to the share of their father Indeed on that ground, they were exonerated from the suit. At the time of the alleged partition, the suit property was allotted to the share of the father and another son, who was a minor at the time of the decree A decree for mesne profits was ultimately passed against the father alone. As the father died, the decree was sought to be executed against the property in the hands of the minor son He resisted execution on the ground that during the pendency of the previous proceedings, there was a partition between him and his father and the properties sought to be proceeded against were allotted to his share and therefore were not liable to be proceeded against in execution The learned Judges also held that the father represented his son throughout the litigation although he was not described as a party on the record At page 890, Mr Justice Venkatasubba Rao, after considering the decision of the Judicial Committee in *Daulat Ram* v. *Mehr Chand*[1] observed,

> "that the managing member could effectively represent the entire family and that a decree passed against him would be binding upon all the members, and secondly, that it is not necessary that it should be stated in the pleadings in express terms that he is suing or is being sued as such manager, the suit will be deemed to have been brought by or against him in his representative character if the circumstances of the case show that he is the manager of the family"

Dealing with the question whether subsequent partition would make any difference, the learned Judge states at page 894 that it does not and gives the following reasons for his opinion

> "The reason for holding that the members not joined should be held liable is, that they are substantially parties to the suit through the manager, in other words, they are sufficiently represented, though not *eo nomine* parties on the record. It follows from this that the decree can be executed not only against the parties whose names appear but also against those who must be deemed to be constructive parties In this view, it is immaterial whether the family continues to remain joint or become divided"

Mr Justice Venkataramana Rao who agreed with Mr. Justice Venkatasubba Rao, states his view in a different manner but to the same effect At page 903, the learned Judge observed :

> "Therefore, where a father or other manager is sued as a representative of a family, the other members of the family must be held to be substantially parties to the suit through such manager The fact that they are not parties *eo nomine* will not render them any the less parties to the suit"

At page 904, the learned Judge continues :

> "When they must be held to be parties to the suit, it is immaterial what the character of the property in their hands is, whether it is still undivided property or has become separate property by division"

The learned Judge also lays down the presumption that

> "where the suit relates to a joint family property and the person sued is either the father or the eldest member, the accredited head of the family, it must be presumed that he was sued as representing his family, and he need not be described as such in the pleadings, nor need the decree be specifically passed against him as such"

We are bound by the Full Bench decision But the learned counsel for the appellants brought to our notice that subsequent to the decision, another Bench of this Court in *Ramanathan Chetti* v *Shanmugham Chettiar*[2], threw some doubts on the principles laid down by the Full Bench It is not necessary to state the facts of that case as the decision in that case did not turn upon the view expressed by the learned Judges about the correctness of the Full Bench decision The observations are really in the nature of *obiter* and it is enough if we read the relevant passage The learned Judges, after extracting the relevant passages from the judgment of the Full Bench, observed as follows :

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1. (1887) L R 14 I A 187 I L R 15 Cal 70 (P C)

2 (1944) 1 M L J 384

"The reasoning, however would seem to overlook the fact that the applicability of the principle of *res judicata* which is made applicable to such cases by Explanation 6 of section 11, Civil Procedure Code, rests not on the theory that the persons represented by the party litigating in respect of the common right are parties to the suit, but on the ground that such persons 'shall for the purpose of this section, be deemed to claim under the persons so litigating' which necessarily implies that these persons are themselves *not* parties to the suit"

However, the learned Judge proceeded to dispose of the case on another point With great respect, we cannot agree with these observations as they ignore the fundamental principle on which the Full Bench decision was based It is no doubt true that the decisions relied upon by the learned Judges in the Full Bench case arose in connection with the plea of *res judicata* based upon Explanation 6 to section 11, Civil Procedure Code, but the principle laid down therein is of general application. The principle was not based upon Explanation 6 to section 11. But the principle laid down by the Full Bench is one that is behind the explanation If the father represented the son in the suit, the son must be deemed to be a party to the suit and the decree. It therefore follows that the decree can be executed against the property that fell to the son's share To hold that a judgment against the father in his representative capacity is binding on the son on the principle of *res judicata* but that the decree so obtained cannot be executed against the son would lead to startling results in that the decree-holder would be compelled to file another unnecessary suit against the son to which the son would have no real defence as he would be precluded from contesting the suit on the ground of *res judicata* For the aforesaid reasons, we are not only bound by the Full Bench decision but we also agree with the principles succinctly stated therein In the present case, the facts are really governed by the Full Bench decision in *Venkatanarayana* v *Somaraju*[1]. From the aforesaid narration of facts, it would be clear that in O S No 106 of 1924, Ramakoteswara Rao, the father, obviously represented his branch of the family. The suit was by one collateral branch of the family against Ramakoteswara Rao and his three sons for partition of the joint family property To that suit, all the sons of Hanumantha Rao were made parties, and necessarily Hanumantha Rao represented the entire branch and each of his sons represented their sub-branch It is impossible to conceive of cases where a father does not represent the members of his family in a partition suit especially when there were no disputes *inter se* between them *Ex hypothesi* it would be so where the sons were not even born at the time when the suit was filed against their father for partition of the joint family properties by another branch of the family In the circumstances of this case, it must be presumed that the father represented the family, and the fact that he was not described as such in the pleadings and that the decree was not specifically passed against the family as such would not make any difference in the legal position There is nothing on the record to rebut such a presumption. We therefore hold that Ramakoteswara Rao represented the appellants in O S. No 106 of 1924 and that although they were not *eo nomine* parties to the decree, the decree-holders are entitled to proceed against the properties that were allotted to their share in the partition that was effected between them and their father

The grandfather, Hanumantha Rao, who is the seventh respondent, has preferred a memorandum of cross-objections. His main contention was that the decree could not be executed as the decree-holder was a party to the composition scheme in the insolvency of the appellant pursuant to which he was discharged. A perusal of the judgment of the lower court shows that this point was not raised or argued before the learned Subordinate Judge ; nor are there materials before us which will justify our interference on that ground. It is stated that the Advocate for the 7th respondent argued this point in the lower court on the 4th September, 1943, when orders were reserved and the application posted for orders on 8th September, 1943, and that without his or the advocate's knowledge, the case was reopened and was adjourned from time to time when finally it was disposed of on 12th April, 1944. To substantiate this contention, the learned counsel for the

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1. (1937) 2 M.L.J. 251 : I.L.R. 1937 Mad. 880 (F.B.).

7th respondent attempted to rely upon an affidavit alleged to have been filed by him in this court. A search of the record disclosed that no such affidavit was filed and indeed no copy of the alleged affidavit was served upon the respondents or their learned counsel We are also not satisfied that the 7th respondent would not have had knowledge of the subsequent posting of the application for re-hearing as the application underwent innumerable adjournments and took about 7 months for disposal after the 4th September, 1943. We are not satisfied that this is a fit case for giving the 7th respondent another opportunity to raise his contentions, which he neglected to raise in the lower court

In the result, the appeal is dismissed with costs of respondents 1 to 6 and the memorandum of cross-objections is dismissed with costs.

K.C. *Appeal and memorandum of cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE MACK

Sripada Sambasiva Rao *Petitioner* *

v.

Kaki Venkatasuryanarayanamurthy and others . *Respondents.*

Stamp Act (II of 1899), Schedule 1, Article 1—Signature in an account book showing a certain amount as due on previous dealings—Admissibility as acknowledgment saving limitation though unstamped.

A mere signature in a running account is not evidence of the debt of which there is already evidence in the account book It is merely an acknowledgment of the correctness of the account and does not require to be stamped There is no law requiring an acknowledgment of liability for the purpose of saving limitation to be stamped Such a signature is therefore admissible in evidence as an acknowledgment which has the effect of saving limitation

Nagappa Chetty v *V.A.A R Firm,* (1925) 49 M L J 306, referred to

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of Small Causes, Rajahmundry, in S.C.S No. 232 of 1947.

B. V. Subrahmanyam for Petitioner

Respondent not represented

The Court delivered the following

JUDGMENT —A rather novel point has been raised in this revision petition by the defendant who was sued for the recovery of Rs 61-11-4 He admittedly signed an acknowledgment in an account book of the plaintiffs on 1st April, 1945, showing that Rs 54-3-6 was due on previous dealings The point raised is a technical one, that this acknowledgment requires a one anna stamp under Schedule I, Article 1, of the Stamp Act and that therefore it is inadmissible in evidence as an acknowledgment of liability which has the effect of saving limitation

The learned District Munsif has referred to some authorities and in my view rightly held that this signature was not an acknowledgment requiring any stamp. This was the opinion expressed in *Nagappa Chetty* v *V.A. A R Firm*[1], by Krishnan, J , though the point for determination did not directly fall for determination there.

To bring the signature within the definition of an acknowledgment in the schedule, it is necessary that it should be " written or signed by or on behalf of a debtor in order to supply evidence of such debt in any book . . . . . . or on a separate piece of paper when such book or paper is left in the creditor's possession ". The words " to supply evidence of such debt " is of vital importance and indicate that the document was intended to be " evidence of the debt " A mere signature in a running account is not evidence of the debt of which there is already evidence in the account books. It is merely an acknowledgment of the correctness

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*C.R P. No 454 of 1948 25th August, 1949

1 (1925) 49 M.L J. 306

of the account and does not require to be stamped. There is to law requiring an acknowledgment of liability for the purpose of saving limitation to be stamped. The point raised is an interesting one, which if allowed, would have a rather startling effect on many acknowledgments and account books which are being daily admitted in evidence unstamped for the purpose of acknowledging the correctness of the account and also for acknowledgment of liability saving limitation

No appearance has been made by the respondents I attach no significance to this As the amount is so small they may think it scarcely worthwhile making an appearance in this Court.

The petition is dismissed without any order as to costs.

K.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE HORWILL AND MR JUSTICE RAJAGOPALAN.

Paramban Mammadu and others . *Appellants* *

v.

The King . *Respondent.*

Indian Evidence Act (I of 1872), *sections* 45 *and* 133—*Evidence of footprint expert—Value—General nature of approver evidence*

The opinion of a footprint expert is not admissible as evidence If the Court is to make any use at all of footprint impressions, it must be satisfied from a comparison of the various footprints that they are those of the persons whom the expert says they are The value of evidence with regard to footprints is obviously very much less trustworthy than evidence with regard to finger prints. In examining a finger print, one not merely compares the general configuration of the finger and all the lines on it, but one is able to study such minute details as the bifurcations and junctions of the ridges and the relative positions on those ridges of the sweat pores With regard to footprints, one can only compare the general shape of footprints found with the shape of impressions taken from the feet of the person suspected. Even in this limited comparison, one has not the same certainty as one would have in comparing finger prints, because foot impressions vary considerably according to the circumstances under which they are made Footprints made when a person is walking slowly or fast or running slowly or fast or jumping, all create differences which are material. Moreover, a footprint taken after a person has walked a considerable distance is larger than a footprint taken when a person has been at rest

One generally expects the evidence of an approver to be rich in detail and colour, consistent within itself and not having any important contradictions when compared with other statements made by him earlier Such evidence carries conviction to the mind ; so that a Court feels that very little other evidence is necessary to satisfy it beyond all reasonable doubt that the approver's story is true But where it is bare and fails to so carry conviction, then very substantial corroboration of the approver's story would be necessary before it would be possible to bring home the guilt of the offence, beyond all reasonable doubt

Trial referred by the Court of Sessions of the South Malabar Division for confirmation of the sentences of death passed upon the said Prisoners in C C. No. 30 of 1948 on 2nd August, 1948, and appeals by the appellants against the sentence of death and the sentence of rigorous imprisonment for two years passed on them in the said case.

K. S. Jayarama Aiyar, B Pocker, K. M. Seethi Sahib, P. A. Quadir Meeran, M R. M. Abdul Karim and Mahboob Ali Khan for Appellants.

The Public Prosecutor (*V L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Horwill, J—The four appellants and three others who were acquitted by the lower Court were charged by the Sessions Judge of South Malabar under section 120-B read with section 302, Indian Penal Code, of conspiring with P W 10 to commit the murder of one Ramasimhan. There was also a charge under section 148 of being armed with dangerous weapons and rioting. They were further charged under four separate counts for the murder of the said Ramasimhan, his

* R.T. No. 83 of 1948 and Crl Appeal Nos. 445 to 448 of 1948 19th January 1949.

brother Narasimhan, the wife of Narasimhan, and one Raju Iyer, a Brahmin cook of Ramasimhan. These four persons will be referred to during the course of the judgment as deceased Nos. 1 to 4 respectively The learned Judge found the first accused only guilty of conspiracy and the four appellants guilty under sections 147 and 34, read with section 302, Indian Penal Code, on all the four counts. He sentenced the four appellants to death and, as already stated, acquitted the other three.

The motive for the offence is said to have been the enmity borne by the Moplah community in general and the seven accused and P W. 10 in particular against Ramasimhan and his brother, the second deceased because they had renounced Islam and allowed themselves to be converted to Hinduism Narasimhan had subsequently been elevated to Nambudiri rank and had been accepted by the Nambudiri community as one of their number ; and to him in marriage was given the daughter of P W 26, a girl of 15 years of age, who was with her husband at the time of the murder and shared his fate After the first deceased had been converted from Islam to Hinduism, he diverted the large sums of money that he was accustomed to contribute to Muslim charities and spent them on Hindu charities. In particular, he renovated a Hindu temple in the vicinity and was responsible for restoring regular worship there He began a diligent study of the Hindu scriptures and was studying the Bhagavad Gita, and had perpetually with him P W. 25, a Nambudiri, to teach mantrams to the second deceased He had moreover sent his two sons to Delhi to be instructed and brought up in the Hindu religion All this, the prosecution say, gave rise to a great deal of enmity against him among Muslims ; and specific instances have been spoken to in the evidence in which Muslims were heard denouncing very severely the first deceased and even threatening his life.

Exhibit P-60 gives an accurate idea of the bungalow of Ramasimhan, by name "Malaramba Bungalow" The main entrance to the bungalow was on the eastern side To enter the house one has to pass through a door situate on the eastern side of a porch, which is the entrance to the bungalow. Just inside that door were lying the first deceased and P W. 24, a boy kept by the first deceased to massage him This witness was lying on a mat (M O 17), which assumes some importance because on it was found a footprint ; and P W 25 lay on another mat (M O. 18), which is important for the same reason. From the verandah one can enter the room marked "B" on the plan and from that central room one can pass to rooms north and south Immediately to the north of that central room was a room in which was lying a child of P.W 26, the mother of the third deceased. Still north of that room again on a cot were lying the second and third deceased. To the south of the central room were lying P W. 26 and two of her children To the west of this series of rooms which run north to south is a verandah, from which is a passage way to the west leading into the dining hall and the kitchen. The western verandah of the main building was separated from this passage way by a door which was said to have been fastened on the night of the offence, as was the main entrance at the east. If those doors were secured, then, apparently, the house could only be entered by breaking open those doors. If one passed through the door separating the western verandah from the passage way, one passed first into the dining hall, where were sleeping the fourth deceased and his assistant, P.W. 22 To the west of the main hall was a kitchen in which P W 22 subsequently took refuge.

According to the story of the persons who were in that bungalow on the night of the offence and who survived the murderous assault, the first inkling that any strangers were trying to enter came from a banging on the front door. P.W. 24, deposed that the door had not been securely fastened. Although there were three bolts, only the bolt on the top had been secured ; and so when the door was knocked that bolt fell and the door opened. P.W. 24 does not give evidence of any great value ; for as soon as he saw a person enter, he ran through into the middle room and there joined P W 26 and her children. P.W 25, on hearing cries, hid behind

an almirah situate close to where he was lying. From there he was able to see something of what was taking place He deposed that a little after midnight (2 A.M. was that time generally agreed upon), he heard a sound of a battering of the front door Before he hid behind the almirah, the first deceased came saying "Who is it, Eda" and then crying out "Boy, I am cheated", referring to the second deceased. He saw somebody cutting the first deceased with a weapon about a cubit long. He was able to see what was happening, not only by the moonlight shining through the door, but by the light of a torch which was being shown by the assailant The second deceased then came running and flashed a torch to see what was happening He ran back when she saw the assailant. The witness saw a person chasing the second deceased; but is unable to say whether or no that person was the same man who had attacked the first deceased. A little later, when things had become a little quieter, he made his escape. When the fourth deceased and P W. 22 heard the door separating the verandah of the main building from the passage being broken open, P W. 22 ran into the kitchen before anyone entered there; but he saw a person attacking the fourth deceased. Subsequently, somebody flashed a torch into the kitchen; but as he was hiding behind the door, he was not seen The fourth deceased, though severely injured, was able to escape and give two statements, Exhibits P-24 and P-7, before he died. Exhibit P-24 is a statement recorded by a Head Constable. Later on, he was taken to the hospital, where the Sub-Magistrate (P W 6) recorded the other statement, Exhibit P-7 The earlier statement was a simple one in which he said that at about 2-30 A M. he saw somebody flashing a torch and heard him kicking at the door of the bungalow The man kicked open the door, flashed the torch in his face, and immediately began to attack him It would seem from this statement that only one person came into the dining room where he was sleeping; but he saw a number of persons running away after attacking the second deceased. Then somebody fired at him with a gun and wounded him in the hip. Exhibit P-7 is to the same effect and is clear that he saw only one person, and that that man incited another to shoot him. It is of importance that in Exhibit P-7 he stated that the man whom he saw was a Moplah. P.W. 18 was sleeping in a Ford Car in a shed that had been erected against the southern wall of the bungalow, and when some persons ran there and set fire to the car, he escaped without identifying anybody. He said that he was able to make out from the accent of the assailants that they were Moplahs There is other evidence that the persons who were attacking there were Moplahs; and we find no reason for thinking that the persons who made these statements were unable to say to what community the attackers belonged; for the dress and speech of the Moplahs are distinctive.

The offence was committed on the 3rd August, 1947, and for a long time no clues were obtained A person by the name of Haneefa was later arrested and identified by P.W. 25 as one of the assailants On the day of his arrest (14th October, 1947) was arrested also Kunhammad, a brother of the first and second deceased, who had been converted upon the persuasion of his brothers, but later, reverted to Islam. Another person arrested at the same time was one Kutti Ali, the father-in-law of Kunhammad. In the meanwhile, the police had been examining the bungalow very closely and a number of blood-stained foot-marks were found in the bungalow on the mats M. Os 17 and 18 and in the portico. One of these impressions was thought at one time by the Footprint Expert (P.W. 33) to be that of the right foot of Haneefa. Soon after these persons were arrested and one of the footprints identified to be that of Haneefa, a charge sheet was filed against these four persons 6 or 7 weeks later, on 2nd December, 1947, another charge sheet was filed, this time against 13 persons, including the four who had been charge-sheeted earlier, but not including any of the present accused or P.W. 10, the approver

On the 14th October, 1947, a special investigating officer (P.W. 45) had been sent to investigate, and he had come to the conclusion that the murder had been committed out of religious fanaticism; and since he had found some hair adhering to a door frame with broken glass in the room in which P.W. 26 was sleeping with

two of her children, he sent out constables to make a diligent search in all the neighbourhood for persons who had been injured. The first man with scars to be found was apparently the seventh accused, who was arrested on 14th December, 1947. His arrest was followed on 17th December, 1947, by the arrest of the sixth accused The fifth accused was found with scars and arrested on 26th December 1947. On 28th December, 1947, the second and fourth accused were arrested, the latter having scars P W 10 had been arrested on 24th December, 1947 and gave a statement implicating himself and others on 30th December, 1947, whereupon the first and third accused were arrested almost immediately on 1st January, 1948. Footprints of the arrested men were taken and examined and provisional charge-sheets filed , but it was not until 22nd March, 1948, that the final charge sheet was filed against these seven accused, and these accused alone

No special reason has been given by the prosecution why these seven accused and the approver P W 10 should have participated in this murder It has not been shown that these eight persons bore any greater enmity towards the first deceased than any other member of their community, except possibly the fourth accused, who is the President of the Izzathai Islam Sangham, the principal objects of which are said to be to relieve needy Mussalmans and to send converted men to Ponnani for training He is a leather merchant , but all the other accused seem to be men of humble status, though of independent means, with the exception of the seventh accused, a coolie Accused 1 to 3 are ryots. The fifth accused is a cart driver and the sixth accused a tea shop-keeper With the exception of the fourth accused, these men do not occupy any position either in society or in the religious life of the community that would make it likely that they would plot a murder of this kind.

The principal evidence against the accused is that of the approver , P W 10 One generally expects the evidence of an approver to be rich in detail and colour, consistent within itself and not having any important contradictions when compared with other statements made by him earlier Such evidence carries conviction to the mind ; so that a court feels that very little other evidence is necessary to satisfy it beyond all reasonable doubt that the approver's story is true The evidence of the approver in this case is not however of that kind It is thin and bare and does not carry with it an air of conviction. After stating that he and other numbers of the Moplah community felt hatred towards the first deceased, he described very briefly the conspiracy, which he said took place on a Saturday about the 14th or 15th of the month of Ramzan, about a week or so before the plot was executed. The plot was hatched quite by chance At Konapparamukku, a place where people gather together in their leisure time to have a chat, the witness chanced to meet accused 4 and 5, and later accused 6, and discussed with them the enormity of the first deceased's lapse into heresy At the actual conspiracy were also present accused 1 and 2 Then, after giving a very short account of the conspiracy, he went on to describe the events of the day of the murder, and said that at about 4 P M on that day (Saturday) he went to Kavattuparamba and there met the sixth accused They were joined some time later by accused 2 to 5 and 7 From there, with the exception of himself, these persons left in ones and twos, apparently, agreeing to meet at Abu Baker Haji's rubber estate at 10 P.M or so The witness waited behind until 7-30 P M for the first accused, who had been observing the Ramzan fast and intended to set out only after he broke it They then went to the place of assignation and assembled there at 10 P M They had with them some unlicenced guns and, as agreed amongst themselves each one of them had a knife. They then proceeded to the Malaparamba bungalow of the first deceased and while the witness kept watch, the others went inside the compound over the southern wall. He then heard the sound of striking the door and human cries. About ten minutes later, all the seven accused returned He fired a shot at somebody who was running away, presumably the fourth deceased They then went on towards a tank about four miles away and there washed off the blood on their persons and either there or in the neighbouring jungle threw away their weapons and blood-stained clothes.

One thing that strikes one about this story apart from its bareness, is the open manner in which the accused and P W 10 met together on the day of offence prior to its commission. One would have expected that they would have adhered to their original plan of proceeding secretly to the place of assignation in Abu Bucker Haji's rubber estate and not being seen together before that We find, however according to the story of this witness, that they met together as early as 4 P.M. and openly waited for one another until all but the first accused had come When one compares the evidence of P W 10 in the Sessions Court with his confessional statement, one finds material discrepancies relating to the circumstances under which the murder was planned Exhibit D-7 series are extracts from his statement made to the police There he stated that they first planned the murder on a Monday about 2-1/2 weeks or so before the murder was committed. Then they, *i e.* P.W. 10, and accused 2, 3, 5 and 6 decided to murder the first deceased on the following Sunday. On that Sunday they received information that the first deceased was not in his bungalow ; and so it was postponed to the following Friday. They then arranged that himself and accused 1 to 3 and 6 should meet at 10 P M that night and that accused 4 and 5 should join them after they had left the tope on their way to Malappuram They however found that it was again impossible to execute their plan that night ; and so the murder was postponed until the following day, with the slightly different arrangement that they should meet together at the Kottapadi maidan at 5 P.M. This seems to us a very different story from what was given by P.W. 10 in his evidence. One cannot say upon reading through the evidence of P.W. 10 that it is necessarily false ; but failing as it does to carry conviction, we feel that very substantial corroboration of his story would be necessary before it would be possible to bring home the guilt of this offence to the appellants beyond all reasonable doubt

The learned Sessions Judge relied principally for the corroboration of P.W. 10's evidence on the evidence of P.W. 33, the footprint expert. In paragraph 38 of his judgment, the learned Judge stated

"So far as accused 1, 3 and 5 are concerned, their complicity is established, because their footprints were found at the scene As regards the 4th accused, P.W 16 proves that the 4th accused was on his way to the scene along with P W 10 and the 5th accused This is sufficient corroboration for P.W 13's evidence, as it is manifest that the 4th accused could not have had a destination different from his companions "

That is to say, assuming the guilt of accused 1, 3 and 5 because their footprints were found in the bungalow, the fourth accused must have been guilty, too, because he was associated with men whose footprints had been proved to be that of the murderers.

The opinion of a footprint expert is not admissible as evidence If the court is to make any use at all of footprint impressions, it must be satisfied from a comparison of the various footprints that they are those of the persons whom the expert says they are The value of evidence with regard to footprints is obviously very much less trustworthy than evidence with regard to finger prints. In a fairly good impression of a finger or even in an impression where only a portion of the finger is shown, there is a wealth of detail available to the expert and to the Court for comparison. One sees in a finger print a large number of ridges and sweat pores situated along them

"In examining a finger print, therefore, one not merely compares the general configuration of the finger and all the lines on it, but one is able to study such minute details as the bifurcations and junctions of the ridges and the relative positions on those ridges of the sweat pores

With regard to footprints, on the other hand, it would seem from the evidence and from what we have been able to read from Dr. Hans Gross's book on Criminal Investigation that one can only compare the general shape of footprints found with the shape of impressions taken from the feet of the person suspected. Even in this limited comparison, one has not the same certainty as one would have in comparing fingerprints ; because foot impressions vary considerably according to the circumstances under which they are made. Footprints made when a person

is walking slowly or fast, or running slowly or fast or jumping, all create differences which are material. Moreover, a footprint taken after a person has walked a considerable distance, as was the case here when the murder was committed, is larger than a footprint taken when a person has been at rest, as was the case when footprints were taken from the various persons in the Sub-Jail, including some of the accused and P W. 10 At page 497 of John Adam's translation of the above book, the learned author says :

> " One may then say with Massen, and rightly, that the details of all the impressions of a bare foot are in each particular case so distinctive and so characteristic that it is always possible to differentiate them, one from another, and recognise again the same impression This is wholly true only when the impressions in question have been produced under identical conditions . .
>
> If then the last and the first impression thus produced be compared, one will see how difficult it is to find this famous ' characteristic resemblance ' "

He then goes on to say that the difficulty increases if the foot is turned or moved. At page 499 he points out the necessity for making a number of trials in order to ascertain the circumstances under which an impression was made. He says that it is therefore necessary to find each time (when conducting the experiment of taking a number of impressions without adding any fresh colouring matter) a footprint resembling the original in the quantity of colouring substance, when alone impressions from the same foot might be expected to be similar. At page 510, the learned author says .—

> " Another result flowing from these conclusions is that the deductions made are only relative ; they can never be expressed by pre-cited data and have only comparative value It is impossible to give measurements or fixed sizes , for the numerous factors—the size, the weight, and the other corporeal singularities of the individual walking, his burden, his gait, and the variable nature of the soil differ in every case, and may be combined in so many diverse ways that it is absolutely impossible to give precise indications on this matter "

After discussing the matter further the author says —

> " If one has but one indistinct footprint and no clue therefrom another must be searched for."

The only other passage that need be set out is found at page 532 .—

> " Much prudence must here be exercised (in taking measurements) and nothing undertaken which shows no chance of success On the one hand the foot itself varies considerably, *e g.*, it is much smaller in cold weather or after a long rest than during hot weather or after a long march ; on the other hand it is difficult to measure, inasmuch as it is not a regular body and must be measured differently according to the parts dealt with "

If we bear all these facts in mind, then we are far from satisfied that the prosecution has proved that the foot impressions seen by the police on M.Os 17 and 18 and on the portico are the foot impressions of accused 1, 3 and 5 The process adopted by the expert for comparison was first of all to lift the impression by placing over it a glass plate Through that glass plate he would see the impression and make its outline on the glass with dots. He would then place the plate so marked over a plain sheet of paper and mark the dots on the paper Finally, he compared that with an impression made directly from the foot of the person suspected.

Ex. P-41 is said to have been taken from M O 17, which is not a very good impression ; and we do not think that the dots showing the outline of the toes follow very closely the outline on the mat Then again we find in examining the angles of the toes on the tracing taken from the impression on the mat and comparing it with the impression taken directly from the feet of the fifth accused that the angles at which the toes meet the ball of the foot are different in the two cases In discussing these impressions the footprint expert stated that in general the size and contour of the pad was the same, as were the relative positions of the toes and the contour of the heel That is true ; but we cannot attach any importance to the inward curve in the lower portion of the pad, which is given as a special characteristic. That inward curve, however, was not very well emphasised in the print taken directly from the foot of the accused ; and the inward curve might well be due to the fact that blood did not cover that particular portion of the pad.

The impression on M O. 18 is also not very clear. The lifted impression in Ex. P-42, the expert stated, is in general of the same length as the impression in Ex P-55, i.e , the impression of the foot of the third accused ; the outer line of the pad is similar ; and the relative positions of the big toe, second toe, and third toe are similar, as is the size of the big toe and of the heel When we examined these, we found that the relative positions of the big toe, second toe, and third toe are anything but similar In fact, they are so dissimilar as to lead us to conclude, not merely that the resemblance between the impression of the third accused's feet was not the same as the impression on the mat, but that the impressions must have been by different persons We also did not find that the outlines and sizes of the heel and big toe and the length were very nearly the same in the two impressions compared

With regard to the impression, Ex. P-54, of the first accused, the expert gave six general characteristics and two special characteristics which he found common to Ex. P-54 and the impression, Ex P-35, lifted from the footprint in the portico The second special characteristic is that there is a depression on the pad between the first and second toe This, as we have stated with regard to other peculiarities in the outline, may have been due to the fact that that portion of the feet was not sufficiently covered with blood to leave an impression, especially as the corresponding depression is not seen to anything like the same extent on the impression taken directly from the first accused's foot In trying to ascertain whether the footprint in the portico was that of the first accused, we are handicapped by not having been able to compare the outline marked on the glass with the outline on the portico itself, and we feel that it will not be safe for us to come to any conclusion against this accused in the absence of the original impression

The learned Sessions Judge, for demonstration purposes, had several impressions taken of the feet of two peons in the Court These we compared with those taken from the mats and the portico , and we found a reasonably close agreement between Ex C-4 and Ex C-5, taken from a foot of one of the peons, and Ex. P-35, which was attributed by the expert to the first accused This is perhaps some indication that one must be careful not to draw too hasty a conclusion from such similarities as were pointed out by the expert Incidentally, it may be mentioned that Mr. Jayarama Aiyar has emphasised the evidence that only one assailant was present in the portico ; and so even if we assume that one of these three accused was present in the bungalow that night, the other two footprints could not have been those of the other two, and might have been the impressions of the first and second deceased, whose footprints could not be taken We do not want to overstress this point ; because the observation of P.W. 25 might have been faulty, and he ran away before the assailants left the bungalow

The learned Public Prosecutor, finding that the evidence with regard to the footprints is far from conclusive, has relied on the fact that accused 4, 5 and 7 were found, when examined by various doctors, to have had scars on their persons which could have been the result of injuries sustained on the night of the offence. If there is evidence that an assailant has received any injury on some particular part of his person and a corresponding injury is found on the body of the suspected person shortly after the offence is committed, and there is medical evidence that that injury was probably caused at or about the time when the offence was committed, the evidence of the injury would be strong corroborative evidence against that person But such evidence becomes increasingly weak as the time between the examination of the injuries or the scars and the date of offence increases. These accused were examined five or six months or more after the offence was committed ; and so it was impossible for the doctors who gave evidence to say precisely that these injuries were caused on the day when the murder was committed or even within a short period before or after. They could not even be sure to within a month or so of the offence when the injuries were caused. Further, there is no evidence that any of the assailants met with injuries at the time when the murder was committed, except that when the police officers were examining the bungalow they found some hair adhering

to some broken glass. That would indicate that on the person of one of the assailants on a part of his body normally covered with hair, one could expect to find an injury. The learned Public Prosecutor has stated that since there was a lot of broken glass strewn about, some of the assailants might have cut their feet walking over it. That may be true ; but it is a curious circumstance that while many scars were found on the bodies of these accused persons, none was found on the feet of any of the accused. The seventh accused had no less than nine scars on his person, the fifth accused had three scars and the fourth accused had one scar and a number of scratches. The learned Public Prosecutor has been unable to suggest how so many injuries could have been caused to these three persons on the night of the offence We are therefore unable to attach any value to this evidence.

P W 41, a tailor, deposed that he made a shirt for the fifth accused about eight months before the offence. When the tank spoken to by P.W. 10 was searched, a number of pieces of cloth were found there ; and P W. 41 claimed to be able to identify a piece of cloth about 15 inches long as a portion of a shirt that he had made for the fifth accused We have examined that fragment ; and we can scarcely believe it possible that P W 41 could identify it as a part of the shirt he had made so long before for the fifth accused.

P W 13, a keeper of tea shops at Kodoor and Chattuparamba, deposed that at about 8-30 P.M on the night of offence he met a man whom he thought to be P.W. 10 and another If it really was P W. 10 that he saw, it would be in accord with the evidence of the approver, for he and the first accused might well have been where P.W. 13 said he saw them at about that hour. But P.W. 13 is unable to say with any certainty that it was P W. 10, and so his evidence is of no value and the learned Sessions Judge very rightly did not place any reliance on it

P.W. 12 deposed that he saw P.W 10, whom he had known for a very long time, and the first accused, who was then a stranger, but whom he afterwards identified as the first accused, together in Malappuram at 4-30 P.M on the evening preceding the offence and again at 7 P.M in a tea shop This evidence is inconsistent with the evidence of P.W. 10, who deposed that the first accused did not arrive there until 7-30 P.M and that it was for him that he had remained behind after the other accused had left for Abu Bucker Haji's tope. Moreover if P W. 12 had seen P W. 10 at 4-30 P M. one would have expected, if P.W. 10's evidence be true, that he would have seen the other accused who were with P W 10 at that time

The only other witness whose evidence needs discussion is P.W. 16. In the absence of any definite conclusion to be drawn from the footprints, the learned Public Prosecutor relies very strongly on the evidence of this witness. He deposed that on the evening preceding the offence he was taking tea in a shop at Palaparamba and left it at about 8-30 P M. He had not gone very far when he saw P W. 10 coming along. Behind him in a group were five other persons whom he did not identify Behind them again, at a distance of 12 yards, were the fourth and fifth accused, whom he had known from boyhood. The place at which he saw these persons was only about a quarter of a furlong from Abu Bucker Haji's plantation, which was the place of assignation. This evidence does not accord very well with the evidence of P.W. 12 who saw P W. 10 and the first accused together on the other side of the plantation at the same time ; and it conflicts still more definitely with the evidence of the approver, who stated that at 4-30 P M. all the accused, with the exception of the first accused, left singly or in pairs, agreeing to meet in Abu Bucker Haji's plantation at 10 P.M As he left with the first accused three hours later, he was unlikely to have been with these persons at 8-30 P M. P.W. 16's evidence, if true, shows that they were leaving the plantation, presumably on their way to commit the murder. These differences in time between the evidence of P.W. 10 and the evidence of P.W. 16 can hardly be due to a mere misjudging of the time. The object of the conspirators was to proceed to the place of assignation singly or in pairs and not to be seen together ; and so it is not likely

that P.W. 10 would have been mistaken into thinking that he left the plantation at 10 P M. if in fact he left it at 8-30 P.M. Moreover, their attempt at secrecy would have been frustrated if they had left the plantation as early as 8-30 P M when they would have expected to meet people on the road, who would see them all together. Nor could P. W. 10 very well have been mistaken as to the time ; for he had just finished taking a cup of tea in the neighbouring tea shop and would have had a very good idea of the time in relation to his meal time , and it is not likely that he would have thought that it was 8-30 P M., if in fact it was 10 P M. The learned Public Prosecutor has asked us to accept the evidence of P. W. 16 on this point in preference to that of P. W 10, and he has argued that we should not reject the evidence of P. W. 16 merely because we think it unlikely that the accused would have been in the open at about that time. If however we accept the evidence of P. W. 16 as true, then it is most unlikely that at the time they were on their way to the scene of offence, which was only eight miles away, and which they did not reach until 2 A.M., the next morning If he did see them, it would seem more probable they were bound on some peaceful errand or were going for shikar, as the fourth accused is reported to have stated to this witness.

It is seen from the above discussion that the evidence of the approver receives no corroboration of any importance from the evidence of any of the other witnesses and has therefore to be rejected, as not being sufficient to bring home the offences to the appellants.

It is unfortunate that such a grave crime has not been detected ; but the failure of the prosecution to prove the offence against the appellants was not due to any defect in the investigation, which seems to have been most carefully—and certainly very honestly—conducted No attempt was made to make evidence, where none was naturally forthcoming ; and if the police were unable to obtain more evidence it was because the Moplah community largely succeeded in maintaining secrecy. It was almost impossible without their co-operation for the police to obtain any more evidence relating to the crime

The appeals are allowed and the convictions and sentences passed on the appellants set aside They are ordered to be set at liberty.

V P.S. *Appeals allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE HORWILL AND MR. JUSTICE BALAKRISHNA AYYAR

Koka Bhaskara Rao and others . *Appellants**

v

Tayi Hemalatamma and others *Respondents.*

Civil Procedure Code (V of 1908), Order 21, rules 90 and 92 (2)—Sale in the joint names of two persons—Application under Order 21, rule 90, impleading only one of the joint purchasers—Failure to implead the other, if a ground for dismissal of application

Where two persons bid jointly and the sale is knocked down in their joint names and the judgment-debtors file an application under Order 21, rule 90, Civil Procedure Code, impleading only one of the joint purchasers, the application cannot be dismissed on that account It is unnecessary under the proviso to sub-section (2) of rule 92 of Order 21, that all the persons affected should be formally impleaded In a proper case a sale can be set aside if notice goes to all persons affected.

Appeal against the order of the Court of the District Judge, East Godavari, at Rajahmundry, dated 27th March, 1946, in E A No 56 of 1946 in E P No 59 of 1945 in O S. No 67 of 1932.

M. S. Ramachandra Rao for Appellants.

K. Kameswara Rao, D. Suryaprakasa Rao, V. Sethumadhava Rao and *Rammohan Rao* for Respondents.

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*A A. O No. 670 of 1946 5th August, 1949

The Judgment of the Court was delivered by

Horwill, J.—In a Court sale two persons bid jointly, and the sale was knocked down in their joint names The judgment-debtors then filed an application under Order 21, rule 90, to have the sale set aside on various grounds, and impleaded only one of the joint bidders. The Court dismissed the application on the ground that only one of the joint bidders had been impleaded.

Mr. Kameswara Rao for the respondent agrees with the learned counsel for the appellants that the order of the learned District Judge cannot be sustained on that ground. The proviso to Order 21, rule 92 (2), is to the effect that no order setting aside a sale shall be made unless notice of the application has been given to all persons affected thereby It would follow from this that in a proper case a sale can be set aside if notice goes to all the persons affected, and that it is unnecessary under this proviso that all the persons affected should be formally impleaded. So it is clear that the learned District Judge's order is wrong.

Mr. Kameswara Rao for the auction purchasers contends that the lower Court should not have allowed the application to proceed without requiring the appellants to furnish security or to deposit the sale amount under the first proviso to rule 90 and that his doing so was the result of collusion between the decree-holder and the appellants. Mr Ramachandra Rao for the appellants concedes that as far as the auction purchasers are concerned, the application to set aside the sale should be considered as not admitted ; so that it is still open to the Court to direct the appellants to furnish security or deposit the sale amount if it thinks proper to do so.

In allowing the appeal, we set aside the order of the District Judge and restore E.A. No. 56 of 1946 to file The learned Judge will consider whether so far as the auction purchasers are concerned the appellants should be required to furnish security or deposit the sale amount. The costs of this appeal will be provided for in the order of the lower Court

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Azima Bi .. *Petitioner* *

v.

Zohara Bi and others .. *Respondents.*

Court-Fees Act (VII of 1870), *section* 7, *(iv-A) and (v) Madras—Suit for partition and possession—Fixed court-fee and court-fee under section* 7 *(v) paid—Plaint setting out that* ex parte *decree against plaintiff was null and void—Whether separate court-fee under section* 7 *(iv-A) payable*

In considering the question of court-fee the principle to be followed is to look at the substance of the claim and not the form and language employed in the plaint

Where the petitioner (plaintiff) sued for partition and possession of her share of her father's estate and in the plaint she stated that an *ex parte* decree obtained against her by the fifth defendant in an earlier suit was null and void as she was fraudulently impleaded therein as a major while in fact she was a minor at that time and that no guardian *ad litem* was appointed and had paid a fixed court-fee and separate court-fee for possession under section 7 (*v*), on the question whether any court-fee under section 7 (iv-A) was not payable,

Held, that since the plaint allegations was clear and the plea of nullity of decree was taken, it was not open to the court to call upon the plaintiff to pay court-fee under section 7 (iv-A) of the Court-Fees Act

Ramaswami v. *Rajagopalachariar*, (1940) 1 M L J 32 . I L R. 1940 Mad 259, distinguished.

Abdulla v *Subramania Pattar*, (1936) 71 M.L J 383 and *Gangaraju* v *Satyanarayana*, A I R. 1931 Mad 674, referred to

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Vellore, dated 12th February, 1949, in O.S. No. 63 of 1948

S. Ramachandra Aiyar for Petitioner.

The Government Pleader (*K. Kuttikrishna Menon*) for Government.

*C. R P No. 286 of 1949 20th July, 1949

The Court delivered the following

JUDGMENT.—This Civil Revision Petition raises the question of what is the proper court-fee payable on the suit plaint. The plaintiff is the petitioner and the suit is for partition in respect of her father's estate. Defendants 1 to 4 are the co-sharers and defendants 5 to 7 are the persons in possession of the suit property from whom the plaintiff seeks to recover possession on the ground that they are trespassers and are not entitled to the property. The plaintiff prays for a decree that the properties in the schedule to the plaint should be partitioned, and that she should be put in possession of her half share and also for mesne profits and costs of the suit. In paragraph 7 of the plaint it is stated that the fifth defendant who claimed to be the owner of the property which is the subject-matter of the suit had a beneficial interest in it, the same having been purchased benami for him in the name of one Habibullah, the father of the petitioner.

The 5th defendant instituted O. S. No 328 of 1943 on the file of the District Munsiff's Court of Tirupathur and obtained an *ex parte* decree against the plaintiff. In paragraph 8 of the plaint the petitioner states that the fifth defendant wilfully and fraudulently impleaded her as a party to that suit describing her as a major while, as a matter of fact, she was a minor at all relevant times No guardian *ad litem* was appointed for the plaintiff herein in the aforesaid suit and the said decree was consequently null and void In considering the question of court-fee the principle to be followed is to look at the substance of the claim and not the form and the language employed in the plaint Bearing that principle in mind it has to be considered whether it is necessary for the plaintiff to ask for the cancellation of the *ex parte* decree in O S No. 328 of 1943 before she could show that she is entitled to partition and possession of her half share of the suit properties. It is well established that when a person is a party to the decree he should necessarily ask for relief to have the decree set aside before he could claim a share in the property and the question in this case is whether the plaintiff was a party to the decree in O S No. 328 of 1943. On the allegations in the plaint she was a minor and there was no guardian *ad litem* appointed for her In the circumstances it could not be said that she was a party as she was not properly represented and the decree would not bind her. Reference is made to the decision reported in *Abdulla* v. *Subramania Pattar*[1], where it was held that the minors could not be deemed to be parties to a prior decree since they alleged that the decree was obtained fraudulently and collusively and that the guardian had acted *mala fide* and negligently. In this case there was no guardian at all that represented the minors and a decree passed against a minor without representation by a proper guardian would be a nullity. This view is supported by the decision of Ramesam, J., in *Gangaraju* v *Satyanarayana*[2]. Since the decree is a nullity the petitioner is not bound to have the decree set aside and so the court-fee under section 7, clause (iv-A), is not payable She has already paid a fixed court-fee and also separate court-fee for possession under section 7 (v) The counsel appearing on behalf of the Government pleader supports the case of the petitioner The learned District Munsiff holds, relying on the decision in *Ramaswami* v *Rajagopalachari*[3], that since the plaintiff is *eo nomine* a party to the suit she is bound by the decree unless it is set aside But the facts in *Ramaswami* v *Rajagopalachari*[3], are different from the facts of the present case That was a case where a minor who was a party to a decree properly represented by a guardian sought to set aside certain decrees and alienations and therefore, the learned Judges held that the relief relating to the cancellation of the decrees should be separately valued and court-fee paid under section 7 (iv-A) of the Court-Fees Act The plaint allegations are clear The plea of nullity of the decree is taken in the plaint and I do not, therefore, think that the order of the lower Court is correct It is not open to call upon the plaintiff to pay court fee under section 7 (iv-A) of the Court-Fees Act The court-fee already paid is sufficient The petition is allowed

K.C. — *Petition allowed.*

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1 (1936) 71 M L J. 383
2 A I R. 1931 Mad 674
3 (1940) 1 M L J 32 I L R 1940 Mad. 259

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR P V RAJAMANNAR, *Chief Justice* AND MR JUSTICE KRISHNASWAMI NAYUDU

Rajammal *Petitioner*

v.

The Chief Judge, Court of Small Causes, Madras and another *Respondents*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), sections 4 and 6—Fixation of fair rent—Fair rent fixed in excess of rent which was being paid prior to such fixation—Date from which landlord is entitled to the fair rent

Where the fair rent fixed under section 4 of the Madras Buildings (Lease and Rent Control) Act is in excess of the rent which was being paid before such fixation, the landlord cannot claim the difference from any date anterior to the date of the filing of the application under section 4 There is no provision corresponding to section 6 (*c*) which provides for refund or other adjustment of any sum paid by the tenant in excess of the fair rent The omission to make such a provision might have been deliberate having regard to the avowed policy of the Act to safeguard the rights of tenants Apart from any speculation as to the policy, it is clear that no retrospective operation can be given to the order fixing the fair rent unless such operation is expressly provided in the Act or should be necessarily implied.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H. R. A. No. 736 of 1948, Court of Small Causes, Madras, and quash the order therein dated 1st October, 1948, H. R. C No 5549 of 1947, L. Dis. Second Additional Rent Controller, Madras

G. T Ramanujachariar for Petitioner

P. Bhoopathi for Respondents.

The Court made the following

ORDER —The only point for determination in this application for the issue of a writ of *Certiorari* to quash the order of the learned Chief Judge of the Court of Small Causes passed in a House Rent Appeal is when a fair rent is fixed under section 4 of the Act whether the landlord is entitled to such fair rent when it is in excess of the rent which was being paid before such fixation from the date of the commencement of the Act or only from the date of the application for fixing the fair rent There is no provision, it is admitted, in the Act itself directly dealing with this question There is however provision in section 6 (*c*) of the Act for refund or other adjustment of any sum paid by the tenant in excess of the fair rent whether before or after the commencement of the Act in respect of the use of the building after the commencement of the Act But there is no similar provision giving right to the landlord to claim the difference between the fair rent fixed and the rent which was being paid before the fixing of such fair rent from any date anterior to the date of the filing of the application under section 4 It was contended for the respondent that such a provision must be implied as a corollary to the provision in section 6 (*c*) of the Act It is a well-established principle of construction of statutes that the Court cannot supply omissions by implication and analogy, unless the existing provisions of a statute by necessary intendment so compel the Court We are convinced that in this case there is nothing in section 6 or in any other provision of the Act which compels us to hold that, when on an application under section 4 of the Act fair rent is fixed the landlord is entitled, when that rent is in excess of the rent which had been paid before the date of the application, to demand the difference The omission to make such a provision might well have been deliberate having regard to the avowed policy of the Act to safeguard the rights of tenants Apart from any speculation as to the policy, it is clear that no retrospective operation can be given to the order fixing the fair rent unless such operation is expressly provided in the Act or should be necessarily implied In this case the application for fixing the fair rent was filed only on 1st September, 1947. The

* C. M. P. No. 2478 of 1949 10th August, 1949.

learned Judge therefore made an error in holding that he could direct the fair rent to come into operation from a date anterior to the date of the application, as in this case from 20th October, 1946, when some improvements were effected to the premises The order of the learned Judge is therefore quashed The order of the Rent Controller will stand confirmed There will be no order as to costs

V.S. *Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND MR JUSTICE SATYANARAYANA RAO.

M. Jaswantmall Sowcar *Petitioner* *

v.

The Collector of Madras . *Respondent*

Land Acquisition Act (I of 1894), section 54—Appeal to Federal Court in case which may fall under section 109 (c), Civil Procedure Code—Competency.

The right of appeal under section 54 of the Land Acquisition Act is limited by section 110, as well as by Order 45 Civil Procedure Code Section 110 has reference only to clauses (*a*) and (*b*) of section 109 and not to clause (*c*) The absence of any mention of section 109 of the Civil Procedure Code in section 54 of the Land Acquisition Act shows that the Legislature did not intend to give a right of appeal against an order of the High Court, unless it fell under clauses (*a*) and (*b*) of section 109 which are dealt with in section 110 and so the section excludes a right of appeal on the ground of a case being a fit one to appeal under clause (*c*) of section 109

Petition praying that in the circumstances stated therein the High Court will be pleased to grant leave to the petitioner to appeal to the Federal Court against the decree of the High Court in Appeal No 193 of 1946, preferred to the High Court against the award of the Chief Justice of the Small Cause Court, Madras, in L C No. 6 of 1945.

R Viswanathan and *S Swaminathan* for Petitioner

The Crown Solicitor for Respondent.

The Judgment of the Court was delivered by

Horwill, J—This is an application for leave to appeal to the Federal Court against our valuation of the petitioner's property under the Land Acquisition Act

Since the value of the subject-matter of the proposed appeal to the Federal Court is less than Rs 10,000, the learned advocate for the petitioner bases his application on an important point or principle which he contends that we applied in fixing the value of the property and argues that this is a fit case for the issue of a certificate to appeal to the Federal Court under section 109 (*c*) of the Civil Procedure Code

Section 54 of the Land Acquisition Act gave a right of appeal to the Privy Council under certain circumstances. The latter part of that section says,

"an appeal shall lie to His Majesty in Council subject to the provisions contained in section 110, Civil Procedure Code, 1908, and in Order 45, thereof"

Section 110 of the Civil Procedure Code has reference only to clauses (*a*) and (*b*) of section 109 and not to clause (*c*). The absence of any mention of section 109, Civil Procedure Code, in section 54 of the Land Acquisition Act shows that the Legislature did not intend to give a right of appeal to His Majesty in Council against an order of the High Court unless it fell under clauses (*a*) and (*b*) of section 109, which are dealt with in section 110.

It is argued that the reference to Order 45 would extend the right of appeal; because Order 45 relates to section 109 as well as to section 110. This is true; but the appeal to His Majesty in Council has to be subject to both section 110 and Order 45 In other words, the right of appeal is limited by section 110

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* C M P No 2151 of 1949 15th July, 1949

as well as by Order 45 We are clearly of opinion that the absence of an reference to section 109 in this section excludes a right of appeal on the ground of its being a fit one to appeal to His Majesty in Council

Even if an appeal were permissible under clause (*c*) of section 109, we should be of opinion that this petition should not be granted In our judgment we did not attempt to lay down any principle of valuation which could be generally applied to a class of cases. We contended ourselves with considering the facts of the case before us and the most appropriate method of valuing the property under the particular circumstances which we had to consider We said,

' We think that in the circumstances of this case and in view of the evidence afforded in respect of the rent fetched for the superstructure and the value of Rs 10,000 that the market value of the site of five grounds should be arrived at by taking 25 years' purchase "

For the above reasons, we are of opinion that this petition should be dismissed. It is dismissed accordingly with costs.

V S *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE SOMASUNDARAM

A S Govindan *Petitioner*

v

Mrs Margaret Jayammal *Respondent.*

Criminal Procedure Code (V of 1898), sections 488 (6) proviso and 489—Period of three months—Computation—Starting point—Change in circumstances—Meaning

It cannot be said that the period of three months mentioned in the proviso to clause (6) of section 488, Criminal Procedure Code, means three months from the date of the knowledge of the order There is no reason why the section should be read with the word " knowledge " which is not there

Change in the circumstances means change in the existence of circumstances and not change in the proof of circumstances

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of maintenance, dated 14th February, 1949, in M P No. 5 of 1949, in M P. No. 333 of 1948, Chief Presidency Magistrate's Court, Egmore, Madras

S K. L Ratan of Jacob and *Ratan* for Petitioner

Respondent in person

G Gopinath for the Crown Prosecutor (*S. Govind Swaminathan*) for the Crown

The Court made the following

ORDER —On 7th September, 1948, an *ex parte* order for maintenance was passed against the petitioner. He filed an application on 4th January, 1949, to set aside that order and also contested the quantum of maintenance. Under the proviso to clause 6 of section 488, Criminal Procedure Code, an *ex parte* order may be set aside for good cause shown on application made within three months from the date of the order This application which was filed on 4th January, 1949, is undoubtedly more than three months from the date of the order But it is contended by the learned counsel that the period of three months means three months from the date of the knowledge of the order In short he wants the word " knowledge " to be introduced which is not there I do not see any reason why the section should be read with the word " knowledge " which is not there If the intention of the Legislature was that it should be three months from the date of the knowledge of the order it would have said so I therefore agree with the lower Court that the application was filed out of time and is liable to be dismissed.

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* Cr R C No 435 of 1949
(Cr R P No 385 of 1949) 31st August, 1949.

Another fact urged by the learned counsel is that he has shown how he has to pay certain debts and this circumstance must be taken into consideration in assessing the income of the petitioner The circumstances which he alleges existed even at the time of the order It is not as if they came into existence after the order was passed Change in the circumstances means change in the existence of circumstances and not change in proof of circumstances The lower Court was therefore right in rejecting the petition I see therefore no reason to interfere with the order of the lower Court

The petition is dismissed

V S *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE SOMASUNDARAM

T. Ethirajulu Naidu *Petitioner.**

Madras Prohibition Act (X of 1937), section 4 (1) (a)—Possession by carpenter of jar containing two gallons of varnish which contained denatured spirit—If an offence

The object of the Madras Prohibition Act is to prohibit the consumption of intoxicating liquor. Varnish is never intended for drink or to be used for intoxicating purposes Where a carpenter is found in possession of a jar containing two gallons of varnish which contained denatured spirit, though varnish has not been exempted from the purview of the Act, he cannot be convicted under section 4 (1) (a) of the Act

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Chief Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, dated 18th March, 1949, in C C No 58 of 1949

B V. Viswanatha Aiyar and *R Desikan* for Petitioner

G Gopinath for the Crown Prosecutor (*S Govind Swaminathan*) for the Crown

The Court made the following

ORDER —The accused has been convicted by the Chief Presidency Magistrate under section 4 (1) (a) of the Madras Prohibition Act and sentenced to pay a fine of Rs 50

The accused is a carpenter and in his carpentry shop a jar containing two gallons of varnish was found This varnish contains denatured spirit and therefore it comes within the definition of liquor in the Act The lower Court finds that the liquid is not drinkable and is not fit for consumption The question is whether the accused is guilty of an offence under section 4 (1) (a) of the Act The object of the Act as the preamble shows, is to prohibit the consumption of intoxicating liquor It is not suggested that the varnish is intended for drink or can be used for intoxicating purposes. Being a carpenter, the possession of varnish was for a legitimate use P W 1, the Prohibition Officer says that if it is varnish he would not have seized it The finding of the lower Court is that it is varnish The Government have no doubt not exempted this from the purview of the Act But the learned Crown Prosecutor, under instructions from Government states that it is not the intention of the Government that there should be a prosecution in a case like this Applying the principle of *de minimus non curat lex*, I hold that the petitioner should not have been convicted I therefore set aside the conviction, and sentence, and acquit the accused. The fine, if paid, will be refunded

Since it is not the intention of the Government to prosecute carpenters for possession of varnishes, it is better they exempt it by appropriate notification

V.S. *Petition allowed.*

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* Cr R C. No. 812 of 1949
(Cr R.P No. 750 of 1949)

2nd September, 1949

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE SOMASUNDARAM.

Chebrole Narayana .. *Petitioner.**

v.

Chendra Rudrayya .. *Respondent.*

Criminal Procedure Code (V of 1898), *sections* 259 *and* 345—*Discharge in case of offences lawfully compoundable without permission being given—Legality.*

It is wrong to think that in cases where offences may be lawfully compounded, the accused cannot be discharged under section 259 of the Criminal Procedure Code without giving permission for compounding.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional District Magistrate, East Godavari at Kakinada, dated 19th March, 1948, in Crl R. P. No. 9 of 1948 (C C. No. 402 of 1949, Additional First Class Magistrate, Rajahmundry).

V. T. Rangaswami Ayyangar and *R. Santanam* for Petitioner

C. Rama Rao for Respondent

The Public Prosecutor (*V L Ethiraj*) for the Crown.

The Court made the following

ORDER.—On a private complaint the petitioner was prosecuted for cheating an offence punishable under section 420, Indian Penal Code. The prosecution witnesses were examined and when the case was posted for hearing, the complainant was absent and the trial Magistrate discharged the accused under section 259, Criminal Procedure Code In revision the Additional District Magistrate set aside the order of discharge on the ground that though the offence may be lawfully compunded, still as, the offence required permission of the Court for compounding (*vide* section 345 of the Criminal Procedure Code) and as such permission was not granted, it was not open to the Magistrate to discharge this petitioner.

The Additional District Magistrate is wrong in thinking that in cases where offences may be lawfully compounded, the accused cannot be discharged under section 259, Criminal Procedure Code, without giving permission for compounding. What the section says is that in case, where the offence may be lawfully compounded, the Magistrate may act in the manner mentioned in section 259 The offence under section 420, Indian Penal Code, in one which under section 345 may be compounded with the permission of the Court and therefore an offence which may be lawfully compounded The Magistrate will therefore be well within his rights to discharge by exercising his discretion But whether he exercised his discretion properly or not is for the revisional Court to go into and decide As the grounds on which the further enquiry has been ordered are untenable, I set aside the order of further enquiry and direct the petition again to be heard on the question whether the trial Court has exercised its discretion properly or not

The revision petition will be heard by any Magistrate other than the Additional District Magistrate who heard the case.

V.S. *Petition allowed.*

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*Cr R C. No 625 of 1948 3rd August, 1949.
(Cr.R P No. 585 of 1948)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE VISWANATHA SASTRI

Ramanujulu Naidu . *Appellant**

v

Gajaraja Ammal *Respondent*

Contract Act (IX of 1872), sections 20 and 21—Mistake—Effect on agreements—Sale by a vendor who according to law on date of sale was entitled to property sold—Vendee mortgaging the same property to vendor as consideration for sale—Subsequent change in law, resulting in vendee being held entitled to the property in preference to the vendor—Suit on mortgage by vendor—Plea in defence of want of consideration—Sustainability.

If an assumption of a basic or fundamental character made by the parties to an agreement is erroneous, the agreement is void at its inception, the law regarding such errors as striking at the root of the agreement itself. The question whether a mistake is basic or fundamental depends on the circumstances of each case and on the construction of the particular contract sought to be enforced. It is not accurate to say that relief can never be given in respect of a mistake of law It may be that owing to the combined effect of the views of both parties of the law and the facts, they made a mistake at the time of entering into the transaction as to the nature of their pre-existing private rights to the property forming the subject-matter of the transaction. Such a mistake is not a pure mistake of law and may be a ground of relief.

Case-law discussed.

One *R* who owned a house and some cultivable lands, died in 1915 leaving him surviving, his widow *S*, his daughter's daughter, *G* and *X* a grandson of his paternal uncle *S*, the widow, died in December 1932 At that time the law as laid down in *Gavarammal* v *Manikammal*[1], was that the Hindu Law of Inheritance (Amendment) Act of 1929 applied only in respect of succession to the property of Hindu males dying intestate after the Act came into force This decision was overruled by *Lakshmammal* v. *Anantharama Aiyangar*[2], where it was held that when a Hindu male died intestate before Act II of 1929 leaving a limited female heir who was alive after the Act came into force, succession to the deceased male member opened after the passing of the Act According to the earlier decision *X* would have succeeded and under the later decision *G* would have succeeded as heir to the property of *R*. Between the dates of these two decisions, *X* sold the properties to *G*, the price being paid by the execution of a mortgage by the vendee *G*, to the vendor *X* The sale and mortgage were executed on 17th February, 1935, each forming the consideration for the other In a suit on the mortgage, *G* pleaded in defence that there was a want or failure of consideration for the mortgage.

Held : The parties to the sale and mortgage, both of them, proceeded on the assumption that the vendor had a good title to the property conveyed by him But according to the law, at the time of the sale and mortgage, the vendor had, in fact, no title to convey though the parties had assumed to the contrary The purchaser *G* was purporting to take a conveyance of her own property not knowing that it was hers The mortgage was the consideration for the sale and once it is found that the vendor had no title to the property conveyed, the mortgage is devoid of consideration.

Appeal against the decree of the Court of the Subordinate Judge, Tiruchirapalli, in A.S.No. 293 of 1945 preferred against the decree of the Court of the District Munsif, Tiruchirapalli, in O.S. No. 476 of 1944.

A. V. Narayanaswami Aiyar for Appellant.

S. Amudachari for Respondent.

The Court delivered the following

JUDGMENT :—The plaintiff whose suit on a mortgage dated 17th February, 1935, has been dismissed by the Courts below is the appellant in this second appeal. The defence of the defendant (here respondent) was that the mortgage was a nominal transaction and that in any case there was a want or failure of consideration for the mortgage.

The facts are these : One Rangappa Chetty who died in 1915 was the owner of a house in Trichinopoly and an extent of 1 acre 80 cents of cultivable land. He died leaving him surviving a widow Seshammal, his grand-daughter (daughter's daughter) Gajarajammal who is the defendant and Govindaswami, a grandson of his paternal uncle. The widow died on 21st December, 1932. By that time the Hindu Law of Inheritance (Amendment) Act (II of 1929) had come into force. In the year 1933 a Division Bench of this Court decided in *Gavarammal*

*S A. No 1939 of 1946 3rd August, 1949.

1 (1933) 66 M L J 70 : I.L R 57 Mad. 718 2 (1937) 2 M L J. 209 I L R. 1937 Mad. 948 (F B).

v *Manikammal*[1] that Act II of 1929 applied only in respect of succession to the property of Hindu males dying intestate after the Act came into force. This decision was overruled by a Full Bench in *Lakshmiammal* v. *Anantharama Aiyangar*[2], where it was held that when a Hindu male died intestate before Act II of 1929 leaving a limited female heir who was alive after the Act came into force, succession to the deceased male member opened after the passing of the Act. Under the earlier decision of this Court, Govindaswami would have succeeded and under the later decision Gajarajammal, the defendant, would have succeeded as heir to the suit properties Between the dates of these two decisions Govindaswami sold the suit properties to the defendant for a sum of Rs. 600, the price being paid by the execution of the suit mortgage by the vendee to the vendor for the full amount of the consideration The sale and mortgage were executed on 17th February, 1935, each forming the consideration for the other Exhibit P-1 is a registration copy of the mortgage By a series of assignments the mortgage right is now said to be vested in the plaintiff

The District Munsif dismissed the suit holding that the sale and mortgage were nominal and unsupported by consideration and even if they were real, they were vitiated by the mistake of the parties. The learned Subordinate Judge on appeal dismissed the suit on the ground that there was a common mistake as regards the rights of the parties and therefore the mortgage was void and unenforceable. Mr A. V. Narayanaswami Aiyar, the learned advocate for the appellant, challenges the correctness of this conclusion on two grounds. He states that on the date of Exhibit P-1, Govindaswami the original mortgagee was rightly considered to be the heir-at-law of the deceased Rangappa Chetty on the strength of *Gavarammal* v. *Manikammal*[1]. He conveyed his interest, such as it was, to the defendant by a sale and took a mortgage on the same property for the price payable It is argued that Govindaswami suffered a detriment and gave up a valuable right to the defendant who, having got what she wanted, cannot refuse to pay for the advantage gained by her. It is urged that there was no failure of consideration merely by reason of a later decision of this Court taking a different view of the law enacted by Act II of 1929. Mr. Narayanaswami Aiyar developed his argument in another way also There was a doubt or dispute as to the respective rights of Govindaswami and the defendant, and the parties chose to settle this dispute by a sale of such rights as Govindaswami had in consideration of the vendee executing a mortgage for Rs. 600. This settlement of a disputed claim is, according to him, sufficient consideration for the mortgage. Secondly he contended that the mistake in the present case, assuming there was one, was a mistake of law regarding the interpretation of Act II of 1929 and was therefore not available under section 21 of the Contract Act as a ground for avoiding the mortgage Exhibit P-1

I shall first deal with the second point urged by the learned advocate for the appellant. When the sale deed was executed in 1935, the vendor and vendee both acted on the footing that the former had a good title to convey and should take the price in the shape of a mortgage on the property sold. It is said that the mistake underlying this transaction was only a mistake of law relating to the interpretation of Act II of 1929, the parties having adopted the same erroneous interpretation of Act II of 1929 as the Bench of this Court which decided *Gavarammal* v *Manikammal*[1].

It is true that section 20 of the Contract Act avoids an agreement only when both the parties to it are under a mistake as to a matter of fact essential to the agreement and section 21 enacts that a mutual mistake as to any law in force in India does not avoid a contract. These sections, however, have a deceptive appearance of simplicity. I do not know that attempts to define the dividing line between mistakes of fact and mistakes of law have been very successful, though help for deciding any particular problem is obtainable from the reported decisions Sections

1 (1933) 66 M L J 70 I L R 57 Mad 718
2 (1937) 2 M L J 209 I L R 1937 Mad. 948 (F.B)

20 and 21 were enacted in 1872 and presumably reproduced the English law as it had been shaped and developed by the English Courts at that date The English law, however, has not been static during the long period that elapsed since 1872 but has progressed in the direction of preventing a person from enforcing a contract against another, or retaining a benefit derived from another which, it is against conscience, that he should enforce or keep. In India, however, these liberal and modern developments of the law have to be fitted into the framework of the Contract Act

Mistakes affecting a contract may be of different kinds and may give rise to different results The mistake may consist in the expression given in a formal document to the real agreement between the parties, in which case the agreement is valid and the remedy is by a rectification I am mentioning this class of mistakes merely to eliminate it from further consideration. The mistake may be such as to prevent any real agreement being formed in which case the agreement itself is void. Each party may have meant something but not the same thing as the other There is no *consensus ad idem* and to use a common legal phraseology " the minds of the parties never met ". In such a case, there is no agreement at all. It may also happen that the parties had a common intention which, however, was based on an assumption made by both of them as to some matter of fact essential to the agreement, such as the existence of the thing which is the subject of the contract. If there is a mistake as regards the foundation which both the parties assumed as the basis of the agreement, the agreement is nullified by that fundamental error.

In *Norwich Union Fire Insurance Society* v. *V. M H. Price, Ltd.*[1], Lord Wright stated the principle underlying section 20 of the Contract Act in these terms :

" It is true that, in general, the test of intention in the formation of contracts and the transfer of property is objective , that is, intention is to be ascertained from what the parties said or did. But proof of mistake affirmatively excludes intention It is, however, essential that the mistake relied on should be of such a nature that it can be properly described as a mistake in respect of the underlying assumption of the contract or transaction or as being fundamental or basic Whether the mistake does satisfy this description may often be a matter of great difficulty."

If an assumption of a basic or fundamental character made by the parties to an agreement is erroneous, the agreement is void at its inception, the law regarding such errors as striking at the root of the agreement itself. To hold otherwise would be creating rights and liabilities entirely beyond and outside what was intended by the parties when they entered into the agreement. The same result has been reached by implying a term in the contract itself that it was conditional upon the existence of a state of things which can reasonably and properly be described to be basic or fundamental. Per Viscount Simon in *Joseph Constantine Steamship Line, Ltd.* v. *Imperial Smelting Corporation, Ltd* [2] The principles above stated have been developed by Courts in their attempt to reconcile the rule as to absolute contracts with the demands of common justice.

It is said that a mistake of law does not vitiate an agreement as all persons are presumed to know the law. Like most maxims of the law, the maxim, that ignorance of law does not furnish an excuse or defence, has but a limited application and it is not proper, in my opinion, to fetter the law by maxims of this kind. There are authoritative decisions of the English Courts that a mistake as to private rights or title to property is equivalent to a mistake of fact. In *Cooper* v. *Phibbs*[3], the appellant, believing himself to be a stranger to a fishery, agreed to take a lease of it from the respondents who believed themselves to be entitled to the fishery and granted the lease It turned out that the appellant was entitled to the fishery and not the respondents The House of Lords declared that the contract of lease was entered into by the parties under a mistake and in ignorance of the actually existing rights and interests of the parties in the fishery and that it was not binding in equity upon the parties Lord Westbury observed :

1. (1934) A C 455, 463
2 (1942) A C 154, 163
3 (1867) L R 2 H L 149, 170.

"The result, therefore, is, that at the time of the agreement for the lease which it is the object of this petition to set aside, the parties dealt with one another under a mutual mistake as to their respective rights . In such a state of things there can be no doubt of the rule of a Court of Equity with regard to the dealing with that agreement It is said '*Ignorantia juris haud excusat*'; but in that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application Private right of ownership is a matter of fact, it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is, that that agreement is liable to be set aside as having proceeded upon a common mistake. Now, that was the case with these parties—the respondents believed themselves to be entitled to the property, the petitioner believed that he was a stranger to it, the mistake is discovered, and the agreement cannot stand"

In *Daniel* v. *Sinclair*[1], the following observations occur

"But in Equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn In *Earl Beauchamp* v *Winn*[2], Lord Chelmsford observes, 'with regard to the objection, that the mistake (if any) was one of law, and that the rule *ignorantia juris neminem excusat* applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant That is very different from the ignorance of a well-known rule of law'"

In *Allcard* v. *Walker*[3], Stirling, J., observed .

"It is said for the defendant Mr Kell that the mistake was one of law and that relief cannot be given in respect of it In my opinion this is not so I think in the first place that the mistake was one which related to the existing rights and interests under the settlement within the meaning of the law as laid down by Lord Westbury in *Cooper* v *Phibbs*[4]"

There is also a dictum of the learned Judge in that case that

'It is not accurate to say that relief can never be given in respect of a mistake of law"

A later case which, however, was not referred to in the argument appears to have cast some doubt on *Cooper* v *Phibbs*[4]. In *Bell* v. *Lever Bros*, *Ltd*[5], Lord Atkin who delivered the leading judgment of the House of Lords on this point observed that the statement of the law in *Cooper* v *Phibbs*[4], was too wide and remarked as follows :

"Even where the vendor has no title though both parties think he has, the correct view would appear to be that there is a contract, but that the vendor has either committed a breach of a stipulation as to title or is not able to perform his contract The contract is unenforceable by him but is not void"

There has been a great deal of critical comment on this case in the Law Quarterly Review and the general opinion of the profession in England appears to be that the case must be regarded as a decision on its own peculiar and confused facts. All that I understand the learned Lord to have held is that unless the mistake goes to the very root of the contract or the whole of the consideration, as for instance where it goes to the existence or identity of the subject-matter of the contract the common mistake of the parties will not affect the binding character of the contract. I need hardly observe that the question whether a mistake is basic or fundamental depends on the circumstances of each case and on the construction of the particular contract sought to be enforced

The rule laid in *Cooper* v *Phibbs*[4] has been followed by the Courts in this country. In *Pratapa Simha Raja Saheb* v. *Simji Raja Saheb*[6], Spencer and Ramesam, JJ., held that an agreement entered into between two brothers to manage a religious endowment by turns on the assumption that they were both entitled to the trusteeship by devolution under the ordinary Hindu Law, was void and unenforceable in view of a subsequent decision of the Court holding that the trusteeship was impartible In *Ramachandra Misra* v *Ganeshchandra Gangopadhya*[7], where both parties entered into a lease on the assumption that the grantor was entitled to the minerals in the land it was later on judicially declared that persons in the position of the grantor were not so entitled, it was held that the lease had become void and unenforceable. Strong reliance was placed by the appellant's counsel on *Appavoo Chettiar* v. *The South Indian Railway Co.*[8]. That was a case of a claim to recover money

1 (1881) 6 A C 181, 190
2 (1873) L R 6 H L 223, 234
3 (1896) 2 Ch 369, 381
4 (1867) L R 2 H L 149 170
5 (1932) A C 161 at 218
6 (1926) 51 M L J 652
7 (1916) 21 C W N 404
8 (1928) 56 M L J 269

paid by a mistake of law, the law in question being a general rule applicable to all citizens alike Ramesam, JJ, who delivered the judgment of the Court felt bound, under the impact of the argument of the Advocate-General to differ from his own *obiter dictum* in a previous case The learned Judge observed that the decision of the Court of Appeal in *Holt* v *Markham*[1], particularly the judgment of Scrutton, L J, had weakened the authority of previous decisions relating to this topic In that case there was a claim for the recovery of money alleged to have been paid by mistake and it was found by all the three learned Judges of the Court of Appeal that there had been in fact no mistake in the payment of the money whose recovery was sought It is true that that distinguished common lawyer entered a protest against the disregard by his brethren in Chancery of the time honoured limitations of the common law by going to the length of recognising

"a right to recover money merely because it would be a right and fair thing that it should be refunded to the payer"

In actions for recovery of money paid under a mistake, ignorance of particular rights has been put on the same footing as ignorance of the general law by English Courts This matter is fully considered in the judgment of the House of Lords in *R. E. Jones, Ltd* v *Waring and Gillow, Ltd*[2], but as I am not now dealing with a claim for money had and received, it is unnecessary for me to pursue this topic further The learned Judges who decided *Appavoo Chettiar* v *The South Indian Railway Co.*[3], while pointing out—and rightly if I may say so—that the general observations in cases like *Cooper* v. *Phibbs*[4] and *Earl Beauchamp* v. *Winn*[5], must yield to the specific provisions of section 21 of the Contract Act recognise that "some kind of mistake of law may be a ground of relief" They also held that,

"If the mistake of law is of such a kind that it is mixed up with certain specific facts relating to a particular individual so much so that it may be said that as the combined effect of a party's view of the law and the facts, he made a mistake at the time of entering into the transaction as to the nature of his pre-existing private right, it may be said that such a mistake is not a pure mistake of law and is covered by the language of Lord Westbury in *Cooper* v *Phibbs*[4]"

If I may very respectfully be permitted to say so, this statement of the law is incorrect in that it omits to state that the mistake must be common to both the parties and assumes that an unilateral mistake is sufficient Subject to this amendment, I am in respectful agreement with the above statement which, indeed, would govern the present case.

To sum up my views on this branch of the argument, I am of the opinion that the parties to the sale and mortgage both of them proceeded on the assumption that the vendor had a good title to the property conveyed by him. The decision in *Gavarammal* v. *Manikammal*[6] which had not then been overruled was enough justification for this assumption. It was later on authoritatively laid down by the Full Bench that the decision in *Gavarammal* v. *Manikammal*[6] was erroneous, but judicial decisions, unlike enactments of the Legislature, are merely declaratory of the law as it has always stood. Therefore, even at the time of the sale and mortgage, the vendor had, in fact, no title to convey though the parties had assumed the contrary The contract related to a subject-matter contemplated by the parties as existing but which in fact did not exist If the vendor had sold that which he had not, the vendee cannot be compelled to pay for that which the vendor could not convey, *Hitchcock* v. *Giddings*[7] The purchaser here was purporting to take a conveyance of her own property not knowing that it was hers There has therefore been a total failure of the proposed subject-matter of the transaction, for no person can buy his or her own property. In such circumstances, the vendor could not be allowed to

"run away with the money in consideration of the sale of an estate to which he had no right"

1 (1923) 1 K B 504 (C.A)
2 (1926) A C 670
3 (1928) 56 M.L J 269
4 (1867) L R 2 H L 149
5 (1873) L R 6 H L 223
6 (1933) 66 M L J 70 I L R 57 Mad. 718
7 (1817) 18 R R 725

Bingham v *Bingham*[1]. The result in law is the same as if the parties had made an agreement expressly conditional on the existence of a good title in the vendor which not existing, the agreement falls with the title The mortgage and sale both formed parts of the same transaction, each being the consideration for the other. They are both unenforceable

Mr Narayanaswami Aiyar's first contention that the mortgage, Ex P-1, is supported by consideration may be shortly noticed It is true that it is not necessary that the consideration should be of equal value with the promise in respect of which it is given It is equally true that the abandonment of a right *bona fide*, even though unfounded or the forbearance to exercise the right or to assert the claim may be a valid consideration for a promise The deliberate renunciation or compromise of doubtful rights is binding on the parties and ignorance of law is not an objection to the validity of a transaction entered into, because the law itself was doubtful It is unnecessary to refer to cases as the above propositions of law are elementary But there is no basis in fact in the present case for an argument based on these principles There was here a sale of property for a price and a mortgage on that very property given by the vendee for the price According to the appellant himself, the title to the property was not in dispute, much less the subject of a *bona fide* dispute by reason of the decision in *Gavarammal* v *Manickammal*[2]. The sale and the mortgage are not part of the settlement of a disputed claim but stand by themselves as business transactions The mortgage is the consideration for the sale and once it is found that the vendor had no real title to the property conveyed, the mortgage is devoid of consideration

For these reasons, I agree with the conclusion of the lower appellate Court and dismiss this second appeal with costs Leave refused

V S — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE KRISHNASWAMI NAYUDU

Thangasami Pillai by Agent Ganapathi Nadar .. *Petitioner*

v

Dhanabagyammal and others . *Respondents.*

Court-Fees Act (VII of 1870) section 17 and 7 (v)—Suit praying for possession of various items in the hands of number of defendants—Suit if embraces distinct subjects—Proper court-fee

Where the plaintiff sued for possession of several properties and the prayer in the plaint was that the plaintiff should be put in possession of the 'undermentioned' properties through process of Court and free from obstruction of the defendants, who came into possession under different titles from the first defendant who in violation of a trust had alienated them On the question of proper court-fee payable whether it should be on the aggregate fee on the total value or on separate portions in possession of different defendants

Held that on the allegations in the plaint and taking the substance of the plaint also into consideration the suit did not embrace distinct subjects but only one subject as claimed in the prayer in the plaint and as such section 17 of the Court-Fees was not applicable to it

Mahant Ramnarain Gir v *Gouri Shanker Lal*, (1928) I L R 7 Pat 402 *In re Parameswara Pattar* (1930) 59 M L J 469 I L R 54 Mad 1 (F B) and *Rajah of Vizianagaram* v *The Government* (1932) 63 M L J 73, relied on

Venkatarama Mohandas v *Kamini Kondiah*, (1945) 2 M L J 571 distinguished

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Cuddalore, dated 3rd February, 1949, in O S. No. 93 of 1947

M. S Venkatarama Aiyar for Petitioner.

The Government Pleader (*K Kuttikrishna Menon*) and *K. Srinivasan* for Respondents

1 (1748) 1 Ves Sen 126 27 E R 934 2 (1933) 66 M L J 70 I L.R 57 Mad. 718.

* C R P No 327 of 1949 29th July, 1949

The Court delivered the following

JUDGMENT :—The point for decision in this revision petition is whether the Court-fee paid by the plaintiff is correct The plaintiff is the petitioner. The suit is for recovery of possession and the prayer in the plaint is that the plaintiff be put in possession of the " undermentioned " properties through process of Court and free from the obstruction of the respondents The suit is in respect of the properties of one Srinivasa Pillai. The plaintiff is the brother's son and the first defendant is the widow On 26th August, 1911, Srinivasa Pillai executed a will, whereby he created a trust of his properties and, during the minority of the plaintiff, appointed the first defendant and the mother of the plaintiff as joint testamentary guardians to manage the estate and to perform the trust In execution of two money decrees obtained by the 11th defendant against the first defendant one in respect of a personal debt due by her and the other in respect of a debt due under a promissory note executed by the deceased Srinivasa Pillai, the properties, being item 5 of B schedule of the plaint, were brought to sale, and the 11th defendant purchased them on 4th June, 1930 It is stated in the plaint that the properties attached were trust properties, in which the first defendant had no interest capable of transfer voluntarily or involuntarily, that the sale is void and the same cannot confer any title much less legal title on the 12th defendant to be validly conveyed by him to others Item 5 of B schedule is a property of the extent of 3 acres and 16 cents. The 11th defendant is now in possession of the middle portion of one acre and 6 cents Defendants 15 to 17 are in possession of the northern portion of the extent of 36 cents , and defendants 18 to 20 are in possession of the southern portion of the extent of one acre and 74 cents These defendants acquired their respective portions from the 11th defendant who is the Court-auction purchaser of the entire property The plaintiff values the suit under section 7 (v) of the Court-Fees Act and has paid Court-fee on the consolidated market value of the property. On the question of Court-fee, the learned Subordinate Judge held that the Court-fee paid was not the proper Court-fee payable on the plaint and that section 17 of the Court-Fees Act would be applicable to the suit and that separate Court-fee should be paid on the market value of the separate portions in the possession of the different defendants since they were, according to the learned Subordinate Judge, distinct subjects under section 17 of the Court-Fees Act. Section 17 of the Court-Fees Act, is as follows .

"Where a suit embraces two or more distinct subjects, the plaint or Memorandum of appeal shall be chargeable with the aggregate amount of the fees to which the plaints or memoranda of appeal in suits embracing separately each of such subjects would be liable under this Act "

The learned Subordinate Judge has held that the cause of action arising against each of these defendants is separate and independent, that the relief for possession also is separate and independent as against them, that by making a single prayer for possession against all defendants, as is done in the plaint, the plaintiff cannot avoid necessity of payment of Court-fee on the market value on these items which constitute defined shares in the subject matter and in possession of each of these defendants, and therefore that section 17 would be applicable to the case.

It is contended on behalf of the petitioner that the view taken by the lower Cour is wrong and that, though the suit may embrace more than one cause of action, it does not embrace two or more distinct subjects within the meaning of section 17 of the Court-Fees Act. In support of this contention, the learned advocate for the petitioner relies on the decision in *Mahant Ramnarain Gir* v. *Gauri Shanker Lal*[1]. That was a case where the plaintiff brought a suit for recovery of possession of a land consisting of various plots in separate possession of the defendants and also for mesne profits on the ground that it was a zerait land and that the entries in the record showing it as the defendants' was ineffectual, null and void, on the allegation that the defendants have in collusion with one another caused wrong entries to be made in the survey records and had dispossessed him There it was held that all

1. (1928) I L R 7 Pat 402

the defendants having been joined together by a common link of conspiracy and collusion, the Court-fee payable was on the total valuation of the land and mesne profits, and not under section 17 of the Court-Fees Act, which contemplates two or more distinct subjects embraced in one suit. In that decision, the learned Judge observed thus ·

"The defendants might set up different claims, but the nature of the suit is not to be determined upon the pleas taken by the defendants but upon the frame and scope and the intention and object of the plaintiff The plaint and plaint alone will determine it and the court-fee has to be paid upon the determination and scope of it Under section 17 of the Court-Fees Act, there must be two or more distinct subjects In the present case, there is only one subject, though consisting of a large area and a number of plots They constitute one subject and that is the claim of the plaintiff that all these lands constitute his zerait."

In re *Parameswara Pattar*[1] the question as to the application of section 17 of the Court-fees Act was considered by a Full Bench of the Madras High Court. It was a suit for possession of immoveable property and mesne profits and the question was whether the Court-fee should be paid on the aggregate value of both the reliefs, or on the value of each of the reliefs separately. Though the claim for possession and the claim for mesne profits were separate causes of action, it was held that they were not necessarily distinct subjects under section 17 of the Court-Fees Act. It was held

The word 'subjects' in this section is somewhat obscure in its meaning, and has been held in some decisions to be not capable of precise definition Ordinarily, the right or title to the land is the basis for the claim for possession of the land, as also for mesne profits, and it cannot therefore be deemed that the two claims are so disconnected, without any inter-relation, as to form *distinct subjects* under section 17 of the aforesaid Act "

The learned advocate for the petitioner also cited the judgment of Ananthakrishna Aiyar, J , in *Raja of Vizianagaram* v. *The Government*[2] That was a suit filed by a landholder against the ryots of a village under section 193, Madras Estates Land Act. There were several ryots in possession of different plots of land and the common ground on which enhancement of rent was asked for was under section 193 of the Madras Estates Land Act It was held by the learned Judge that having regard to the decision of the Full Bench in In re *Parameswara Pattar*[1], it was no sufficient answer that the landholder could file separate suits against each of the ryots, and that the causes of action in respect of each ryot was different. The suit being one for enhancement of rent on common grounds, it could not be said that the suit embraced "distinct subjects." Applying the principle laid down in the Full Bench decision in In re *Parameswara Pattar*[1], the test whether a suit embraces two or more distinct subjects does not depend upon the cause of action on which the plaint is based, but depends upon the basis of the claim and the right under which the plaintiff claims The basis of the claim in this suit is that the sale in favour of the 11th defendant in execution of a decree that was passed against the first defendant is null and void, the sale being of properties which are trust properties That was the only ground on which the plaint is based and if the plaintiff could succeed in establishing that the property was trust property and that the sale was null and void the plaintiff has to succeed in the case. The fact that portions of the said property had been subsequently alienated by the 11th defendant would not change the position. If once the plaintiff establishes that the sale in favour of the 11th defendant is null and void, the plaintiff is entitled to get possession from all the defendants. The learned Government Pleader to whom notice was given in this petition, concedes that if the case of the plaintiff is that the Court sale is void and the persons in possession are trespassers, in a suit for possession no separate Court-fee need be paid, but Court-fee on the aggregate value of the properties would be sufficient But he contends that the cause of action is different in each case, the basis of the claim is not only the void nature of the sale in favour of the 11th defendant since the plaintiff has also stated in the plaint that the defendants in possession of the respective portions are not *bona fide* transferees for valuable consideration from an ostensible

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1 (1930) 59 M L J 469 I L R 54 Mad 1 (F B) 2 (1932) 63 M L J 73.

owner. I do not think that the additional allegation made in the plaint, namely, that they were not *bona fide* transferees for value from an ostensible owner, would change the character of the suit or alter the basis on which the plaintiff sues for recovery of possession of the properties The plaintiff succeeds if he establishes that the sale in favour of the 11th defendant is valid, unless the defendants can allege and prove that they are *bona fide* transferees for value from an ostensible owner. That is a defence which is open to the defendants and it is not the basis of the claim of the plaintiff in the suit The learned advocate for the petitioner has also brought to my notice the decision of Bell, J , in *Venkatarama Mohandas* v. *Kamini Kondiah*[1]. In that case, a person who became the owner of certain properties by reason of a settlement deed executed by his father, on entering upon them found various lessees in occupation of different parts under tenancies created by the settlor. Some of the tenants refused or neglected to attorn to the new owner who thereupon filed a single suit against them for ejectment and mesne profits till date of delivery of possession It was held that the suit in the circumstances comprised a number of " subjects " as required by section 17 of the Court-Fees Act and the plaint would be chargeable with the aggregate amount of the fees to which the plaints in suits embracing separately each of such subjects would be liable. It was observed that the plaintiff was seeking in that suit, not the same relief, but similar reliefs against the various defendants. The learned Judge observed in that case that there appeared to be no legal inter-connection between the defendants, that they had nothing in common with each other and they were joined merely as a matter of convenience, that as against each defendant the plaintiff would have to prove a similar but a separate case, and that the amount claimed was different against each defendant But the facts of this case are different ; and, further, the Full Bench decision in In re *Parameswara Pattar*[2] and the decision in *Rajah of Vizianagaram* v *The Government*[3] were not brought to the notice of the learned Judge in *Venkatarama Mohandas* v. *Kamini Kondiah*[1] On the allegations in the plaint and taking the substance of the plaint also into consideration I am of opinion that the suit does not embrace distinct subjects but only one subject and as such section 17 of the Court-fees Act would not be made applicable to a suit of this nature. However, even if there is any doubt in the matter, being a taxing statute, the subject is entitled to the benefit of doubt arising on the meaning of the statute. I therefore find that the lower Court erred in holding that section 17 of the Court-Fees Act would be applicable to this case The order of the lower Court is set aside and this revision petition is allowed The petitioner will get his costs from the party respondent

K C — *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE KRISHNASWAMI NAYUDU

N T Palanisamy Chettiar by agent V D Seetharama Mudaliar .. *Petitioner**

v

Komara Chettiar and others .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, rule 10—Addition of not necessary parties to avoid multiplicity of proceedings—If justified—Suit for specific performance of agreement to sell—Sons of executants of agreement—If necessary parties to the suit

In an application under Order 1 rule 10, Civil Procedure Code, the Court should consider mainly whether the presence of the proposed parties would be necessary for adjudicating upon the questions that are involved in the suit and an order for addition of parties should not be made merely with a view to avoid multiplicity of suits if otherwise their presence is not necessary for determining the real questions involved in the suit.

1. (1945) 2 M L J 571 (F B)
2. (1930) 59 M L J 469 . I L R 54 Mad 1
3. (1932) 63 M L J 73

* C.R.P No 1105 of 1948. 20th July, 1949.

In a suit for the specific performance of an agreement to sell against the executants of the agreement, the sons of the latter would not be necessary parties to such a suit and cannot be added as parties under Order 1, rule 10, Civil Procedure Code, even though they may plead that the agreement would not bind them

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Coimbatore, dated 29th July, 1942, in I A No 1216 of 1948, in O. S No 116 of 1947.

M Krishna Bharathi for Appellant

T. R. Srinivasa Aiyar for Respondent

The Court delivered the following

JUDGMENT —The petitioner is the plaintiff in O S No. 116 of 1947 on the file of the Subordinate Judge's Court of Coimbatore instituted by him for specific performance of an agreement to sell dated 23rd January, 1944, executed by defendants 1 and 2. The 3rd defendant is a subsequent purchaser of the property and has therefore been impleaded The suit was filed on the 22nd January, 1947 and issues were settled on the 28th August, 1947 The respondents filed I A. No. 1216 of 1948 for adding themselves as party defendants 4 to 9 and this application was made under Order 1, rule 10, Civil Procedure Code The allegations in the affidavit in support of the application are that respondents 1 to 5 are the sons of the 1st defendant and that respondent 6 is the son of the 2nd defendant, that in respect of the suit properties they filed O S No 265 of 1947 in the Sub-Court of Coimbatore alleging that the alienations by the 1st and 2nd defendants are not binding on them and for partition and possession of their separate shares. They also state that they had to contend that the agreement will not bind them in so far as they are concerned and that there are good reasons for the success of their defence. The application was opposed and the learned Subordinate Judge passed an order as follows :

"The sons of the defendant want to plead that the agreement to sell is not for the benefit of the sons. To avoid multiplicity of proceedings it is better that the petitioners are also impleaded "

He also observes that the petition has been delayed and directs that costs should in any event be paid to the plaintiff by the respondents

It is contended on behalf of the petitioner-plaintiff that this is a suit for specific performance of an agreement executed by defendants 1 and 2 and that the main issue that has to be decided in the suit is whether the agreement had been executed and whether the plaintiff had otherwise complied with the terms of the agreement and entitled to specific performance by getting a document of sale from defendants 1 and 2 and that questions relating to title are foreign to the suit for specific performance. Further it is pointed out that there is no prayer in the plaint for the recovery of possession of properties. The prayer in the plaint is for a declaration that the plaintiff is the owner of the plaint properties and to order that the defendants should execute a sale deed in respect of the plaint properties in favour of the plaintiff and that on their default the sale deed may be ordered to be executed by the Court on behalf of the defendants in favour of the plaintiff This is the usual prayer in suits for specific performance though it is also permissible to add a prayer for possession in such suits

The learned Councel for the petitioner cited the decision in *Nagi* v. *Damodhar*[1], where it is held that a Court acts without jurisdiction if, in a suit for specific performance of contract, it joins other causes of action which cannot properly be investigated in that suit It is also held that a person who claims adversely to the vendor is not a necessary party to a suit for specific performance of a contract to sell. Two English decisions are referred to in that judgment and I will refer to the following passage in the judgment of Cottonham, L C , in *Tasker* v. *Small*[2].

" It is not disputed that, generally, to a bill for a specific performance of a contract of sale, the parties to the contract only are the proper parties , and, when the ground of the jurisdiction of Courts

1 I L R (1947) Nag 623

2 (1837) 40 E R 848, 850

of Equity in suits of that kind is considered it could not properly be otherwise The Court assumes jurisdiction in such cases, because a Court of Law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy But in equity, as well as at law, the contract constitutes the right, and regulates the liabilities of the parties , and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in It is obvious that persons, strangers to the contract, and therefore, neither entitled to the right nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it "

In *Prem Sukh Gulguha* v. *Habib Ullah*[1] which is also referreed to in *Nagi* v. *Damodar*[2] the learned Judges observed,

" The necessary parties in a suit for specific performance of a contract for sale are the parties to the contract, or if they are dead their legal representatives as also a person who had purchased the property from the vendor after the contract He is a necessary party as he would be affected, if he is a volunteer, or if a purchaser for value, had purchased with notice of the contract A person who claims adversely to the vendor, is, however, not a necessary party "

In *Muni Samappa* v *Gurunanjappa*[3] Rajamannar, C J., observes that

" Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party (for instance the sons of the vendor being entitled under Hindu Law to shares in the property) is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has "

It is therefore clear that the respondents are not necessary parties to this suit for specific performance of an agreement to sell. The application is made under Order 1, rule 10. Order 1, rule 10, clause (2) enables a Court to add as party any person whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit. The question involved in the suit as disclosed by pleadings in the suit and in view of the observations of the learned Judges whose judgment I have cited above, is not one relating to the liability of the sons nor does it relate to the right of the sons in respect of the properties. What the plaintiff would get if he succeeds in getting a decree for specific performance is a sale deed which will bind only the executants of the sale, namely, defendants 1 and 2 and would not affect the position of the sons or their rights if any to these properties I think that the rights of the sons to these properties is not a question involved in the suit and it is therefore not necessary that they should be made parties. Mr. Srinivasa Aiyar, learned Counsel, appearing for the respondents referred me to the prayer in the plaint which includes a declaration that the plaintiff is the owner of the plaint properties and argues that it involves a question as to the title of the property since the plaintiff's ownership is asked to be declared in this suit itself. What is asked for in the prayer is only a declaration of the title of the plaintiff as the purchaser from defendants 1 and 2 on the strength of the agreement of sale and it is not the title of the vendors to the property that has been asked to be established in this suit I should therefore think that no question of title is involved in the suit *Balusami Aiyar* v. *Lakshmana Aiyar*[4] is cited by the learned Counsel for the respondents It proceeded on a different set of facts In this suit there is no allegation that the agreement to sell executed by these defendants was binding on the sons and in fact no reference is made in the plaint to the sons at all The plaint contains only the allegation regarding the execution of the agreement and payment of the consideration which went in discharge of certain mortgages In *Balusami Aiyar* v *Lakshmana Aiyar*[4] Kumaraswami Sastri, J., observes

" Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has "

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1. A I R. 1945 Cal 355.
2. I L R. (1947) Nag 623
3. (1949) 2 M L.J Short Notes, p 7 since reported in (1949) 2 M L J 342
4. (1921) I L R. 44 Mad 605

The plaintiff-petitioner is willing to take such title as the vendors, that is, defendants 1 and 2, could pass in his favour The learned Subordinate Judge states to avoid multiplicity of suits the addition of parties might be allowed In an application under Order 1, rule 10, Civil Procedure Code, the Court should consider mainly whether the presence of the proposed parties would be necessary for adjudicating upon the questions that are involved in the suit and an order for addition of parties should not be made merely with a view to avoid multiplicity of suits if otherwise their presence is not necessary for determining the real questions involved in the suit. In a simple suit of specific performance like the present one filed against the vendors, the sons of the vendors are not necessary parties.

As I find that the learned Subordinate Judge has acted with material irregularity in the exercise of his jurisdiction this Civil Revision Petition is allowed with costs and the order of the lower Court is set aside

V.S. *Petition allowed.*

[PRIVY COUNCIL.]

(On Appeal from the High Court of Judicature at Nagpur.)

PRESENT —LORD GREENE, LORD MORTON OF HENRYTON AND SIR JOHN BEAUMONT.

Mohanlal Hargovind of Jubbulpore *Appellant**

v.

Commissioner of Income-tax, C. P and Berar, Nagpur .. *Respondent.*

Income-tax Act (XI of 1922), *section* 10 (2), *paragraph* 12 (*as amended in* 1939)—*Applicability—Scope—* Bidi *manufacturer entering into contracts for the right to collect* tendu *leaves from forests for short periods—Consideration paid for—Whether capital or revenue expenditure*

The assessees carried on business at several places in the Central Provinces of India as manufacturers and vendors of country-made cigarettes which are known as *bidis* These cigarettes are composed of tobacco rolled in leaves of a tree known as *tendu* leaves The assessees obtained the leaves by entering into a number of short term contracts with the Government and other owners of forests who granted the right to collect and remove the leaves The assessee was allowed by the contract to coppice small *tendu* plants a few months in advance to obtain good leaves and to pollard *tendu* trees a few months in advance to obtain better and bigger leaves The assessees claimed deduction for the consideration paid in respect of the contracts in computing their profits for purposes of Income-tax

Held, the contracts grant no interest in the land and no interest in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which of course, implies the right to appropriate them as their own property The small right of cultivation given in the contracts is merely ancillary and is of no more significance than would be, for example, a right to spray a fruit tree given to the person who has bought the crop of apples The fact that the rights under the contract are exclusive is of no significance in a case of this nature As under the contracts it is the *tendu* leaves and nothing but the *tendu* leaves that are acquired, expenditure made in acquiring them cannot be said to be capital expenditure Accordingly an allowance can be made for such expenditure in computing the gains or profits of the assessee for the purpose of income-tax

Sir Roland Burrows, R K Handoo and *T P Naik* for Appellants.

J. Millard and *P V Subba Row* for Respondent.

Their Lordships' Judgment was delivered by

LORD GREENE —This appeal raises a short question as to the application of section 10 (2), paragraph 12, Income-tax Act, 1922, as amended by the Income-tax (Amendment) Act, 1939, in respect of assessments on the appellants for the years 1940-41 and 1941-42 That paragraph provides that in computing profits or gains of a business for the purpose of income-tax an allowance is to be made for

" any expenditure (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly or exclusively for the purpose of such business "

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*28th July, 1949

Certain expenditure claimed by the assessee to be a permissible deduction under this paragraph and admitted to have been made "wholly and exclusively for the purpose" of the business of the appellants was disallowed by the Income-tax Officer His order was confirmed successively by the Appellate Assistant Commissioner of Income-tax, Nagpur, and by the Income-tax Appellate Tribunal, Bombay Application was made to that Tribunal for a reference to the High Court of Judicature, Nagpur, of the question whether the appellants were entitled to the deduction in question and the High Court (Grille, C J. and Sen, J.) answered that question in the negative for the reasons given by them in their judgment in another case (Miscellaneous Civil Case No 55 of 1943) [1]

The relevant facts are as follows. The appellants carry on business at several places in the Central Provinces of India as manufacturers and vendors of country-made cigarettes which are known as *bidis* These Cigarettes are composed of tobacco contained or rolled in leaves of a tree known as *tendu* leaves which fulfil a corresponding function in the finished cigarette to that played by a cigarette paper The appellants obtain the *tendu* leaves which they require by entering into a number of contracts with the Government and other owners of forests. Two of these contracts which were taken as typical of the rest are included in the record, one relating to a Government forest and one to a forest belonging to the Rewa State. It is important to examine the terms of these documents The former is dated 5th September, 1939, and is made between the Divisional Forest Officer on behalf of the Secretary of State in Council and the appellant's representative described as the "forest contractor" Clause 1 identifies the subject-matter of the contract, which is described as "the forest produce sold and purchased under the agreement," as that specified in schedule 1 in the "contract area" therein indicated. By clause 2 the quantity of the forest produce is defined as all the said produce

> "which may now exist or may come into existence in the contract area which the forest contractor may remove from the said area during the period from 5th day of September 1939, to the 30th day of June, 1941"

Schedule 1-A provides that

> "the contractor shall commence his work before the . day of . 193 , and shall, to the satisfaction of the office empowered to execute the contract on behalf of Government, make continuous and adequate progress throughout the term of the contract"

In this provision the dates by an obvious oversight are left in blank but the date of commencement could not be later than 31st December, 1939. In the second of the two agreements which, with certain minor differences, is substantially in the same form, the period of the operations is 1st October, 1938, to 30th June, 1941, and the work is to be commenced on 1st October, 1938. This agreement recites an application for the grant of "the contract of collecting and removing" *tendu* leaves The grant is a grant of the right to collect and remove them from the area described. In the case of each contract a sum payable by instalments is fixed as the consideration for the grant. In the former contract the contractor is allowed to coppice small *tendu* plants a few months in advance to obtain good leaves and to pollard *tendu* trees a few months in advance to obtain better and bigger leaves

It appears to their Lordships that there has been some misapprehension as to the true nature of these agreements and they wish to state at once what in their opinion is and what is not the effect of them They are merely examples of many similar contracts entered into by the appellants wholly and exclusively for the purpose of their business, that purpose being to supply themselves with one of the raw materials of that business. The contracts grant no interest in land and no interset in the trees or plants themselves. They are simply and solely contracts giving to the grantees the right to pick and carry away leaves, which of course, implies the right to appropriate them as their own property.

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1 I.L.R (1946) Nag 252

The small right of cultivation given in the first of the two contracts is merely ancillary and is of no more significance than would be *e g*, a right to spray a fruit tree given to the person who has bought the crop of apples. The contracts are short-term contracts The picking of the leaves under them has to start at once or practically at once and to proceed continuously. It is true that the rights under the contracts are exclusive but in such a case as this that is a matter which appears to their Lordships to be of no significance.

The question, therefore, resolves itself into the short one—is expenditure of this character made in acquiring one of the raw materials of the appellants' manufacture capital expenditure within the meaning of this Act? There is no definition of that expression which must in their Lordships' opinion be construed in a business sense save in so far as there may be rules of construction applicable to it Their Lordships feel no doubt that in a business sense this expenditure is expenditure on revenue account and not on capital account just as much as if the *tendu* leaves had been bought in a shop Under the contracts it is the *tendu* leaves and nothing but the *tendu* leaves that are acquired It is not the right to pick the leaves or to go on to the land for the purpose—those rights are merely ancillary to the real purpose of the contracts and if not expressed would be implied by law in the sale of a growing crop

In their Lordships' opinion the High Court has adopted an approach to the question which has diverted its view from the real point and has attached too much importance to cases decided upon quite different facts Cases relating to the purchase or leasing of mines, quarries, deposits of brick earth, land with standing timber, etc. referred to in the judgment and relied upon in the argument before the Board do not appear to their Lordships to be of assistance nor do their Lordships consider that the elaborate distinction between movable and immovable property drawn in the judgment affords in such a case as the present a reliable test. The cases principally relied on in the judgment are the *Alianza Co* v *Bell*[1] affirmed, (1905) 1 K B 184 and (1906) A C 18 and *Kauri Timber Co, Ltd* v *The Commissioner of Taxes*[2] The former was the case of a company whose object was treated as one to work and develop a bed containing a substance called caliche from which nitrates and iodine could be obtained by a process or manufacture It is analogous to the purchase or leasing of a mine and was obviously capital expenditure. The claim was one equivalent to a claim to deduct the expenditure made in acquiring the land for it was a claim to deduct the amount carried year by year to a sinking fund set up to meet the exhaustion of the caliche. This case appears to their Lordships to bear no resemblance to the facts of the present case which resembles much more closely the case described and distinguished by Channell, J, at page 673 of the report in *Alianza Co* v *Bell*[1] of the cost of material worked up in a manufactory That, said the learned Judge, is

"a current expenditure and does not become a capital expenditure merely because the material is provided by something like a forward contract, under which a person for the payment of a lump sum down secures a supply of the raw material for a period extending over several years"

In the *Kauri Timber case*[2] the company's business consisted in cutting and disposing of timber. It acquired in some cases timber bearing lands, in other cases it purchased the standing timber. The leases were for 99 years So far as the cases where the land was acquired were concerned there could have been no doubt that the expenditure made in acquiring it was capital expenditure. In the case of the purchase of the standing timber what was acquired was an interest in land The purchasers bought the trees which they could allow to remain standing as long as they liked As Lord Shaw said in delivering the judgment of the Board (at page 776)

"So long as the timber, at the option of the company remained upon the soil, it derived its sustenance and nutriment from it The additional growths became *ipso jure* the property of the company"

In the present case the trees were not acquired nor were the leaves acquired until the appellants had reduced them into their own possession and ownership

1 (1904) 2 K B 666 2 (1913) A C 771

by picking them. The two cases can, in their Lordships' opinion, in no sense be regarded as comparable. If the *tendu* leaves had been stored in a merchant's godown and the appellants had bought the right to go and fetch them and so reduced them into their possession and ownership it could scarcely have been suggested that the purchase price was capital expenditure. Their Lordships see no ground in principle or reason for differentiating the present case from that supposed

Their Lordships will humbly advise His Majesty that this appeal should be allowed and that the respondent should be ordered to pay the costs of the appellants of and relating to the reference to the High Court. The respondent will pay the costs of this appeal

Solicitors for Appellant . *Hy. S. L Polak & Co*

Solicitor for Respondent *Solicitor, High Commissioner for India.*

K.S. ——— *Appeal allowed.*

[PRIVY COUNCIL]

(On appeal from Supreme Court of Trinidad and Tobago.)

PRESENT .—LORDS PORTER, SIMONDS, NORMAND, MORTON OF HENRYTON AND MACDERMOTT.

Lennox Arthur Patrick O'Reilly and others . *Appellants* *

v.

Cyril Cuthbert Gittens .. *Respondent.*

Domestic tribunal—Decision of—Jurisdiction of Civil Courts to interfere—Limits.

Provided that a domestic tribunal (like the stewards of a turf club) does not exceed its jurisdiction and acts honestly and in good faith, the Civil Court cannot intervene, even if it thinks that the penalty is severe or that a very strict standard has been applied

A person who joins an association governed by rules under which he may be expelled has no legal right of redress if he be expelled according to the rules, however unjust and unfair the rules or the action of the expelling tribunal may be provided that it acts in good faith

Sir Walter Monckton, Messrs Richard Ewes and *John Hobson* for Appellants.

Sir D. Maxwell Fyfe, Messrs G D Squibb and *H S. Grannum* for Respondent.

Their Lordships' Judgment was delivered by

LORD MORTON OF HENRYTON —This appeal and cross-appeal arise out of an action, brought by Dr. Cyril Cuthbert Gittens hereafter called the respondent as plaintiff against the appellants, which succeeded in part and failed in part

The appellants were at all material times the stewards of the Trinidad Turf Club. That club is the recognised turf authority in the Colony of Trinidad and Tobago, and exercises it powers and jurisdiction by the stewards of the club The respondent is a dental surgeon and an owner and trainer of race horses At all material times the respondent held a trainer's licence which expressly provided as follows

"This licence is issued subject to the rules, regulations and resolutions of the Trinidad Turf Club for the time being and may be withdrawn or suspended by the stewards of that club in their absolute discretion , and such withdrawal or suspension may be published in any local newspaper or newspapers, for any reason which may seem proper to such Stewards, and they should not be bound to state their reasons "

The respondent entered a horse called "Tommy Boy," owned and trained by himself, in certain races at a meeting held by the Tobago Race Club, under the authority of the Trinidad Turf Club, in the spring of 1944. All entries for the said races were made "subject to the rules and regulations of the Trinidad Turf Club" "Tommy Boy" won the first and fifth races on the second day of the meeting, namely, 4th March

In accordance with a practice recently instituted by the stewards of the Trinidad Turf Club, swabs of the saliva of each winner were taken on the course. After examination, the Government analyst reported on 18th April, 1944, to the Trinidad Turf Club that the swabs taken from "Tommy Boy" contained evidence of the

* 14th July, 1949

presence of heroin On 25th, 27th and 29th April, 1944, the appellants, acting as stewards of the Trinidad Turf Club, held an inquiry into this matter. The respondent attended the inquiry and was represented by solicitor and counsel. At the hearing the respondent was given a full opportunity to cross-examine, to lead evidence and to put forward his contentions by his counsel. At the beginning of the hearing the respondent by his counsel objected to the presence of the appellants de Nobriga and Liddelow on the ground that they were biased against him. This objection was overruled and all the appellants accordingly sat in the inquiry. At the conclusion of the hearing the appellants issued findings and an Order in the following terms

"Turf Club Office, 29th April, 1944.

The Stewards of the Trinidad Turf Club, having investigated the circumstances relating to "Tommy Boy' find as follows

(i) A drug was administered to 'Tommy Boy' on the second day of the Tobago Races (4th March, 1944, which was calculated to affect its speed

(ii) The Stewards hold the trainer, Dr Cyril Gittens, responsible for the safeguarding of the horse

They Order ·

(*a*) That 'Tommy Boy' be disqualified as from this date from all future racing under the Rules of the Trinidad Turf Club ,

(*b*) That the licence of Dr Cyril Gittens, as trainer, be withdrawn ;

(*c*) That Dr Cyril Gittens be warned off pursuant to the powers vested in the Stewards of the Trinidad Turf Club

L A P O'Reilly, Steward.
C A Child
C. Lloyd Trestrail
George de Nobriga
S Liddelow"

The writ in this action was issued on 5th May, 1944. By his Statement of Claim delivered on 16th October, 1944, the respondent claimed ·

"(A) A declaration that the defendants acting or purporting to act as stewards of the Trinidad Turf Club had no jurisdiction to entertain the said inquiry or to make any of the said decision or orders thereon or alternatively that they exceeded their jurisdiction by making any decision or order against the plaintiff and/or his race horse "Tommy Boy' and/or that the defendants de Nobriga and Liddelow (either or both of them) were disqualified from participating in the said inquiry or in any of the decision or orders thereon and/or that the said tribunal was improperly constituted and/or that the said defendants failed to make any due or proper inquiry and/or that the said decision or orders were and are, contrary to the dictates of natural justice

(B) A declaration that for the reasons aforesaid (or any of them) the said decision and/or orders were, and are, null and void and/or should be set aside

(C) An injunction restraining the defendants (and each of them), as Stewards of the Trinidad Turf Club or otherwise from taking any step or doing any act or thing in respect of the plaintiff and/or his said racehorse 'Tommy Boy' to implement or carry into effect in any manner whatsoever the said decisions and/or orders made by the defendants as aforesaid

(D) Such further and/or other relief as the nature of the case may require"

On 21st June, 1946, Hallinan, J., made an Order in the Supreme Court of Trinidad and Tobago granting the respondent (1) a declaration that the appellants by their Order of 29th April, 1944, purported to warn off the respondent in such a manner as to make him a "disqualified person" and in so doing acted *ultra vires* the powers conferred upon them by the Trinidad Turf Club and therefore had no authority or jurisdiction to make such order ; (2) a declaration that the appellants' ruling that the respondent had failed to safeguard his horse and the order warning him off were contrary to natural justice for the reasons that the appellants adjudged the respondent by a rule or principle which precluded them from making a proper inquiry.

The learned Judge held that the respondent's claim for an injunction could not be maintained, and that the Court could not interfere with the appellants' orders disqualifying the horse "Tommy Boy" from all future racing under the

rules of the Trinidad Turf Club, and withdrawing the respondent's licence to train, because the appellants had power under the Trinidad Rules of Racing to disqualify a horse which had been the subject of fraudulent practice and the licence to train could be withdrawn or suspended in the absolute discretion of the stewards The learned Judge did not uphold the respondent's claim that the appellants de Nobriga and Liddelow were disqualified from participating in the inquiry

At the hearing of this appeal the appellants contended that the action should have been dismissed. The respondent on his cross-appeal did not press his claim for an injunction, but contended that all the declarations claimed in the action should have been granted

The issues arising for the decision of the Board may therefore be summarised as follows (1) Had the appellants power to "warn off" the respondent and if so did the order warning off the respondent result in his becoming a "disqualified person"? (2) Was the inquiry null and void because, to quote the order of the learned Judge, "the appellants adjudged the respondent by a rule or principle which precluded them from making a proper inquiry"? (3) Was the inquiry null and void because the appellants de Nobriga and Liddelow, or one of them, were or was disqualified from sitting by reason of bias against the respondent? (4) Had the learned Judge power to grant any declaration in the present case? and (5) Were the orders of the appellants disqualifying the horse "Tommy Boy" and withdrawing the licence of the respondent as trainer, valid or invalid?

The first question depends upon the true construction and effect of certain rules At the hearing of the appeal reference was made to five sets of rules, Rules of Racing of the Trinidad Turf Club (hereafter called the Trinidad Rules of Racing), General Rules of the Trinidad Turf Club (hereafter called the Turf Club General Rules), Rules and Orders of the Jockey Club, 1890, English Jockey Club Rules of Racing, 1940, and the Rules of the Tobago Race Club It is necessary at this stage to quote the following rules

Trinidad Rules of Racing

"*Rule* 1 'Stewards' Unless otherwise stated wherever word 'Stewards' is used, it means the Steward or Stewards of the meeting or their duly appointed deputy or deputies

Rule 17 The Stewards of the Trinidad Turf Club have power, at their discretion, to grant, and to withdraw, licences to officials, trainers, jockeys, grooms, and race courses, to fix the dates on which all meetings shall be held, to make enquiry into and deal with any matters relating to racing in the Colony They also have power in cases of emergency or expediency to modify or to suspend any Rule or Regulation, for such period or periods as they shall think fit, without giving previous notice

Rule 125 Any person who shall—

(i) administer or cause to be administered, for the purpose of affecting the speed of a horse, drugs or stimulants, internally, by hypodermic, or other method, or

(ii) corruptly give or offer or promise, directly or indirectly, any bribe in any form to any person having official duties in relation to a race or race horse, or to any trainer, jockey, or agent or to any other person having charge of, or access to, any race horse, or

(iii) having official duties in relation to a race, or if any trainer, jockey, or agent, or other person, having charge of, or access to, any race horse, corruptly accept or offer to accept any bribe, in any form, or

(iv) wilfully enter or cause to be entered or to start for any race a horse which he knows or believes to be disqualified, or

(v) be guilty of, or shall conspire with any other person for the commission of, or shall connive at any other person being guilty of any other corrupt or fraudulent practice in relation to racing in this or any other country,

shall be warned off by the Stewards and reported forthwith to the Stewards of the Trinidad Turf Club

When any person is warned off, and as long as his exclusion continues, he is a disqualified person.

Rule 127 A 'disqualified person,' so long as his disqualification lasts, is unable—

(1) to act as Steward or Official at any recognised meeting,

(2) to act as authorised agent under these Rules,

(3) to subscribe for, or enter, run, train, or ride a horse in any race at any recognised meeting or ride in trials,

(4) enter any Race Course, Stand, or Enclosure,

(5) except with permission of the Stewards of the Trinidad Turf Club be employed in any Racing Stable

Rule 132 The English Jockey Club Rules of Racing for the time being in force shall apply in any case not provided for in these Rules "

Turf Club General Rules

"*Rule* 17 In addition to the powers conferred on them by the Rules of Racing of the Trinidad Turf Club, the Stewards have a discretionary power to warn any person off any premises belonging to, occupied by, or under the control of the Trinidad Turf Club, and in case of such notice being disregarded, to take legal proceedings against the offenders In deciding any question the Stewards may call in any other member to their assistance, or if they think the importance or difficulty of the case requires such a course, to refer it to a General Meeting "

The last-mentioned rule gives the appellants, in the clearest possible terms, a power to warn any person off any premises belonging to, occupied by, or under the control of the Trinidad Turf Club In their Lordships' view the appellants exercised this power, whether or not they exercised any other power, by their order warning off the respondent " pursuant to the powers vested in the Stewards of the Trinidad Turf Club " It is contended, however, by counsel for the respondent that this is a " warning off " of a domestic character which merely has the effect of preventing the person so warned off from going upon the premises of the Trinidad Turf Club, and has not the effect of making him a " disqualified person " within the meaning of Rr 125 and 127, Trinidad Rules of Racing They point out, quite correctly, that the respondent was not found guilty of any of the practices mentioned in rule 125, Trinidad Rules of Racing, and they contend that the words " when any person is warned off, etc ", at the end of that Rule, apply only to a person who is warned off by the Stewards of the meeting under rule 125, and have no application to any person who is warned off by the Stewards of the Trinidad Turf Club under any other rule Their Lordships cannot accept this contention It involves the proposition that there are two distinct kinds of warning off, one of which does, and one of which does not, have the result of rendering the person warned off a " disqualified person " The phrase " warn off " is a phrase of well-recognised meaning in racing circles, and by reason of certain mutual arrangements, which need not be set out in full but are referred to in Rule 1, English Jockey Club Rules of Racing, a person who is warned off the premises of the Trinidad Turf Club is treated as having been warned off the premises of a large number of other clubs all over the world After a careful consideration of all the relevant rules, their Lordships are unable to give to the words " when any person is warned off " the limited meaning for which the respondent's counsel contend In their Lordships' view, any person who is warned off by the Stewards of the Trinidad Turf Club, whether under the Turf Club General Rules or under the Trinidad Rules of Racing, becomes a " disqualified person."

It would appear from the evidence that some at least of the appellants considered that the respondent was warned off under Rule 17, Trinidad Rules of Racing, and not under Rule 17, Turf Club General Rules Counsel for the appellamts contended that the appellants had power to impose a sentence of warning off under either of these rules They relied upon the power given by the former rule " to make enquiry into and deal with any matters relating to racing in the Colony " They pointed out that it was unlikely that the Stewards of a meeting would be given power to warn off under Rule 125, Trinidad Rules of Racing, but that the superior body, the Stewards of the Trinidad Turf Club, should have no such power under Rule 17 of the same Rules Surely, said they, the power just quoted from Rule 17 must include a power to impose such a well-known sentence as warning off Their Lordships think that there is much force in this argument, but they have found it unnecessary to arrive at a conclusion upon it, as they are satisfied, for the reasons already stated, that under Rule 17, Turf Club General Rules, the appellants had power to impose a sentence of warning off resulting in the respondent becoming a disqualified person within Rule 127, Trinidad Rules of Racing. The result is that in their Lordships' view the first of the five questions already stated should be answered in the affirmative.

In considering the second question it is important to bear in mind that neither the learned Judge nor their Lordships' Board is entitled to sit as a Court of appeal from the decisions of a domestic tribunal such as the Stewards of the Trinidad Turf Club The jurisdiction of the Courts in regard to tribunals of a domestic nature has been discussed in many cases but their Lordships think that the observations which apply most directly to the present case are those contained in the judgment of Maugham, J., as he then was, in the case of *Maclean* v. *The Workers' Union*[1]. The Tribunal in that case was the executive committee of the Union and Maugham, J., observed (at page 620 med) :

"At the outset it may be expedient to point out that the question will not be whether the Court considers that the conduct of the defendants or their executive committee was fair and just, but the very different question whether the case is one in which the Court has power to interfere

The jurisdiction of the Courts in regard to domestic tribunals—a phrase which may conveniently be used to include the committees or the Councils or the members of trade unions, of members' clubs, and of professional bodies established by statute or Royal Charter while acting in a quasi-judicial capacity—is clearly of a limited nature Parenthetically I may observe that I am not confident that precisely the same principles will apply in all these cases, for it may be that a body entrusted with important duties by an Act of Parliament is not in the same position as, for example, the executive committee in the present case Speaking generally, it is useful to bear in mind the very wide differences between the principles applicable to Courts of justice and those applicable to domestic tribunals. In the former the accused is entitled to be tried by the Judge according to the evidence legally adduced and has a right to be represented by a skilled legal Advocate All the procedure of a modern trial including the examination and cross-examination of the witnesses and the summing up, if any, is based on these two circumstances A domestic tribunal is in general a tribunal composed of laymen. It has no power to administer an oath and, a circumstance which is perhaps of greater importance, no party has the power to compel the attendance of witnesses It is not bound by the rules of evidence, it is indeed probably ignorant of them It may act, and it sometimes must act, on mere hearsay, and in many cases the members present or some of them (like an English jury in ancient days) are themselves both the witnesses and the Judges Before such a tribunal counsel have no right of audience and there are no effective means for testing by cross-examination the truth of the statements that may be made The members of the tribunal may have been discussing the matter for weeks wth persons not present at the hearing, and there is no one even to warn them of the danger of acting on preconceived views

It is apparent and it is well settled by authority that the decision of such a tribunal cannot be attacked on the ground that it is against the weight of evidence, since evidence in the proper sense there is none, and since the decisions of the tribunal are not open to any sort of appeal unless the rules provide for one"

Maugham, J, then quoted from the judgment of Bowen, L J, in *Leeson* v. *General Council of Medical Education and Registration*[2] :

"There must be due inquiry The accused person must have notice of what he is accused He must have an opportunity of being heard, and the decision must be honestly arrived at if he has had a full opportunity of being heard"

And observed :

"To my mind that statement of the case *mutatis mutandis* is applicable, apart from any special rule, to all such cases as I am considering, and it follows exactly the same lines as the well-known decision of the Court of appeal in the case of *Dawkins* v *Antrobus*[3]"

Their Lordships have set out these passages because they accept the principles thus laid down as being applicable to the case now before them. Applying them they are unable to reach a conclusion that the proceedings at the Court of inquiry can be set aside on the grounds stated by the learned Judge.

It is true that no evidence was given indicating that the respondent either administered a drug to "Tommy Boy" or had any knowledge that a drug was being administered It was he himself who had suggested, some time before, that the saliva of winners of races should be tested, and he knew that the winners on the first day's racing at the Tobago spring meeting had had their saliva examined. He had trained and raced horses with success for many years and it is difficult to believe that he could have so directly imperilled his position merely in order to win another race. In fact, it appears from the evidence given by the appellants at the trial that they were all prepared to believe that the respondent had nothing

1. (1929) 1 Ch 602
2. (1890) 43 Ch D 366
3 (1881) 17 Ch D 615.

to do with the administration of the drug Thus no moral blame was attached to the respondent, and his punishment was no doubt severe. Counsel for the respondent contended that the rule of absolute responsibility of a trainer, applied in *Chapman* v *Ellesmere*[1], should not have been applied strictly in the present case, having regard to the fact that the trainer was to some extent deprived of the supervision of his horse by the following rule, which had been introduced by the then Stewards of the Trinidad Turf Club in 1934 and appears in the official programme for the 1944 spring meeting of the Tobago Race Club.

> "(6) Horses intending to start in a race must be in the Paddock at least one hour and in the saddling stalls 30 minutes before the time appointed for the race."

The learned Judge attached great importance to this rule. He said in his judgment "There is no doubt in my mind that the new practice did weaken the responsibility of the trainer" and he stated his conclusion as follows

> "By the adoption of what was in the circumstances an unreasonable and arbitrary rule"—here the learned Judge is referring to the rule applied in *Chapman's case*[1]—"the defendants in effect deprived the plaintiff of a proper opportunity to make his defence In my opinion the application of this inflexible rule was contrary to natural justice and on this ground alone this Court can and should make a declaration in the plaintiff's favour"

No doubt it was open to the appellants to take a more lenient view of the respondent's responsibility in the present case. They might have thought that in all the circumstances, and having regard to the rule introduced in 1934, he should not have been held responsible for the unfortunate incident which took place in regard to "Tommy Boy." All these matters, however, are essentially matters for the domestic tribunal to decide as it thinks right Provided that the tribunal does not exceed its jurisdiction and acts honestly and in good faith, the Court cannot intervene, even if it thinks that the penalty is severe or that a very strict standard has been applied. The matters dealt with in the judgment of Hallinan, J., under this head do not affect the jurisdiction of the tribunal, and no attack has been made upon the honesty or good faith of its members Moreover their Lordships cannot agree with the observations of Hallinan, J, already quoted that :

> "by the adoption of what was in the circumstances an unreasonable and arbitrary rule, the defendants in effect deprived the plaintiff of a proper opportunity to make his defence"

From the notes of the inquiry which appear in the record it is plain that counsel for the respondent had every opportunity of putting the respondent's case and he in fact argued at some length that the rule in *Chapman's case*[1], should not have been applied, and that the respondent should not have been penalised unless it was found that he was actually implicated in the "doping." For these reasons the second question must be answered in the negative

Their Lordships now turn to the question of bias It is convenient to quote at this stage certain observations of Maugham, J, in *Maclean's case*[2], which in their Lordships' view, apply *mutatis mutandis* to the present case .

> "A person who joins an association governed by rules under which he may be expelled, *e g*, such rules as in the present case exist in Rr 45 and 46, has in my judgment no legal right of redress if he be expelled according to the rules, however unfair and unjust the rules or the action of the expelling tribunal may be, provided that it acts in good faith It is impossible to doubt that, if the rules postulate an inquiry, the accused must be given a reasonable opportunity of being heard The phrase, 'the principles of natural justice,' can only mean in this connection the principles of fair play so deeply rooted in the minds of modern Englishmen that a provision for an inquiry necessarily imports that the accused should be given his chance of defence and explanation On that point there is no difficulty Nor do I doubt that in most cases it is a reasonable inference from the rules that if there is anything of the nature of a *lis* between two persons, neither of them should sit on the tribunal But when it is sought to lay down elaborate rules, taken from decisions, as to Courts of law, and to apply them in such a case as the present, I think it is prudent to remember that these more or less artificial principles have no application except so far as they can be derived from a fair construction of the rules, and that the implication can only be made if it is clear that the parties, who are laymen and not lawyers, must have intended it"

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1. (1932) 2 K.B. 431. 2. (1929) 1 Ch. 602.

On this part of his case, counsel did not lay any stress on the position of the appellant de Nobriga, but he relied very strongly on certain observations of the learned Judge in regard to the appellant Liddelow. These observations are of such importance that they must be set out at some length After summarising the evidence in regard to the previous unfriendly relations between the respondent on the one hand and the appellants de Nobriga and Liddelow on the other, the Judge continued

" The allegations of bias against the defendants de Nobriga and Liddelow may be summed up shortly The plaintiff has for many years been on bad terms with both defendants he hates them and they dislike him I do not consider that the defendant de Nobriga would allow this dislike consciouly to bias his judgment against the plaintiff his dislike of the plaintiff was not sufficient to disqualify him from sitting on the enquiry At the same time far from trying to avoid the delicate position of adjudicating upon someone he disliked—a feeling which he knew was more than reciprocated—he assisted in the adjudication at Arima and he sat on the enquiry The comment of the Privy Council upon similar facts in the case of *Thompson* v *British Medical Association (N S W Branch)*[1] is appropriate here

'In their Lordships' view persons called upon to discharge judicial or quasi-judicial duties can never have it too often impressed upon them how undesirable it is that they should attempt to discharge those duties under conditions which throw suspicion, however undeservedly, on their motives and action '

In the case of the defendant Liddelow, the prejudice went much further There is, in my opinion, a grave suspicion that he was not an impartial Judge I can say without hesitation that his *bias* should have disabled him from sitting on the enquiry and were the enquiry a judicial proceeding and not merely quasi-judicial his presence on the tribunal would have invalidated the proceedings But the question here is whether his presence prevented the enquiry from being a proper enquiry and, therefore, contrary to natural justice It is unreasonable to expect that the standard of impa rtiality and detachment in a domestic tribunal's members should be as impeccable as in Courts of Law, and therefore I consider that the oft-repeated maxim that justice must not only be done but appear to be done, should not be applied too rigorously in the case of domestic tribunals In this I follow the conclusion reached by Maugham, J , in *Macleans* v *The Worker's Union*[2] I think the test should be whether the presence of prejudiced persons inject such an element of bias into the tribunal as to give rise to a reasonable suspicion that the trial was not a fair one In the circumstances of the present case, I do not consider that the presence of the defendant, Liddelow, on the Tribunal was sufficient to give rise to such a suspicion "

At first sight this passage, and especially the words " There is, in my opinion, a grave suspicion that he was not an impartial Judge " might appear to mean that Mr Liddelow, sitting as a member of the tribunal, did not honestly apply his mind to arriving at the proper conclusion on the evidence ; in other words, that he did not act honestly in the discharge of his judicial duty If that were the meaning of the words just quoted their Lordships would be of opinion that the decisions of the tribunal could not stand They think, however, that a consideration of the judgment as a whole makes it clear that this could not have been the learned Judge's meaning He had already said, " In the present case the plaintiff does not challenge the honesty or *bona fides* of the defendants " and after the passage in question he said

" I have no doubt the stewards are persons of great integrity and experience They have striven to keep the sport of racing clean and to protect the racing public Perhaps it was these very qualities which led them to judge the plaintiff by a rule that it might be both salutary and fair to enforce if the practice before 1934 had remained unaltered or if trainers since 1934 had been expressly warned of their absolute liability "

Further, if the learned Judge had thought that Mr Liddelow had not honestly discharged his judicial functions as a member of the tribunal he could hardly have said

" In the circumstances of the present case, I do not consider that the presence of the defendant, Liddelow, on the Tribunal was sufficient to give rise to such a suspicion "

i e, the suspicion that the trial was not a fair one. Reading the judgment as a whole their Lordships are satisfied that when the learned Judge used the phrase " a grave suspicion that he was not an impartial Judge " he meant merely that Mr. Liddelow started the proceedings with a dislike for the respondent and a consequent prejudice against him They do not understand the learned Judge as

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1 (1924) A C 764 at p 781.

2. (1929) 1 Ch 602

finding that Mr Liddelow did not honestly try to arrive at the proper conclusion on the evidence This being so, their Lordships think that the appellants, sitting as a tribunal, discharged the obligation which lay upon them to act honestly and in good faith It may be that it would have been wiser, and in better taste, if Mr. Liddelow had refrained from sitting at the inquiry, having regard to the previous relations between the respondent and himself, but their Lordships cannot find that his presence as one of the tribunal rendered its conclusions null and void They think that the standard to be applied in the present case is the standard laid down by Maugham, J, in *Maclean's case*[1] and they do not think it would serve any useful purpose to discuss the many other cases cited in argument in which standards have been laid down, in varying terms, for tribunals of various kinds In the present case the respondent, from the start of his career as a trainer and owner, submitted himself to the jurisdiction of certain individuals, namely, the Stewards for the time being of the Trinidad Turf Club No doubt these Stewards would have some personal acquaintanceship with persons who owned and trained race horses in Trinidad and Tobago, and they would have been more than human if they had not been in more friendly relations with some trainers and owners than with others Yet in submitting himself to the " rules of the Trinidad Turf Club for the time being," the respondent agreed, in effect, that the appellants should be his Judges in the circumstances which arose in 1944 He cannot now complain of their decision against him unless he can establish one of the grounds of objection stated in *Maclean's case*[1] and this he has failed to do

Having arrived at the conclusion that the proceedings of the Stewards cannot be treated as being null and void on any of the three grounds already discussed, their Lordships can deal very briefly with issues 4 and 5 As to issue 4, if there had been any reason for holding that the proceedings were null and void, it would have been necessary to consider whether the present case was one in which a declaratory judgment or order could properly be made under Order 25, rule 5 of the Rules of the Supreme Court This question does not, however, arise, having regard to the conclusions already arrived at on the first three issues

As to issue 5, which forms the subject of the cross-appeal, as the proceedings at the inquiry are in no way invalid their Lordships agree with the learned Judge in thinking that he could not interfere either with the disqualification of " Tommy Boy " or with the withdrawal of the respondent's licence Rule 48, Trinidad Rules of Racing provides

" Any horse which has been the subject of fraudulent practice may, at the discretion of the Stewards of the Trinidad Turf Club, be disqualified for such time and for such races as they shall determine "

There is no doubt that the unfortunate horse in question had been the subject of a fraudulent practice, namely, the administration to him of a drug with the intention of increasing his speed. This fact gave the Stewards a discretion to disqualify the horse, notwithstanding that his owner and trainer was not shown to have been in any way a party to the fraudulent practice in question As to the withdrawal of the respondent's licence, the terms of the licence gave the Stewards absolute discretion to withdraw or suspend it This discretion they exercised at the inquiry. Their Lordships need not consider whether an inquiry was necessary before the licence was withdrawn, as an inquiry was in fact held Nor need they consider whether proof of bad faith could affect the validity of the withdrawal as bad faith is not suggested in the present case. In these circumstances the questions debated in the recent case of *Russell* v *Duke of Norfolk and others*[2] do not arise for decision in the present case.

For the reasons stated their Lordships are of opinion that the respondent's action should have been dismissed by Hallinan, J. They will humbly advise His Majesty that this appeal should be allowed and the cross-appeal dismissed

1 (1929) 1 Ch. 602 2. (1949) 1 All E.R. 109

and that the respondent's action against the appellants should be dismissed. The respondent must pay the costs of the appellants of the action, the appeal and the cross-appeal.

Solicitors for Appellants . *J N Mason & Co.*

Solicitors for Respondent *Maples Teesdale & Co*

K.S. *Appeal allowed and Cross-appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE SUBBA RAO AND MR. JUSTICE PANCHAPAKESA AYYAR.

Gummalapura Tagginamatada Kotturuswami .. *Appellant**

v.

Setra Viravva and others . *Respondents*

Hindu Law—Adoption—Will giving widow authority to adopt with approval of the five trustees appointed in the will—Adoption with approval of sole surviving trustee—Validity

Civil Procedure Code (V of 1908), section 35-A—Compensatory costs—If can be ordered merely on the basis of past activities of plaintiff and his propensity to file suits for getting properties

A testator by his will gave permission to his wife *V* to adopt a son The will stated "I have given her permission to adopt as many times as would be necessary, should the previous adoption be unsuccessful But *V* should adopt only a boy approved by the respectable persons appointed by me in paragraph 14 Should *V* die before making any adoption, the persons becoming trustees should arrange for the adoption of a boy for the continuation of my family in accordance with my kulachara " For the purpose of carrying out the provisions of the will the testator nominated five persons as trustees by the will One of the five persons thus appointed declined to accept the job and the other four accepted , but died one by one leaving only one alive The widow made an adoption with the approval of the sole surviving trustee

In a suit by a person claiming to be a reversioner challenging the validity of the adoption,

Held on a reading of the will, it was manifest that the testator's intention was undoubtedly to enable *V* to select the boy she liked, but only to get the approval of that boy by the original trustees who happened to be alive and holding that office at that time There was no condition precedent at all to *V's* adopting any boy she liked The so-called power given to the trustees was simply a power to approve , in other words it is no real power at all Even if the five trustees are held to have a power to approve the adoption, that power must be held to be given to trustees *officially* and to have devolved on the surviving trustee whose approval will be quite sufficient Accordingly the adoption by *V* was valid

Authorities discussed

The past activities of the plaintiff in filing suits and his propensity to file suits for getting properties should not be taken into consideration for the purpose of awarding compensatory costs against him A suit involving arguable and complicated questions of fact and law cannot be held to be "frivolous and vexatious" to warrant the awarding of compensatory costs.

Appeal against the decree of the District Court, Bellary, in O S No. 39 of 1943, etc.

Alladi Krishnaswami Aiyar, K. Umamaheswaram and *Alladi Kuppuswami* for Appellants

T L Venkatarama Aiyar, Kasturi Seshagiri Rao and *S Srinivasa Aiyar* for Respondents.

The Judgment of the Court was delivered by

Panchapakesa Ayyar, J. —This is an appeal against the judgment and decree of the District Judge of Bellary dated 26th November, 1945, in O S. No. 39 of 1943 That suit was filed on behalf of all the reversioners by the appellant, Gummalapura Tagginamatada Kotturuswami, head of the Lingayat Togginamutt at Kampli, claiming to be the nearest reversioner of the estate of his natural brother, Setra Kari Virappa, given away in adoption, for a declaration that the adoption of Kotrabasayya, the second defendant, on 11th October, 1942, by Setra Viravva, the first defendant and widow of Kari Virappa, was invalid, as not being in conformity with the will of Kari Virappa, Exhibit P-2 (*a*), dated 10th October, 1920 and on other grounds and not binding on the plaintiff and the other reversioners.

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*Appeal No 55 of 1946, etc 25th March, 1949

The estate is worth about a lakh of rupees Setra Kari Virappa was given in adoption to one Virappa Devaru and this was referred to in Virappa Devaru's will Exhibit P-1 dated 4th February, 1899. That adoption also had been contested, but unsuccessfully Kari Virappa died on 23rd October, 1920 He had been a *Pattadhikari* or head of the Lingayat Tagginamutt before the plaintiff By a curious custom in that *mutt*, as well as in many other similar Lingayat *mutts* in Bellary district, a small boy is made the *pattadhikari* when he is a minor, and he puts on yellow robes , but when he attains majority, he may decide to marry and then can resign the *pattadhikariship* to his nominee, marry and raise a progeny. The consequence is that his rights of inheritance in his family, whether natural or adopted, do not cease, as in the case of an ordinary Hindu *sanyasi* who becomes civilly dead, on assuming the yellow robes The evidence of P W. 13, a *pattadhikari* of a similar type, and of other witnesses, and the documentary evidence in the case proved this fully

The important clauses relevant for our purpose in Exhibit P-2 (*a*), Kari Virappa's will, are in paragraphs 3 and 14. In paragraph 3, Kari Virappa said

"I have no issue whatever For the purpose of continuation of my family, I have given permission to my wife, Viravva, to adopt a son I have given her permission to adopt as many times as would be necesary, should the previous adoption be unsuccessful But Viravva must adopt only a boy approved by the respectable persons appointed by me in paragraph 14 Should Viravva die before making any adoption, the persons becoming trustees should arrange for the adoption of a boy for the continuation of my family in accordance with my kulachara (family usage) "

The material portion of paragraph 14 runs as follows :

"For the purpose of duly carrying out after my death the arrangements proposed herein for securing a suitable boy and adopt him according to our religion , then to take charge of the properties and manage them properly during the minority of my adopted son and then make them over to my adopted son as soon as he attains majority, to look after the protection of my wife and my adopted son , for giving effect to the arrangements proposed in regard to the Sanskrit *Patasala* referred to in paragraph 10 , for dealings with the properties of the adopted son in future by sale or otherwise according as circumstances may require , for improving the said properties by the addition or acquisition of other properties, and in general, for the purpose of working out the terms and conditions contained in this will after my death, I nominate the following gentlemen as Trustees —"

He then nominated Holayya, Gundappa, Malkambanna, Gurusanthappa and Huchappa (P W 10) as trustees and added

"After me these trustees should carry through everything as directed herein If any vacancy should occur among these trustees, the remaining trustees are empowered to co-opt anyone they please "

One of the five persons thus appointed trustees declined to accept the job ; the other four accepted ; but died, one by one, leaving only P. W. 10 alive now.

After Kari Virappa's death the four trustees who had agreed to function filed along with defendant, Kari Virappa's widow, O. S No. 20 of 1921 in the Subordinate Judge's Court, Bellary, to recover some lands from Kari Virappa's adoptive mother, Chennamma and others. In that suit, it was decreed that Kari Virappa had been validly adopted by Virappa Devaru in 1892, despite Chennamma's denial of this that he had become the *pattadhikari* of this *mutt* in 1896 and had relinquished that office in 1909 in favour of the plaintiff, then aged 3 or 4, and had married Setra Viravva, the first defendant in 1911, that he had not forfeited his right to inherit the properties of Virappa Devaru his adoptive father by reaon of being a *Sanyasi* that he had, in fact, inherited all of them and enjoyed them till he died and that he had bequeathed his properties to his widow, the first defendant, as a *persona designata* under his will [Exhibit P-2 (*a*)] dated 10th October, 1920 Chennamma had also set up three reversioners, who were, according to this plaintiff, one degree more removed than himself from Virappa Devaru, to file O S No 57 of 1921 attacking the adoption of Kari Virappa as false and invalid. The plaintiff who was a natural brother of Kari Virappa said that he did not join in that suit because his own brother's adoption was being attacked therein, though he was a nearer reversioner than the persons who filed the suit O S Nos. 20 and 57 of 1921 were tried together and O S No 57 of 1921 was dismissed. This plaintiff

then filed a suit in 1923, after attaining majority, against Chennamma for recovering some *mutt* lands In that suit, the first defendant is alleged to have helped him financially and otherwise The suit was decreed in his favour and he got the lands he sued for He lived in the house of defendant 1 till 1926 or 1927

Having succeeded in 1923 suit, the plaintiff is said to have cast covetous eyes on the first defendant's property He filed O P No 2 of 1929 in the District Court, Bellary, for permission to file a suit in *forma pauperis* against the first defendant claiming some properties in her possession as belonging to the *mutt* In that pauper petition, he swore that he was a *Sanyasi* and, therefore, could not claim the family lands in contrast to his present position That pauper petition was dismissed The plaintiff paid the court-fee and filed O S No 15 of 1929 The suit was compromised and the plaintiff got substantial properties from the first defendant at the instance of some panchayatdars Chennamma the adoptive mother of Kari Virappa who was inimical towards defendant 1, resided with the plaintiff till she died in 1939 She had sworn as a witness in the suits of 1921 that the plaintiff was not related at all to the family of her husband, Virappa Devaru, and that he was an absolute stranger to the family The plaintiff explained that this was false and was due to her anger at his not joining in O S No 57 of 1921

In 1925, the 1st defendant began to take steps to adopt a boy Her first attempt proved futile as the boy she wanted to adopt was found to be an orphan and ineligible for adoption under the Hindu law. She had given a notice Exhibit D-23, regarding this proposed adoption to P W 10, one of the original surviving trustees P W 10 and the only surviving trustee, Guru Santhappa, were said to have suggested the names of several suitable boys related to the family to the 1st defendant for adoption , but she is said to have been not willing to adopt any of these

On 22nd November, 1934, Guru Santhappa and P W 10 the only two surviving trustees, are said to have co-opted the plaintiff and two cousins of his (defendants 3 and 4) as trustees in the place of the three deceased original trustees under the powers given in paragraph 14 of Kari Virappa's will Exhibit D-29 (*a*) is said to be the proceedings relating to the co-option of the three trustees. The learned District Judge disbelieved the story of this co-option as the minutes about it formed the only entry in that note-book and the fact of the co-option was not communicated to the first defendant, and even in the telegraphic notice (Exhibit D-24) sent to the 1st defendant on 14th December, 1934, asking her not to adopt without the consent of the trustees, only the names of Guru Santhappa and P. W. 10, the original trustees, appeared as trustees and not the names of these alleged co-opted trustees, and as it was admitted that these co-opted trustees did nothing at all ever since their alleged appointment. He considered that the whole thing was a manoeuvre by the plaintiff to harass and obstruct the widow, the 1st defendant and get more properties from her.

In 1939, the 1st defendant adopted one Sekharayya Exhibit P-14 was an invitation card issued for that adoption. D. Ws 1 to 5 and 7 swore that P W 10 approved of that adoption and was the only surviving original trustee then, and that he attended the adoption with his wife A photograph (Exhibit D-32) taken on the occasion shows P. W 10's wife seated prominently next to defendant 1, who had the adopted boy in front of her The lower Court disbelieved P W. 10's statement on oath that he had not approved of that adoption or attended the ceremony.

The plaintiff and P W 10 and defendants 3 and 4 filed a pauper petition O. P No. 10 of 1940, in the District Court, Bellary, to declare that adoption invalid Of course, prior to that, the plaintiff resigned his post as co-opted trustee. That pauper petition was thrown out It is alleged that before the plaintiff decided to pay court-fee and file a regular suit the co-opted boy died on 6th August, 1942.

On 18th September, 1942, the first defendant entered into an agreement, Exhibit D-25, with the natural father of the second defendant for the adoption of

the second defendant by her. On 11th October, 1942, she took the boy in adoption. But the adoption deed Exhibit D-26 was executed only on 23rd June, 1943. No invitation card was issued for the second adoption or a photograph taken on the occasion. The reason given by the first defendant's counsel in the lower Court was that, as the first boy, taken in adoption after the invitation card and photo, died prematurely, it was not considered proper to invite another stroke of fate by following a similar procedure regarding the second boy; the lower Court accepted that argument, in view of the superstitions prevalent in the countryside regarding such matters D.Ws. 1 to 5 and 7 swore that the prior approval of P.W. 10 the only surviving original trustee was taken for this adoption also, and that P.W. 10 attended the adoption with his wife, as on the previous occasion. P.W. 10, of course, denied this also; but the lower Court disbelieved his statement on oath and held that he must have approved the adoption and attended the ceremony with his wife as before

The plaintiff, of course, contended that the adoption was without the consent or approval of P W 10, the surviving original trustee, and was invalid on that account, that it was invalid also because there was not the joint approval of all the five original trustees as required under the will of Kari Virappa. He urged that if, for whatever reason, one of the original trustees did not join in the approval, the adoption would be invalid in law He contended that P W. 10 did not attend the adoption ceremony. He contended further that the approval of the three co-opted trustees was also required to make the adoption valid He urged that the boy adopted was not of the same family and was not even fit and suitable otherwise, and that the adoption was invalid for that reason too He relied on the genealogy in Ex P-11, a copy of a genealogical table filed in 1860, for proving that he was a reversioner of Kari Virappa, and urged that all the nearer reversioners were dead, and, so, he was the nearest reversioner alive The learned District Judge disbelieved him and holding that he was not even a relative or remote reversioner of Kari Virappa, being a man belonging to the Gundada family, and not to the Setra family of Kari Virappa. The first defendant had urged that the plaintiff was simply claiming to be a reversioner and relative because of the adoption of his natural brother, Kari Virappa, by the Setra family, and because of his natural father, Sanapurappa, having migrated along with his son, Kari Virappa, to the richer Setra family after the adoption and described himself as Setra Sanapurappa by virtue of his new surroundings The learned District Judge also held that even if the plaintiff was really related to Kari Virappa, the evidence proved that there were nearer reversioners alive, and that the plaintiff was not really suing on behalf of all the reversioners, as he pretended, but only in his own selfish interests, and that the Court's discretion should not be exercised in his favour; and he allowed to maintain it as per the ruling in *Velu Sethurayar* v. *Karupayammal*[1], since the circumstances for deviating from that rule laid down in *Lakshmiammal* v. *Anantharama Iyengar*[2] were different from those in the present suit.

Defendants 1 and 2 had, of course, vigorously contested the plaintiff's suit, and alleged that the plaintiff was neither a relative nor a reversioner, but an utter stranger not interested in Kari Virappa's properties They also stated that the plaintiff was civilly dead, and was disentitled as a *sanyasi*, from claiming any reversionary rights, even if he had any. They asserted that the adoption of the second defendant was perfectly valid and binding, as it was performed in pursuance of the imperative and insistent wishes of Kari Virappa, who wanted to provide for his spiritual and worldly welfare after his death, and was also approved of by P.W. 10, the only surviving original trustee, who alone was required to be consulted and whose approval was quite enough. Of course, they denied the truth and validity of the alleged co-option of three trustees Defendants 6 and 7 were only persons who got some bequests under the will of Kari Virappa. Defendants 3 and 4 were two of the three co-opted trustees (the third one being the plaintiff

1. (1945) 2 M L J 442.

2 (1937) 2 M.L.J. 209: I.L.R. 1937 Mad. 948 (F.B.).

himself), and defendant 5 was the surviving original trustee (P W 10) Defendants 3 to 5 had vigorously supported the plaintiff's case

The learned District Judge framed the following issues

(1) Whether the plaintiff is a reversioner entitled to sue ?

(2) Whether the plaintiff, the head of the Taggina *mutt*, is a *sanyasi* who is civilly dead and had lost all his civil rights ?

(3) Whether plaintiff is not entitled to sue by reason of his becoming a *sanyasi* ?

(4) Whether the adoption of 2nd defendant by defendant 1 is invalid for all or any of the reasons stated in paras 6 to 9 and 12 of the plaint ?

(5) Is the suit barred by *res judicata* by reason of the judgment in O S No 57 of 1921, Sub-Court, Bellary ?

(6) Whether the gold jewels and silver articles set out in the plaint schedule belonged to the estate of the late Kari Virappa and are they in the possession of defendant 1 ?

(7) Whether the suit is malicious and vexatious and whether defendants 1 and 2 are entitled to compensatory costs under Section 35-A, Civil Procedure Code.

After discussing the entire evidence, he found, on issue No 1 that the plaintiff was neither a relative nor a reversioner, and was, in any case not the nearest reversioner, and was not therefore entitled to sue On issues Nos. 2 and 3 he held that the plaintiff was not civilly dead and was entitled to sue though he had become a *sanyasi*. He remarked that it passed his comprehension how a person so engrossed in worldly affairs as the plaintiff had shown himself to be, could have thrust on him the legal position of a *sanyasi* a position derived from a complete renunciation of all the properties and mundane materialism. On issue No 4, he found that the adoption of the second defendant was perfectly valid and binding. On issue No. 5, he found that the suit was not barred by *res judicata* by reason of the judgment in O S No. 57 of 1921 on the file of the Sub-Court, Bellary. On issue 6, he did not give any finding as no evidence was let in by either side On issue 7, he found that the suit was false and vexatious and that the evidence showed that the plaintiff had been harassing the 1st defendant for several years and that he had manoeuvred himself into the position of a co-opted trustee with ulterior motives probably in order to force her to part with some more property, and that he had filed this extraordinary suit in the guise of a reversioner, but really only for his own benefit, and that he had undoubtedly caused great expense, vexation and harassment to defendant 1 by a prolonged trial and lengthy depositions and should, therefore, be made to pay compensatory costs under section 35-A, Civil Procedure Code and he fixed the compensatory costs at Rs 750 In the end, he dismissed the suit with full costs of defendants 1 and 2 fixing the pleader's fee at Rs. 1,000 besides giving Rs 750 as compensatory costs The plaintiff has appealed.

[Their Lordships after dealing with certain contentions not necessary for the purpose of this report continued.]

The next contention was that even if the *factum* of the adoption of the second defendant was proved, and that P W. 10, the only original surviving trustee, approved of that adoption and attended the ceremony, the adoption would still be invalid under the will Ex P-2 (*a*) of Kari Virappa, since the will stipulated that the first defendant should adopt only a boy approved by the respectable persons appointed by him in paragraph 14 and so all the five persons named in paragraph 14 should give a joint approval, and that if any one of those five persons did not accept the trusteeship, or died before the adoption, or refused to give their approval the adoption would be invalid. Mr Alladi Krishnaswami Aiyar, who urged this point as the strongest thing in favour of the appellant, relied on paragraph 965 of Halsbury's Laws of England, volume 25, and some passages on pages 159 to 162 of

Farwell on "Powers" and several Privy Council and Bombay and Madras rulings. Farwell remarks thus at page 159:

"The consent of any person required to consent, and also all formalities annexed to the execution, must be respectively given and perfected during the lifetime of the donee of the power."

At pages 161 and 162, he remarks:

"If a power is given, to be executed with the consent of one or more persons, and that one, or any one of the others dies, the power is gone"

Paragraph 965 of the Halsbury's Laws of England, volume 25 is only to the very same effect Of course this represents the law in England as well as in India in all cases where the consent of any person entrusted with a power is required, and where *naked power* is given to such persons At page 512 Farwell has remarked:

"Mere powers, as distinguished from trusts, are strictly construed, and can only be exercised by the persons who are either expressly or by reference, designated as donees of the power"

He goes on to add that such powers cannot be exercised after the death of the persons designated, and that a bare power given to two or more cannot be executed by the survivor But he and Hailsham and all others agree that where a power is annexed to an *office*, like executors, trustees, etc, all persons who fill that office can exercise that power

The learned advocate for defendants 1 and 2 urged that in the present case no *power* at all was given to the persons appointed as trustees in paragraph 14 by the testator, but only their approval as trustees of the boy adopted by the widow was required It was urged further by the learned advocate for defendants 1 and 2 that paragraph 3 of the will, already extracted, showed beyond all possibility of doubt that the testator was very keen on adopting a son for his temporal and spiritual benefit to continue his line and to conform with his *kulachara*, and that this so obsessed him that he even made a provision for the trustees to adopt a boy for him if the first defendant should die without making any adoption—an illegal thing, as held in *Amirto Lal Dutt* v *Surnomoyee Dasi*[1] and showing by the very illegality of the provision his terrible anxiety that a child should be adopted for him to continue his line and fulfil the *kulachara*

Mayne has remarked at page 215 of his Hindu law and Usage "the rules of construction of authorities to adopt have been laid down by the Judicial Committee in *Sri Raja Venkata Narasimha Apparao* v *Parthasarathi Apparao*[2] and in *Rajendra Prasad Bose* v *Gopal Prasad Sen*[3] Apparently the construction will be more liberal where the paramount intention to be gathered from the language of the will the authority is religious than when it is secular (*Sri Raja Venkata Narasimha Apparao* v *Parthasarathi Apparao*[2] and *Rajendra Prasad Bose* v *Gopal Prasad Sen*[3]) But both the objects *viz.*, to secure spiritual benefit to a man and to continue his line are meritorious in the view of the Hindu law and both are in consonance with the feelings known to prevail throughout the Hindu community (L R. 33 I A 145) Where an authority to adopt is given by a husband the presumption is strong that he desires to be represented by an adopted son. The Courts would not be astute to defeat an adoption not clearly in excess of the power given by placing a narrow construction of the words of the authority, *Bhagat Koer* v. *Dhanukhdhari Prasad Singh*,[4] *Mutsaddilal* v. *Kundan Lal*[5]" The learned advocate for defendants 1 and 2 urged that a liberal construction should be given to the words of para. 3 of the will and paramount intention of the testator, to have an adopted son, carried out and the adoption upheld. He pointed out that an absolute and unlimited power was given to the widow to adopt as many times as would be necessary, should the previous adoption be unsuccessful, and that the direction that she must adopt only a boy approved by the respectable persons appointed by him in paragraph 14 should be taken to be merely recommendatory and not mandatory; that failure

1 (1900) L R. 27 I A 128 I L R 27 Cal. 996 (P C)

2 (1913) 26 M L J 411 · I L R 37 Mad 199 L R 41 I A 51 (P C)

3 (1930) 59 M L J 615 . L R. 57 I A. 296 I L R 10 Pat 187 (P C)

4 (1919) 37 M L J 513 · L.R. 46 I A 259: I L R 47 Cal 466 (P C).

5 (1905) 16 M L J 174 L.R. 33 I.A. 55 I L R 28 All 377 (P C).

to go by that direction would not make the adoption invalid, that, in any event, the direction was intended only to operate regarding the five persons appointed by the testator himself as trustees in paragraph 14 and only the trustees alive at the time of the adoption need be approached by the widow for approving the adoption, and that as the approval of P W 10, the sole surviving trustee, to this adoption had been asked for and given, the adoption was perfectly valid in any event We agree. There is no doubt whatever in our minds that the testator was very very anxious to have a boy adopted for him in order to continue his line for both temporal and spiritual purposes, the word "*kulachara*" indicating the spiritual motive, which is also further reinforced by the testator's having been a *pattadhikari* of a *mutt*, and having been deeply interested in the maintenance of a Sanskrit *Patasala*, named expressly in the will as a thing to be looked after carefully Indeed, the very provision in the will for the trustees to adopt a boy for him in case his widow died without adopting one shows his anxiety to have an adopted son at all costs.

No doubt, as per the rulings of the Privy Council in *Sri Raja Venkata Narasimha Apparao* v *Parthasarathi Apparao*[1] and *Rajendra Prasad Bose* v *Gopal Prasad Sen*[2] and the rulings of the Bombay High Court in *Rangubai* v *Bhagirathi Bai*[3] and of the Madras High Court in *Janakiramayya* v *Venkatalakshmamma*[4] a power to adopt must be exercised strictly in accordance with the terms, and the rules prevailing in England as to the construction of powers applicable thereto, though in construing a document whether in English or the vernacular, the fundamental rule is to ascertain the intention from the words used and the circumstances are to be regarded only to show the intended meaning of the words used We are satisfied from the reading of the will of Kari Virappa that he intended his widow to adopt as many times as was necessary, out of her own free choice, without restricting the choice to relatives etc and without delegating the selection of the boy to the trustees or compelling her to select the boy in consultation with them His intention was undoubtedly to enable her to select the boy she liked, but only to get the approval of that boy by the original trustees who happened to be alive and holding that office at that time.

It is not a case here as in the case of *Sri Raja Venkata Narasimha Apparao* v *Parthasarathi Apparao*[1], where the two widows of the testator were jointly given a power to adopt, and it was held, therefore, that one widow could not adopt by herself, as she had not been given the sole power to adopt a boy, as in this case Nor is this a case like *Rangabai* v *Bhagirathi Bai*[3], where the previous consent of the Government to the adoption was made a condition precedent In this case, there is no condition precedent at all to the widow's adopting any boy she liked. She was only asked to adopt a boy who had the approval of the original trustees appointed under paragraph 14, meaning thereby the trustees in their official capacity and enabling therefore a surviving trustee, like P W 10, to give the consent. Nor is it a case as in *Amirto Lal Dutt* v *Surnomoyi Dasi*[5], where a widow was authorised to adopt only in conjunction with two other executors, or as in *Rajendra Prasad Bose* v. *Gopal Prasad Sen*[2] where the widow was allowed to adopt only with the previous permission of the testator's father, or as in the case of *Janakiramayya* v. *Venkatalakshmamma*[4], where the widow was given the power to adopt only acting in conjunction with the testator's mother.

We are satisfied that none of the rulings relied on by Mr Alladi Krishnaswami Aiyar for holding the adoption invalid would apply to the circumstances of this case.

The ruling in *Sri Raja Venkata Narasimha Apparao* v *Parthasarathi Apparao*[1], will not apply. There is no question of joint power given to two widows here and the consequent necessity for both the widows to act jointly before adopting a person as in that case. It is because of the two widows jointly empowered that their Lord-

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1 (1913) 26 M L J 411 I L R 37 Mad. 199 L.R. 41 I A 51 (P C)
2 (1930) 59 M L J 615 · L.R 57 I A. 296, I.L.R. 10 Pat. 187 (P C).
3 (1877) I L R 2 Bom 377
4. (1931) M W N. 473.
5. (1900) L R 27 I A. 128; I.L.R 27 Cal. 996 (P C).

ships held that to hold that one of the widows could adopt a son after the death of the other widow would be providing for a period of time which the testator left unprovided for and would be making an addition to his testamentary dispositions which no Court, construing a will, was entitled to do Here, however, there are no two widows, but only a single widow. Nothing need be added to the testamentary dispositions of this testator for holding this adoption to be invalid Indeed, it will only be carrying out the testamentary dispositions of the testator and construing the will in the way he wanted Nor was any power given to the five trustees appointed by the testator in paragraph 14 of his will to select a boy for adoption much less to force that boy on the widow and disentitle her to adopt any boy other than the boy they selected The so-called power given to the trustees under the testator's will was simply a power to approve, in other words it is no real power at all The Canarese word used is "oppida" or approval and not "anumathi" or permission much less "hakku" or right

In *Rajendra Prasad Bose* v. *Gopal Prasad Sen*[1] also an adoption by the widow was expressly made subject to a condition precedent namely the approval of the testator's father and could not have been made by the widow herself acting alone It was not a case of mere approval as here. Their Lordships of the Privy Council remarked in that case

"It is important to bear in mind that Ram Prasad could not have been married many years before the anumatipatra was executed, and his wife was then only 13 or 14 years of age. It is unlikely that he could ever have wished that his girl wife should have an unrestricted choice in the selection of his adopted son to the extent of allowing her to bring a stranger to inherit his property In their Lordships' opinion, the words "with the permission of my father" created a condition precedent to the exercise of the power of adoption certainly during the lifetime of the father, and there is no reason for holding that the words are to have a different effect after the death of Golak (the father)"

Here the widow was not a young girl when the testator died, as in that case, but was 31 years old at the time of the will and had lived with her husband, the testator, for many years, and had infused such confidence in him that he had asked her not to make one adoption but as many adoptions as necessary in order to carry out his paramount intention of having an adopted son to continue his line and fulfil the kulachara

So, too, in *Janakiramayya* v *Venkatalakshmamma*[2], one of the important reasons given for holding the adoption invalid, on construing the will, was that the will provided for the devolution of the properties in the contingency of no adoption by the widow, showing thereby that the testator had no paramount intention of having an adopted son in any event; whereas, here the will does not provide for the contingency of no adoption by the widow except by asking the executors to adopt in case the widow did not adopt

It has been held in In re *Smith Eastick* v *Smith*[3], that when a testator appointed his wife, Mary Ann Smith, his brother, Charles Smith, and his friend, Robert Bell, executors and trustees for selling his estate, it must be presumed that the power was given to them *ex officio*, as an incident to their office, inspite of there having been ample indications of personal confidence in them, and that the power given to the trustees passed to the office of the holder or holders thereof for the time being. Here, therefore, even if the five trustees appointed under paragraph 14 of the will are held to have a power to approve of the adoption, that power must be held to be given to the trustees *officially*, and to have devolved on the surviving trustee, P W 10, whose approval will be quite sufficient. We agree with the lower court in holding that no trustees had been really co-opted in 1934, as pretended, and that the evidence regarding such co-option is worthless and was rightly disbelieved, being unfit to be acted upon, these trustees having

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1 (1930) 59 M L J 615, L R. 57 I A 296, I.L R. 10 Pat 187 (P C).

2 (1931) M W N 473

3 (1904) Ch D 139

not joined in Ex. P 16, issued shortly after their appointment, and having done nothing after their supposed appointment, and even the resolution regarding their appointment, being highly suspicious

Mr. Alladi Krishnaswami Aiyar's argument that all the five trustees appointed in paragraph 14 should give a *joint consent* is unsustainable in this case, because the so called "power" has been given to the trustees *officially*, and not to each personally, and, so, may be exercised by the holder for the time being, as held in In re *Smith Eastick* v *Smith*[1] and in paragraph 957 of Halsbury's Laws of England, Volume 25 and also by Farwell It has been expressly held by the Privy Council in *Bal Gangadhar Tilak* v *Srinivas Pandit*[2], that where a Hindu testator, by his will, appointed five trustees for his property and gave power to his widow to adopt a son with their consent and advice and one of the trustees declined to act, the consent of the declining trustee was not necessary and that the adoption made with the consent of the other four trustees was valid Their Lordships did not decide the question as to what would have happened if only the majority of the trustees who functioned had agreed to the adoption Possibly, that decision would have depended on the reasonableness of the refusal An unreasonable refusal, motivated by corrupt or improper motives, might have been ignored and the testator's paramount intention to adopt carried out, and the adoption upheld, if it was of suitable boy, as in this case Though the plaintiff had urged at first that the boy adopted in this case, namely, defendant 2, was unfit in general and as not belonging to the testator's family group of agnates, this objection was not proved by any evidence and was not even pressed before us. The second defendant is obviously a fit and suitable boy from the same community, eligible for adoption, as spoken to by D Ws 1 to 5 and 7, and, as is clear from the approval of P W 10, the sole surviving trustee. That he was not the testator's agnate or relative is no ground for disqualification, even if true

In *Rattanlal* v *Baijnath*[3], the Privy Council has held that where a Hindu testator appointed four executors and provided, by a clause in his will, that the said executors should be competent to select a boy of good family in the neighbourhood and have him adopted by his wife on his behalf and one of the executors after consultation with the others selected a boy to be adopted, and the widow adopted him, the adoption was valid, even though the other three executors had not asked the widow to adopt that boy, or even expressed to her their approval of the adoption. In that case, the widow was not given the power to adopt a boy, as here, and the executors were asked to select the boy It follows that in this case the adoption would have been easily held by their Lordships to be valid

In *Surendra Nandan* alias *Gyanendra Nandan Das* v *Sailaja Kant Das Mahapatra*[4], it was held that where a Hindu appointed one *K*, as manager of his property under his will, and added that his widow "will adopt a son with the good advice and opinion of the manager," and the widow wanted to adopt a boy and intimated her intention to the manager and requested him to come and see the ceremony performed, and he declined to receive the letter, and the widow eventually adopted the boy without his consent, the adoption was not invalid for lack of such consent, as such consent was *not a condition precedent* to the validity of the adoption But, of course, it is unnecessary to rely on that, as we are satisfied that P. W. 10 did approve of the adoption and did attend the function with his wife, as sworn to by D. Ws. 1 to 5 and 7 In the end, therefore, we have no hesitation in agreeing with the learned District Judge that the adoption of the second defendant by the first defendant was valid and binding on the plaintiff and other reversioners.

The last contention was that the learned District Judge erred in awarding compensatory costs to the first defendant by raking up his past record of litigation, and relying on it for that purpose, though no compensatory costs could

1 (1904) Ch D 139
2 (1915) 29 M L J 34 L R 42 I A 135 I L.R 39 Bom 441 (P C).
3 (1937) I L R 19 Lah 1 (P C)
4 (1891) I L R. 18 Cal 385

have been awarded in the circumstances of this suit, which involved arguable and complicated questions of fact and law and could not be held to be frivolous and vexatious We agree The very fact that this suit had to be argued strenuously on both sides, in the lower Court and here, and that the judgments have had to be elaborate after weighing the contentions on both sides, will show that the suit was not frivolous and vexatious, and that this was not a case fit for awarding *compensatory costs* The past activities of the plaintiff in filing suits, and his propensity to file suits for getting properties, should not, in our opinion, have been considered for this purpose any more than the bad character of an accused can be considered for convicting him when there is no other evidence So, we set aside the order regarding compensatory costs

In the end, therefore, we modify the judgment and decree of the lower Court by deleting the award for compensatory costs to defendant 1 and confirm them in all other respects We dismiss this appeal, except to the extent indicated above, with full costs (one set) of the contesting respondents, defendants 1 and 2.

K.S — *Judgment and decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE HORWILL AND MR JUSTICE BALAKRISHNA AYYAR.

S Rangaraju Naidu . *Appellant**

v

D. J Keymer and Co, Ltd. . *Respondent.*

Original Side Rules (Madras High Court), Order 7, rule 6—Summary suit—Question whether unconditional leave to defend should be granted or not—Materials that can be considered

It cannot be said that one should decide the question as to whether leave to defend unconditionally should be granted or not, upon a consideration of the pleadings only The Court can take into consideration all the circumstances of the case as disclosed in the plaint and in the affidavits and other material that is available in coming to the conclusion whether the defence set up is a sham or plausible one

On appeal against the judgment and order of Yahya Ali, J, dated 7th March, 1949, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No 3107 of 1948 in C S No 114 of 1948.

N S Raghavan for Appellant

B V Ramanarasu and *M C Nayak* for Respondent.

The Judgment of the Court was delivered by

Horwill, J—This is an appeal against the order of Yahya Ali, J, imposing a condition before permitting the appellant to defend the suit brought against him by the respondents

The principal contention of the learned advocate for the appellant is that it was not open to the learned Judge to go into the merits of the defence and to judge the material placed before him to arrive at a conclusion whether or not there was any truth in the case put forward by the defendant According to this argument the learned Judge should confine himself to the pleadings If, in the written statement, a case is put forward which, if proved, would be a successful answer to the plaint claim, then leave should be granted unconditionally In support of the argument the learned advocate for the appellant relies on the decision in the House of Lords in *Jacobs* v *Booths Distillery Co*[1], a decision of Beasley, C J, and King, J. in *Sundaram Chetty* v *Valliammal*[2], and a recent decision of Satyanarayana Rao and Viswanatha Sastri, JJ, in *Kesavan* v *The South Indian Bank*[3].

In the House of Lords case two judgments were delivered, one by the Lord Chancellor (Lord Halsbury) and the other by Lord James of Hereford We do

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*O S.A No. 52 of 1949 31st August, 1949.

1. 85 L T. 262
2. (1934) I L R. 58 Mad. 116.
3. (1949) 2 M L J 70

not find anything in the judgment of the Lord Chancellor which affords any support for this argument, though there are remarks in the very short judgment of Lord James of Hereford which afford a basis for such an argument This House of Lords case has, however, come up for consideration in a number of cases in this Court The two cases of this Court relied on by the learned advocate for the appellant discuss the House of Lords case in some detail *Sundaram Chettiar* v. *Valliammal*[1], certainly affords support for the argument that it is not permissible for the Court to consider the truth or otherwise of the defence put forward In *Ebrahim Sait* v *South India Industrials, Ltd* [2], the learned Judges had to consider *Sundaram Chettiar* v *Valliammal*[1] and Madhavan Nair, Officiating Chief Justice said of that case

> " It appears to us that in stating the rule the learned Judges, if we may say so respectfully, have not sufficiently emphasised the qualification that, in order to bring the defendant within the rule which entitles him to ask for leave to defend without any condition, the defence should be a *bona fide* one and not a mere attempt to prolong or delay the case . "

The learned Judges later went on to say .

> " It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defences raised show that there is a fair issue to be tried by a competent tribunal before leave to defend is given unconditionally "

This was very much the view expressed in *Periya Miyan Marakayar* v *Subramania Iyer*[3], where the learned Chief Justice said

> " It is not enough for instance, to say, ' I have got a good defence ' but the defendant must say what the defence is, and, as a rule, bring something before the Court to show that it is a *bona fide* defence and not a mere attempt to gain time by getting leave to defend "

This remark was dissented from by Beasley, C J , in *Sundaram Chettiar* v *Valliammal*[1] but, as pointed out in *Ebrahim Sait* v *South India Industrials, Ltd* [2], the learned Chief Justice and King, J , in considering the case before them, did not ignore the merits of the case , for Madhavan Nair, Offg C J., after the first of the two passages above cited, said

> " It may be said that this aspect (whether the defence was a *bona fide* one or not) cannot be said to have been altogether overlooked (in *Sundaram Chettiar* v *Valliammal*[1], because reliance has been placed by him on the decision of this Court in *Periya Miyan Marakayar* v *Subramania Iyer*,[3] "

The latest case in which this question has been dealt with is *Kesavan* v. *South Indian Bank*[4], where the general tenor of the argument of Satyanarayana Rao, J , does afford some support for the argument of the learned advocate for the appellant ; but even there the learned Judge said at the bottom of page 71

> " In coming to a conclusion whether such a test (whether the defence is a sham or plausible one) is satisfied or not the Court should have taken into consideration all the circumstances of the case as disclosed in the plaint *and in the affidavits and other material that is available,* as was laid down by Bowen, L J , in *Bailberg* v *Abrams,* 77"[5]

The learned Judges also refer to *Periya Miyan Marakayar* v *Subramania Aiyar*[3], and did not express dissent from the remarks of Schwabe, C J , as to the criterion to be adopted in cases of this kind It does not appear, therefore, from the decisions above cited that this High Court has gone so far as to say that one should decide the question as to whether leave to defend unconditionally should be granted or not, upon a consideration of the pleadings only If that were indeed the case, then if the framing of the written statement were in the hands of a competent advocate, there never need be a case in which unconditional leave to defend should not be granted.

If we are to consider the case for the defence put forward on the merits by Mr. N. S. Raghavan, there is no doubt something to be said on both sides on the

1 (1934) I L R 58 Mad 116
2 I.L R. (1939) Mad 36.
3. (1923) 46 M.L J 255
4 (1949) 2 M L J 70
5. (1884) 77 L.T J 255 (C A)

question whether the defence put forward by the defendant is a *bona fide* one or not, but sitting in appeal as we do, we do not find sufficient reason for disagreeing with the order of the learned trial Judge, passed in the exercise of his discretion

The appeal is dismissed with costs A further three weeks' time will be given to the appellant for fulfilling the terms of the condition laid down by the learned trial Judge. Two weeks thereafter will be allowed for the filing of the written statement.

K S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE KRISHNASWAMI NAYUDU

M Sundararajulu Naidu *Petitioner**

v

Natesa Mudaliar and others . *Respondents*

Civil Procedure Code (V of 1908), section 52—Produce of estate of deceased judgment-debtor—Liability to attachment

Where the estate of a deceased judgment-debtor in the hands of his heir is liable for the debt, it cannot be said that crops raised by the heir on a portion of the estate will not be liable to be attached in execution of the decree

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Valangiman, at Kumbakonam, dated 28th February, 1949, in E P No 8 of 1949 in S C S No. 173 of 1947

G R Jagadisa Aiyar for Petitioner

T S Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT —This revision petition arises in execution proceedings The petitioner who is the decree-holder in S. C S No 173 of 1947 filed the said suit for recovery of a sum of Rs 148-7-0 due on a promissory note dated 29th March, 1944, executed by one Ramiah Mudaliar, the undivided son of the first defendant and brother of defendants 2 to 5 and father of defendants 6 to 8, for the benefit of the joint Hindu family consisting of himself and the defendants, in his capacity as the managing member of the family The first defendant, the father, raised a plea that there was an oral partition by division in status in 1929 and that the estate in his hands was not liable The learned District Munsiff passed a decree directing the defendants to pay Rs 145-10-0 with interest and costs out of the properties and assets of Ramiah Mudaliar in their hands The petitioner filed E P No 8 of 1949 for attachment of the standing crops and by an interim order the standing crops on the lands were attached E A No 17 of 1949 was an application filed for the appointment of a receiver to take possession of the standing crops and sell the same and deposit the realisations into Court On this application an order was made appointing a receiver who took possession of the crops, sold the proceeds and deposited the amount realised in Court The first defendant filed a claim petition in E. A No 36 of 1949 for raising the attachment and by the time the application came up for hearing most of the crops on the land had been harvested and the sale proceeds were deposited in Court An order was made on 31st January, 1949, that as more than the decree amount had been deposited into Court, the attachment was raised, apparently the attachment relating to the crops other than those harvested already by the receiver In the main execution petition E P No 8 of 1948, the first defendant raised an objection that the crops were raised by him after the decree was passed in 1947 and as such they do not belong to the estate of the deceased Ramiah Mudaliar and hence not liable to be attached. He also raised a further contention that even the lands on which the crops were raised do not form part of the estate of the deceased In support of these objections, the first defendant

* C R P. No. 417 of 1949. 27th July, 1949.

filed an affidavit wherein he again referred to the oral partition by division in status in 1929 which was denied by the petitioner decree-holder in his counter-affidavit. The learned District Munsiff did not however give a definite finding as to whether the lands on which the crops were raised formed part of the estate of the deceased but held that he was of the opinion that the attachment of the crops was illegal because the crops, under no circumstances could be said to belong to the estate of the deceased, as the decree was passed in 1947 and the crops were admittedly raised after that date Though a clear finding has not been given whether the lands formed part of the estate of the deceased or not, it is clear that the District Munsiff proceeded on the assumption that the lands were part of the estate of the deceased, but that, in any event, the crops having been raised by the first defendant subsequent to the decree in 1947 out of his own efforts and exertions himself meeting the expenses of cultivation, they could not be said to form part of the assets of the deceased and therefore the crops were not liable to be attached in execution of the decree

The learned counsel for petitioner relies on the Full Bench case in *Kadirvelusami Nayagar* v *Eastern Development Corporation*[1], where it is held that on the death of a debtor, the income accruing to his heir from landed property of which the debtor died possessed, is assets of the debtor in the hands of the heir, liable to satisfy his debts within the meaning of section 52, Civil Procedure Code This ruling of the Full Bench was followed in *Manzur Husain* v (*Firm*) *Ram Ratan*[2], where the learned Judge held that where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree then even the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decree Here it is contended that the standing crops having been raised by the first defendant, it could not be said to represent the income as such of the estate. It may be that the first defendant may be entitled to the cultivation expenses and to any expenses which he might have incurred in raising the crops But I am unable to agree with the learned District Munsiff that under no circumstance the crops could be said to form part of the estate of the deceased. I am of opinion that the learned District Munsiff is in error in holding that the crops are not liable to be attached I therefore allow the civil revision petition with costs.

K S ——— *Petition allowed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR P V. RAJAMANNAR, *Chief Justice* AND MR JUSTICE RAGHAVA RAO

Miss Revathi by next friend and guardian S Parthasarathy *Petitioner**

v

M. Venkataraman and another .. *Respondents*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), sections 10 and 12 (4)—Application for eviction dismissed for default—Not a bar to a second application for eviction—Desirability of making rules similar to Order 9, rules 8, 9 and 13, Civil Procedure Code, under the Act pointed out

The dismissal for default of an application by a landlord before the Rent Controller does not bar a second application for eviction The words "finally decided" in section 10 of the Madras Buildings (Lease and Rent Control) Act clearly imply that the prior application should have been decided on the merits Without an adjudication on the merits an issue cannot be said to have been finally decided, so as to bar a second application for the same relief In the absence of a provision similar to the provision of Order 9, rule 9, Civil Procedure Code, it cannot be said that there is a general and universal rule of procedure, according to which once a suit or a petition is dismissed for default of appearance of the plaintiff or the petitioner, a subsequent suit or petition shall not be entertained claiming the same relief and based on the same cause of action

Shailabala Dasee v *Gobardhandas Ladsaria*, (1934) I L R 62 Cal 15, relied on

[Desirability of making rules corresponding to Order 9, rules 8, 9 and 13 of the Civil Procedure Code under Madras Act, XV of 1946, pointed out]

1 (1923) 46 M L J 261 I L R 47 Mad 411 (F B)
2 A I R 1936 Lah. 236.

* C. M. P. No. 8229 of 1948. 18th February, 1949.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari*, call for the records in H R A. No 264 of 1948 against L Dis. No 4034/H.R C /47 on the file of the Chief Judge, Court of Small Causes at Madras and quash the order dated 24th August, 1948, in H R A No 264 of 1948, passed by the Chief Judge, Court of Small Causes at Madras

V K Thiruvenkatachari, N V B Shankara Rao and *G Vasantha Pai* for Petitioner.

P Somasundaram and *N Suryanarayana* for 1st Respondent

The Order of the Court was pronounced by

The Chief Justice—This is an application by the owner of premises bearing municipal door No 91, Mowbrays Road, Alwarpet, for the issue of a writ of *certiorari* to quash the order of the Chief Judge of the Court of Small Causes in H R A. No. 264 of 1948, dated 24th August, 1948 That appeal arose out of an application filed by the petitioner before the Rent Controller, Madras, for eviction of the first respondent from the premises on the ground that he had committed default in the payment of the rent for January, 1947. One of the main pleas of the respondent was that the application was not maintainable because of the dismissal of a prior application made by the petitioner to the Rent Controller on 5th June, 1947. On that date, neither the petitioner nor her Advocate was present when the application was called, and therefore the petition was dismissed for default. The respondent also raised other pleas on the merits The Rent Controller by his order dated 29th January, 1948, passed an order for eviction of the respondent. He found that the respondent committed default in payment of the rent for January, 1947. He overruled the objection as to the maintainability of the application, because the prior application had not been judicially decided on the merits. There was an appeal by the respondent to the Court of Small Causes at Madras. The learned Chief Judge agreed with the Rent Controller on the merits that the respondent had committed default in paying the rent for January He, however, considered that the objection of the respondent to the maintainability of the application was well founded Relying mainly upon the provisions of sub-section (4) of section 12 and section 10 of the Act, he held that the present application was barred by reason of the dismissal of the prior application

Section 10 of the Act runs thus

" The Controller shall summarily reject any application under sub-section (2) or under sub-section (3) of section 7 which raises substantially the same issues as have been finally decided in a former proceeding under this Act or under the corresponding provisions of the Madras House Rent Control Order, 1945, or the Madras Non-Residential Rent Control Order, 1945, between the same parties or between parties under whom they or any of them claim "

Sub-section (4) of section 12 is as follows

" The decision of the appellate authority and subject only to such decision, an order of the Controller shall be final and shall not be liable to be called in question in any Court of law whether in a suit or other proceeding or by way of appeal or revision."

Mr V. K Thiruvenkatachari, the learned counsel for the petitioner, contended that neither provision has the effect of operating as a bar to the present application The words " finally decided " in section 10, clearly imply that the prior application should have been decided on the merits Without an adjudication on the merits, an issue cannot be said to have been finally decided He relied upon the catena of decisions relating to the corresponding provision in the Civil Procedure Code, where it has been held that a decree of dismissal passed in a suit on default of appearance of the plaintiff does not operate as *res judicata* under section 11, Civil Procedure Code, or any other general principle We agree with this contention The words " finally decided " are words found in section 11 of the Civil Procedure Code, and we do not see why the judicial interpretation of the words in the Civil Procedure Code should not apply in construing the same words in the Rent Control Act.

Under the provisions of the Civil Procedure Code, when a suit is dismissed for the default of appearance of the plaintiff, a fresh suit on the same cause of action

is barred. That is because of the specific provision of Order 9, rule 9 This provision must be construed along with the provision made in Order 9 for setting aside dismissals for default of appearance In the absence of a provision similar to the provision of Order 9, rule 9, Civil Procedure Code, there is no authority to compel us to hold that there is a general and universal rule of procedure, according to which once a suit or a petition is dismissed for default of appearance of the plaintiff or the petitioner, a subsequent suit or petition shall not be entertained claiming the same relief and based on the same cause of action. On the other hand, the decision of the Calcutta High Court, in *Shailabala Dasee* v *Gobardhandas Ladsaria*[1] lends support to the contrary view In that case, a suit filed on the Original Side of that Court was dismissed for non-prosecution under the provisions of rule 36 of Chapter X of the Rules on the Original Side It was held that in the absence of any rule forbidding the bringing of a fresh suit, the plaintiff whose suit had been so dismissed was at liberty to bring a fresh suit Mr P Somasundaram, learned counsel for the respondent, urged upon us that this decision was based upon the practice obtaining on the Original Side of the Calcutta High Court, which again was based on the practice of the Supreme Court in England It is true, no doubt, that the learned Judges, in discussing the question and in referring to the authorities in England, advert to the practice obtaining in England and on the Original Side of that High Court But the principle of that decision is not to be found in the rule of practice, but in the general rule that in the absence of any provision, either in the general adjectival law or in the rules of a Court preventing a plaintiff from proceeding with a suit in the circumstances above-mentioned, the later suit could not be held to be not maintainable Just as Mr Somasundaram pressed before us it appears that it was pressed before the learned Judges there, that the result of this decision would be that a plaintiff, if he so chooses, might use the procedure of the Court as an instrument of oppression and that he might indulge in a succession of suits and thus harass his opponent But the learned Judges, while sympathising with the hardship of such a contingency, nevertheless came to the conclusion that the subsequent suit was maintainable in law. As the learned Judges there point out, we hasten also to point out that it is highly desirable that a rule corresponding to Order 9, rule 9 and possibly provisions also corresponding to Order 9, rules 8 and 13 should be made under Madras Act XV of 1946, or as we pointed out on another occasion, some of the salutary rules of procedure contained in the Code of Civil Procedure might be made applicable to the procedure under Madras Act XV of 1946

This case, however, must be decided on the present state of the law, and in the absence of a provision corresponding to Order 9, rule 9 of the Code of Civil Procedure, we have no alternative but to hold that the present application for eviction was sustainable in spite of the dismissal for default of the prior application.

Mr Somasundaram relied considerably on the provision of sub-section (4) of section 12 In our opinion, that provision does not help the respondent for two reasons For one thing, the order of the Controller of which a finality is laid down in that provision must be an order on the merits Secondly, that provision only declares that the order of the Controller, and if there is an appeal, the decision of the appellate authority, shall be final in the sense that it shall not be liable to be called in question in a suit or other proceeding or challenged by way of appeal or revision The petitioner strictly is not doing any of the things prohibited by that provision He is not actually calling in question the prior order of the Rent Controller He has filed another substantive application That application must be heard and decided, unless it is barred under the provisions of section 10 of the Act and therefore has to be summarily rejected As we hold that section 10 does not apply to the present case, it follows that the application was maintainable.

Another contention raised by Mr. Somasundaram, a contention which did not find favour with the appellate authority, was based upon sub-section (6) of section 7 which is also as follows :—

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1. (1934) I L R 62 Cal. 15.

"Where an application under sub-section (2) or sub-section (3) for evicting a tenant has been rejected by the Controller, the tenancy shall subject to the provisions of this Act be deemed to continue on the same terms and conditions as before and shall not be terminable by the landlord except on one or more of the grounds mentioned in sub-section (2) or sub-section (3)"

The short answer to this contention is that the provisions of this sub-section apply only to a case where an application has been "rejected" by the Controller. The circumstances under which an application has to be rejected are found set out in sub-section (2) and sub-section (3) Under sub-section (2) which is material for the purpose of this petition, if the Controller is not satisfied that any of the grounds alleged by the landlord existed, then he shall make an order "rejecting" the application There is a similar provision in sub-section (3) In this case, it cannot be said that the prior application was rejected because the Controller was not satisfied as to the existence of one or other grounds set out in sub-section (2) of section 7 The Controller never went into the merits at all We cannot, therefore, accept this contention of Mr Somasundaram

Nor is there any substance in the argument that there has been an acquiescence in the order of the appellate authority by reason of the delay in filing the application for a writ of *certiorari* The appellate order was made on 24th August, 1948, but it appears that it was only on 1st December that a certified copy of the order was obtained, and the application was made in December, 1948 It cannot be said that there has been any delay, nor is there any proof of conduct which would justify this Court to hold that the petitioner has lost her rights by laches or acquiescence

Finally, Mr Somasundaram pointed out that he raised specifically in his counter-affidavit a plea of estoppel in paragraph 5 and also adduced evidence on that plea, but the Rent Controller failed to give a finding on it He made it a ground of complaint in his memorandum of appeal to the Court of Small Causes but that Court also did not deal with that point It is true that the appellate order does not refer to this plea, though it was made a specific ground of appeal.

For the reasons set out above, the order of the learned Judge of the Court of Small Causes is vitiated by a clear error apparent on the face of the record and has to be quashed As already mentioned, one of the points which arose for decision in the appeal has not been heard and decided by the appellate authority and the appeal may have to be heard afresh on that point

As the petitioner has substantially succeeded in the application, the first respondent will pay her the costs of this application

K S ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR P V. RAJAMANNAR, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI NAYUDU

P Rangathaman ... *Petitioner* *

v

Sankarlal Davey and another ... *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *sections* 7 (2) (*ii*) (*a*) *and* 10—*Sub-letting—Written consent—Necessity—Date of such consent—"Finally decided"—Meaning—Application withdrawn—Subsequent application if barred*

If there is a transfer or sub-letting after the commencement of the Madras Buildings (Lease and Rent Control) Act, the tenant can be saved only by a written consent of the landlord from the consequences, namely, eviction

Though it was held not necessary to decide in the case whether the written consent of the landlord need be necessarily of a date after the commencement of the Act, it was remarked that *prima facie* a written consent given before the commencement of the Act, if it was subsisting at the time of any sub-letting after the Act might be sufficient to plead successfully to the landlord's application for eviction on the ground of such sub-letting.

* C M P No 3780 of 1949 16th August, 1949.

The words " finally decided " in section 10 of the Act clearly implies that the prior application should have been decided on the merits Where the application for eviction was withdrawn with leave to file a fresh application on the view of the then state of law that notice terminating tenancy was necessary, it cannot be said that the petition is " finally disposed " so as to bar a fresh application for eviction

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H R A No. 1926 of 1948, Special Judge, Court of Small Causes, Madras, in L Dis. No 5004 of 1948, House Rent Controller, Madras and quash the order made therein

V. S. Rangaswami Aiyangar for Petitioner.

M S Venkatarama Aiyar and *T S Purushotham* for Respondents.

The Order of the Court was made by

The Chief Justice—Both the Rent Controller and the Appellate Tribunal, namely, the Court of Small Causes, have ordered the eviction of the petitioner on the ground that he had after the commencement of the Madras Act XV of 1946 sub-let the premises to one Krishnan Nair without the written consent of the landlord, the respondent before us The petitioner, the tenant, seeks to have the order of the Appellate Tribunal quashed by a writ of *certiorari* on two grounds.

The first ground is that the application for eviction on which the order against him was made was itself liable to be rejected *in limine* under section 10 of the Act because a prior application made by the landlord was dismissed on 3rd November, 1948, in the following circumstances The landlord filed an application for eviction on substantially the same grounds as those alleged in the later application , but apparently having regard to the judgment of a learned Judge of this Court which held that due notice terminating the tenancy was necessary before an application for eviction could be maintained even under the Act, he applied to withdraw this petition with liberty to file a fresh petition after due notice terminating the tenancy. The petition was allowed to be withdrawn and was dismissed. Under section 10 of the Act the Controller shall summarily reject any application for eviction which raises substantially the same issues as have been finally decided in a former proceeding under the Act or under the corresponding provisions of the Madras House Rent Control Order, 1945, or the Madras Non-Residential Building Rent Control Order, 1945, between the same parties or between parties under whom they or any of them claim. It is contended by the learned counsel for the petitioner, V. S Rangaswami Aiyangar, that the issues now raised in the present application must be deemed to have been finally decided by the order of dismissal on the prior application In support of this contention, he cited to us three decisions of this Court in *Rama Reddi* v *Motilal Daga*[1], *Chidambaram Nadar* v *Rama Nadar*[2] and *Alagappa Chettiar* v. *Ramakrishna Aiyar*[3]. All these decisions are concerned with the construction of the words " final order " in Article 182 (5) of Schedule I to the Indian Limitation Act. They have absolutely no bearing on the determination of the question in the present case, namely, whether issues arising in an application for eviction can be deemed to have been *finally decided* by an order dismissing the application because the petitioner withdraws it It was held by a Bench of this Court in C.M P. No 8229 of 1948, *Miss Revathi by guardian S. Parthasarathy* v *M Venkataraman*[4], that when an application for eviction is dismissed for default of appearance or for non-prosecution, a subsequent application is not liable to be rejected under section 10 of the Act It was therein observed that the words " finally decided " in section 10 clearly implied that the prior application should have been decided on the merits It is obvious in this case that there was no decision, still less a final decision on any of the issues which arose for determination in the prior application and which also arise in this application. This contention must therefore be overruled.

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1. I L.R (1938) Mad 326
2. (1937) 1 M.L.J 453 I L.R. 1937 Mad 616 (F B).
3. (1941) 2 M L J 493
4. Since reported in (1949) 2 M.L.J. 594.

It was next contended that though there was a concurrent finding that Krishnan Nair was let into the premises by the petitioner, after the commencement of the Act, nevertheless the petitioner is not liable to be evicted on that ground because there was an agreement between the petitioner and the landlord prior to the commencement of the Act which entitled the petitioner to sub-let the premises at any time to any one As rightly pointed out by the learned Judge of the Court of Small Causes, this plea was not specifically pleaded But apart from this technical objection we find that there is a more substantial objection to this argument We are now only concerned with the language of section 7 (2) (ii) (*a*) Under that provision the landlord is entitled to obtain an order for eviction of his tenant if the tenant has after the commencement of the Act without the written consent of the landlord transferred his right under the lease or sub-let the entire or any portion of the leased building If, therefore, there is a transfer or sub-letting after the commencement of the Act, the tenant can be saved only by a written consent of the landlord from the consequence, namely, eviction It is not necessary for us to determine in this case whether the written consent of the landlord need be necessarily of a date after the commencement of the Act *Prima facie* it appears that even the written consent, giver before the commencement of the Act if it is subsisting at the time of any sub-letting after the Act, might be sufficient to enable the tenant to plead successfully to the landlord's application for eviction But in this case as the Rent Controller points out, there is no written consent of the landlord either before or after the commencement of the Act Therefore the second contention of the petitioner also fails. In the result this application is dismissed with costs of first respondent

V.S. *Application dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE HORWILL AND MR JUSTICE BALAKRISHNA AYYAR.

Kuteer Vengayil Rayarappan Nayanar, Karnavan of Kuteer Vengayil Tarwad *Appellant* *

v.

Kuteer Vengayil Valiya Madhavi Amma and others *Respondents.*

Civil Procedure Code (*V of* 1908), *section* 104—*Appeal against order removing receiver—If lies—Order removing receiver coupled with order appointing fresh receivers—Effect on the right of appeal*

The wording of section 104, Civil Procedure Code, makes it clear that unless an appeal is specially provided for in the Code, no appeal will lie against any order Hence in the absence of any special provision in the Code for an appeal against an order removing a receiver, no appeal would lie.

Anthony Ulysess John v *Agra United Mills, Ltd*, A I R 1931 All 72, *Surendranath* v *Nagarchand,* (1946) I L R 25 Pat 779, *Ramaswamy Naidu* v. *Ayyalu Naidu,* (1923) 46 M L J 196 and C M A No 278 of 1944, followed

Sripati Datta v *Bibhuti Bhushan Datta,* (1925) I L R 53 Cal 319 and *Mano Mohan Niyogi* v *Surendrakumar Ray Chaudhury,* (1932) I L R. 60 Cal 162, not followed

An order removing a receiver would not become appealable merely because it is coupled with an order appointing fresh receivers The order should be considered as two distinct orders It would be anomalous if the removed receiver who has no right of appeal against the order of removal would be entitled to appeal merely because at the same time the Court thought it necessary to appoint other receivers to administer the estate The appointment of a successor cannot give a right to a dismissed receiver to canvass the grounds for his dismissal

Appeal against the order of the Court of the Subordinate Judge, Tellicherry, in I.A. No. 709 of 1947 in O S No 28 of 1945.

The Advocate-General (*K Rajah Aiyar*) and *A Achuthan Nambiar* for Appellant.

O. T. G Nambiar, Balakrishna Kurup, D A Krishna Variar, Ravi Varma, V. P. Gopalan Nambiar, T. V. Raman and *M K Nambiar* for Respondents.

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* A.A.O No 179 of 1949. 26th August, 1949

The Judgment of the Court was delivered by

Horwill, J—The appellant was appointed a receiver in O S No 28 of 1945. Upon a petition by some of the parties to the suit, who made certain allegation of maladministration, the appellant was removed from his receivership by the Subordinate Judge of Tellicherry and two others were appointed in his stead A preliminary point argued in the appeal is whether the appeal is maintainable

We have no doubt that the law in most High Courts, including this High Court, is that no appeal lies against an order removing a receiver The matter came up directly for decision in C M A. No 278 of 1944 before a Bench of this Court ; and it was held that in the absence of any special provision in the Code for an appeal against an order removing a receiver, no appeal would lie The learned Judges purported to follow *Ramaswami Naidu* v. *Ayyalu Naidu*[1], although the question that came up for decision in that appeal was whether any appeal lay against an order refusing to remove a receiver If an order removing a receiver were appealable then an order refusing to remove a receiver would also be appealable and *vice versa.* Even if this matter were *res integra,* we should be of opinion that no appeal lies against the order removing a receiver , for section 104, Civil Procedure Code, begins by saying " An appeal shall lie from the following orders *and . . . . from no other orders.*" This seems to us to make it clear that unless an appeal is specially provided for in the Code, no appeal will lie against any order.

The learned Advocate-General relies on *Sripati Datta* v *Bibhuti Bhushan Datta*[2] and *Abdul Kadar* v *R M P Chettiar Firm*[3], in which it was held that an order removing a receiver was appealable In both these cases the learned Judges relied on the provisions of section 16 of the General Clauses Act which runs

" Where a power to make an appointment is conferred then the authority having the power to make the appointment shall also have power to suspend or dismiss any person in exercise of that power "

We are unable to see how it can be argued from this section that an appeal would lie against an order removing a receiver This provision can be relied on to show that a Court appointing a receiver has also power to remove him ; but it would not follow that because the Court had power to remove a receiver that the order removing him was appealable It seems to us that the reasoning of the learned Judges in this case runs counter to the express provisions of section 104, Civil Procedure Code, just quoted In another Calcutta case, *Mano Mohan Niyogi* v *Surendrakumar Ray Chaudhury*[4], *Sripati Datta* v *Bibhuti Bhushan Datta*[2], was followed ; but the opinion there expressed was *obiter,* since the learned Judges went on to say that no *appeal* lay at the instance of a receiver who was not a party to the suit. These Calcutta decisions overlooked the earlier decisions of the Calcutta High Court such as *Eastern Mortgage and Agency Co., Ltd* v *Premananda Saha*[5] and *Sahabjada Faridun Shiko* v *Fakir Muhammad*[6], which were followed in *Ramaswami Naidu* v *Ayyalu Naidu*[1]. That the opinion of the Allahabad and Patna High Courts is the same as in Madras can be seen from *Anthony Ulysess John* v *Agra United Mills, Ltd.*[7] and *Surendranath* v *Nagarchand*[8] In the former case, the learned Judge who delivered the judgment of the Bench said :

" The appellants rely upon a decision of the Calcutta High Court in *Sripati Datta* v *Bibhuti Bhushan Datta*[2] This decision undoubtedly favours the contention of the appellants We regret, however, that we cannot follow it This decision proceeds upon the ground that under section 16 of the General Clauses Act (Act 10 of 1897) the power to appoint includes the power to remove or dismiss and that therefore the right to appeal from an order of appointment must be held to include the right of appeal from an order of dismissal We cannot follow this reasoning and we do not see what the principle underlying section 16, General Clauses Act, has to do with the right of appeal Where a right of appeal has to be expressly conferred by statute it cannot be presumed to exist by recourse to a rule of analogy or a rule of logic "

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1. (1923) 46 M L J 196
2. (1925) I L R 53 Cal 319
3. A I R 1933 Rang. 387
4. (1932) I.L.R. 60 Cal. 162.
5. (1914) 20 C W N 789
6. (1914) 24 I.C 862.
7. A I R 1931 All. 72
8. (1946) I.L.R 25 Pat. 779.

With these remarks we respectfully agree. *Anthony Ulysses John* v *Agra United Mills, Ltd* [1], was approved of and followed in *Surendranath* v *Nagarchand*[2]

The only question that has given us some concern is whether the order complained of is appealable on the ground that the order of removal of the appellant is coupled with an order appointing two fresh receivers It is argued that since an order appointing the two receivers would be appealable, then that same order, which incidentally removed the appellant from receivership, would be appealable on that ground also In this particular case we find from a reference to the Memorandum of Appeal that it is not a ground of appeal that two other persons were appointed receivers The whole tenor of the grounds of appeal is that the appellant was wrongly removed We do not wish to base our decision on this narrow ground, as we are of opinion that the order of the learned Judge should be considered as two distinct orders one removing the appellant and the other appointing two new receivers It would be indeed anomalous if the appellant, who has no right of appeal against the order of dismissal, would be entitled to appeal merely because at the same time the Court thought it necessary to appoint other receivers to administer the estate Our attention has not been drawn to any case in which it has been held that the appointment of a successor gave a right to a dismissed receiver to canvass the grounds for his dismissal

This appeal being not maintainable, it is dismissed with costs

V S ——— *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HORWILL AND MR. JUSTICE BALAKRISHNA AYYAR

Kutoor Vengayil Rayarappen Nayanar of Kullon Vengayil Tarwad *Petitioner* *

v

Kutoor Vengayil Valiyu Madhavi Amma and others .. *Respondents*

Civil Procedure Code (V of 1908), *section* 109 *(a) and (c)—" Final order "—Meaning of—Leave to appeal against order dismissing as not maintainable an appeal against order removing a receiver—If can be granted*

A final order as contemplated by section 109 (*a*) of the Code of Civil Procedure must be one which affects finally the rights of parties An order removing or appointing a receiver does not affect at all the rights of the parties, it is merely an order making provision for the due preservation of the estate during the pendency of the suit As a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review by the Federal Court The question whether one person or the other should be appointed as receiver cannot ordinarily be of any great practical importance Accordingly an order dismissing as not maintainable an appeal against an order removing a receiver is not a fit one for the granting of a certificate for appeal to the Federal Court

Petition under sections 109 and 110 and Order 45, rule 3, Civil Procedure Code and section 3, Federal Court's Enlargement of Jurisdiction Act, 1947, for the grant of a certificate to enable the petitioner to appeal to the Federal Court of India against the judgment and order of the High Court, Madras, dated 26th August, 1949, in A A O. No 179 of 1949, preferred against the order of the Court of the Subordinate Judge, Tellicherry, dated 25th March, 1949, in I A No 709 of 1947 in O S No 28 of 1945.

The Advocate-General (*K Rajah Aiyar*) and *A Achutan Nambiar* for Petitioner

O. T G Nambiar, D A Krishna Variar and *M. K. Nambiar* for Respondents.

The Order of the Court was delivered by

Horwill, J—In this application for leave to appeal to the Federal Court against the order of this Court[3] dismissing as not maintainable an appeal against the order of the Subordinate Judge of Tellicherry removing the petitioner from receivership and appointing two others, it has been argued that the petitioner

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1 A I R 1931 All 72
2 (1946) I L R 25 Pat 779
3 (1949) 2 M L J 599
* C. M. P No. 6017 of 1949 30th August, 1949.

has the right to appeal either under section 109 (*a*) or section 109 (*c*), Civil Procedure Code

As for the first contention that the order passed by us was a final order, it is sufficient to state that a final order contemplated under section 109 (*a*) must be one which affects finally the rights of parties An order removing or appointing a receiver does not affect at all the rights of the parties ; it is merely an order making provision for the due preservation of the estate during the pendency of the suit. This is such a w ll-recognised principle of law that authority for this proposition should hardly be necessary We therefore content ourselves with referring to *Rajnithi* v *Nrisingha*[1], in which after a full discussion of the various decisions it was held that an order appointing or removing a receiver was not a final order

If the order is not a final order then an appeal will lie to the Federal Court only if in the words of section 109 (*c*), Civil Procedure Code, it can be "certified to be a fit one for appeal" This sub-section is no doubt very widely expressed , and it might not be easy in the absence of authority to say whether a case was a fit one for hearing by the Federal Court or not ; but it is clear that leave to appeal to the Federal Court should not be granted unless the question raised is a matter of considerable importance. The propriety of granting a certificate under this sub-section was considered by their Lordships of the Privy Council in *Benoy Krishna Mukherjee* v *Satish Chandra Giri*[2], where they remarked,

> "They think it right to add that, as a general rule and in the absence of special circumstances or some unusual occasion for its exercise, the power of making interlocutory orders is one which is not a suitable subject for review by the Judicial Committee"

It is no doubt true that the question decided by us is one of jurisdiction , but the matter is not here of any great importance, nor can the question whether one person or another should be appointed as receiver ordinarily be of any great practical importance. We do not therefore consider that this is a fit case for the granting of a certificate for appeal to the Federal Court We are fortified in our conclusion by the remarks of the learned Judges in *Mahomed Musaji* v. *Ahmed Musaji*[3], where they said, in considering a similar application,

> "We are however not concerned with the propriety or otherwise of the order against which leave is sought , it is sufficient to say that no special question arises, such as would justify an order under clause (*c*) of section 109 of the Code or under section 40 of the Letters Patent"

The petition is dismissed with costs

K S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR JUSTICE MACK

T Ganapathia Pillai .. *Petitioner* *

v

N Somasundaram Pillai and others . *Respondents*

Civil Procedure Code (V of 1908), Order 14, rule 2—Exercise of discretion under—Interference in revision

The discretion that a trial Court is called upon to exercise under Order 14, rule 2, Civil Procedure Code, is a nice one to be determined by the facts of each case, in other words, whether the preliminary issue of law raised would be sufficient and is so clear cut that it will decide the suit finally once and for all

Where a Court declined to decide first an issue of jurisdiction as a preliminary issue which was one of mixed law and fact namely whether the suit filed under section 92, Civil Procedure Code, with the consent of the Advocate-General did not also come within the scope of section 73 of the Madras Hindu Religious Endowments Act requiring sanction of the Board

Held That in the circumstances, the lower Court had acted with no material irregularity in the exercise of its discretion under Order 14, rule 2, Civil Procedure Code

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1 (1933) I.L.R 12 Pat 723
2 (1927) 54 M L J 423 L R 55 I.A 131 : I L R 55 Cal 720 (P C).
3 (1911) 13 C L.J 507.
* C.R.P. No 275 of 1949 19th August, 1949.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Subordinate Judge's Court, Mayavaram, dated 10th February, 1949, in I A. No 93 of 1949 in O S No 68 of 1948.

G R Jagadisa Aiyar for Petitioner

M S Venkatarama Aiyar and *B Govinda Pillai* for Respondents.

The Court delivered the following

JUDGMENT —Petitioner is a defendant who seeks to revise an order by the learned Subordinate Judge of Mayavaram declining to decide first an issue of jurisdiction raised by the petitioner, as a preliminary issue and directing the suit for reasons he gave to be disposed of once and for all on all issues The issue of jurisdiction appears to be one of mixed law and fact, namely, whether the suit filed under section 92, Civil Procedure Code, with the consent of the Advocate-General does not also come within the scope of section 73 of the Hindu Religious Endowments Act requiring sanction of the Hindu Religious Endowment Board. There are said to be both secular and religious trusts mingled in a general trust being administered by the defendant who has been acting as a trustee of a long-standing family trust Under Order 14, rule 2, Civil Procedure Code, a Court has ample discretion to try an issue of law if it is of opinion that the case or any part thereof may be disposed of on issues of law only and for that purpose may postpone the settlement of issues of fact till after the issues of law have been determined

Piecemeal trial of suits have been deprecated in many decisions In the prolix pleadings which characterise mofussil suits every conceivable legal position is taken as to jurisdiction and maintainability and so on They are frequently put forward without much basis only to be abandoned at the time of actual hearing Trial Judges have to be constantly on guard against falling into the trap of giving findings on preliminary issues of law which may be taken up to higher Courts in appeal or in revision with the object of protracting the litigation indefinitely at the instance of a defendant I am far from saying that the issue of jurisdiction raised in the present case is of such a nature Mr Jagadisa Iyer has drawn my attention to a Patna decision by Courtney-Terrell, C J., in *Janakidas* v *Kalu Ram*[1], in which he interfered in revision and directed an issue of law framed in the suit as to whether it was barred by the principle of *res judicata* to be tried first as a preliminary issue. He observed that to refuse to exercise revisional jurisdiction in a case of that kind might give rise to the greatest hardship and that the injured party might be put to enormous expense in having issues elaborately tried which were quite unnecessary if the suit was in fact barred. The discretion that a trial Court is called upon to exercise under Order 14, rule 2 is a nice one to be determined by the facts of each case, in other words, whether the preliminary issue of law raised would be sufficient and is so clear cut that it will decide the suit finally once and for all. Mr Venkatarama Aiyar for the respondents points out that the defendant filed a Civil Miscellaneous Appeal (C M A No 14 of 1949) in this litigation against the appointment of a receiver That appeal was dismissed. I do not desire to make any observation as regards the merits The learned Subordinate Judge has in his order referred to the assurance of the learned vakil for the plaintiffs that very little oral evidence had to be taken on all the issues which had to be decided mainly on documents which were in Court I am unable to see in what manner the learned Subordinate Judge has acted with material irregularity in the exercise of his discretion under Order 14, rule 2, Civil Procedure Code. In fact, I think, in the circumstances he has properly exercised that discretion

The petition is dismissed with costs

K C *Petition dismissed*

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1. A I R 1936 Pat. 250

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE HORWILL, AND MR JUSTICE BALAKRISHNA AYYAR.

M A Malik .. *Appellant* *

v

V S. Thiruvengadaswami Mudaliar . *Respondent*

Civil Procedure Code (V of 1908), section 51, proviso, clause (c)—Applicability—Order for payment of an amount in a misfeasance summons against a Director—Execution—Director unable to raise money to discharge the debt—Arrest can be ordered as he was "bound in a fiduciary capacity to account"

A Director of a company occupies a fiduciary position with regard to the members of the company and he his liable to account to them Where a Director is ordered to pay in misfeasance proceedings a sum of money, he can be arrested in execution proceedings though he was a pauper and was quite unable to raise the money to discharge the decree

Appeal against the order of the District Court, Tirunelveli, dated 21st March, 1947, in E P No 5 of 1946 in O P No 206 of 1932 (Application No 845 of 1933 on the file of the High Court)

R Gopalaswami Aiyangar, C A Mahomed Ibrahim and *T S Santhanam* for Appellant

D Narasaraju and *T T Srinivasan* for Respondent

The Judgment of the Court was delivered by

Horwill, J—In misfeasance proceedings taken by the liquidator during the course of a winding up of a company of which the appellant was a Director for a year or so, this Court on the Original Side directed that the appellant do pay the Official Liquidator the sum of Rs 2,991-14-0 and Rs 4,866-6-0

"being the amounts of loss occasioned in respect of the share brokerage, preliminary expenses and investments in unauthorised banks respectively . "

The respondent having taken an assignment of the decree proceeded against the appellant in execution and applied to the Court for his arrest The question arose whether under section 51, Civil Procedure Code, the respondent was liable for arrest He pleaded that he was a pauper and was quite unable to raise the money to discharge the decree The Court however found that since he was a Director and it was on account of his breach of duty that the loss had been sustained by the company, clause (*c*) of the proviso to section 51 applied, and

"that the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account"

It is not contended by the respondent that a Director is an express trustee of the property of the company ; but it has always been held that the relationship between a Director and a member of a company is that of trustee and *cestui que trust*, and Directors have been described as commercial trustees, *quasi* trustees, and the like In *Cavendish Bentinck* v *Fenn*[1], Lord Macnaghten said that the expression "misfeasance" in section 165 of the Indian Companies Act was not misfeasance in the general sense of the word but as being in the nature of a breach of trust The learned advocate for the appellant has attempted to draw a distinction between misfeasance, or active wrongdoing, and non-feasance, or mere negligence. One does not find in section 235 of the Indian Companies Act the word "non-feasance" A Director is under an obligation to assist in the management and supervision of the affairs of the company ; and if a breach of his duty to the company results in a loss to the company, he is bound to make compensation to the company in respect of the "misapplication, retainer, misfeasance, or breach of trust" A failure on the part of a person to do his duty with regard to the property of a company over which he has control by virtue of his being a Director amounts to misfeasance within the meaning of section 235 of the Indian Companies Act.

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* A.A.O. No. 193 of 1947 23rd August, 1949.

1. (1887) 12 A.C. 652 at 669.

Mr Gopalaswami Iyengar for the appellant has sought to take us through the facts of the case in an attempt to prove to us that the appellant was in no way responsible for the loss that occurred , but we cannot, as the learned District Judge pertinently pointed out, go behind the decree itself The judgment of this Court also shows that the appellant failed to do his duty

One of the earliest Indian cases that dealt with the duties of a Director towards the members of the company is *The New Fleming Spinning and Weaving Co , Ltd* v *Kessowji Naik*[1], the learned Judge said

" My conclusion is that, (*a*) although the directors are not trustees in every sense of the term, they stand in a fiduciary relation towards their shareholders with respect to the funds and the business placed in their charge , (*b*) It follows that they are liable to be sued for a breach of trust, in case they have not dealt with the property and watched over the business as carefully as a man of ordinary prudence would deal with such property and watch over such business if they were his own "

Again at page 396

" If instead of performing their duty and showing reasonable diligence, the defendants delegated all the control to the agent, and so enabled him to misapply the company's money, they must, on the authority of the rule laid down by Lord Langdale, be held liable for that misapplication "

Ramasami v *Sreeramulu Chetti*[2] also considered the relationship between a Director and the members of a company Reference is made therein to certain English cases in which it had been held that the relationship of trustee and *cestui que trust* subsists between the Directors of Joint Stock Companies and the shareholders, it being held in such cases that misfeasance by a Director was a breach of trust Even in In re *Forest of Dean Coal Mining Co*[3], relied on by the learned advocate for the appellant, we find at page 453 this passage .

" Again, directors are called trustees They are no doubt trustees of assets which have come into their hands, or which are under their control . "

We have not been referred by the learned advocate for the appellant to any case in which it was held that the relationship between a Director and the members of a company is not that of trustee and *cestui que trust.* Although, as already stated, he is not an express trustee yet he certainly occupies a fiduciary position with regard to the members of the company

It is next argued that even though a Director occupies a fiduciary position in relation to the members of a company, he is not liable to account to them It seems to us that his liability to account flows from his fiduciary position, which requires him to hold the property of the company over which he has control for the benefit of the members of the company If he holds the position of a trustee with regard to the members of the company, it means that the members of the the company can call upon him to account for the property over which he has control on their behalf This is expressed in the opening sentence of paragraph 533 of Halsbury's Laws of England, Vol V

" Directors are trustees of the property of the company in their hands or under their control and *must account* to the company for all such property "

We are therefore satisfied that the learned District Judge was right in holding that an order for arrest could issue against the appellant even if his allegation that he had no money were true

The appeal is dismissed with costs.

K S *Appeal dismissed.*

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1. (1885) I L R 9 Bom 373 at 394
2. (1896) I.L R. 19 Mad 149
3. (1878) 10 Ch D. 450.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE HORWILL AND MR JUSTICE BALAKRISHNA AYYAR

Pedapati Mangayya *Appellant**

v

Garapati Achayamma and others *Respondents*.

Transfer of Property Act (IV of 1882), section 56—Mortgagor selling items of mortgaged property to others who promise to pay off the mortgage—If a " contract to the contrary " affecting the buyer's right to have the mortgage debt satisfied out of properties not sold to him

The interest of the mortgagee remains dominant and any right given to the purchaser of certain items of the hypotheca is subject only to the superior rights of the mortgagee whose interest is not to be injured or jeopardised by any order which the Court might pass in favour of the purchaser The buyer is, in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the properties not sold to him A mere agreement by the buyer of some items of the hypotheca to pay off the mortgage debt will not amount to a ' contract to the contrary " within the meaning of section 56 of the Transfer of Property Act, to enable the mortgagor to claim that the items of hypotheca sold to the buyer must be first proceeded against by the mortgagee in executing his decree

Appeal against the order of the Court of the Subordinate Judge, Rajahmundry, dated 23rd August, 1946, in E A. No 217 of 1946 in O. P. No 4 of 1943

V Parthasarathi for Appellant.

N C V Ramanujachari for Respondents

The judgment of the Court was delivered by

Horwill, J—On 27th March, 1934, the appellant mortgaged a number of items of property to the transferor of the first respondent for Rs. 3,000 On 18th September, 1940, he executed three sale deeds in respect of certain items of the mortgaged property in favour of respondents 2 to 4, clearly intending that by these sales the whole mortgage debt should be paid off and the vendees left to enjoy the property free of mortgage Unfortunately, respondents 2 to 4 did not pay the money, although it is alleged that some years later the money was deposited in Court On an application under the Madras Agriculturists' Relief Act, the debt was scaled down in O P No 406 of 1943 to Rs 3,100-14-6 The mortgagee thereupon sought to bring the hypotheca to sale fot the mortgage debt, but the appellant, in E A No. 217 of 1946, asked that the Court in equity should sell first the items of the hypotheca that had been sold to respondents 2 to 4 The learned Subordinate Judge, in a very brief order, dismissed the application, saying that the respondents had a statutory right under section 56 of the Transfer of Property Act to have the items sold to them, sold last

The respondents 2 to 4 were *ex parte* when the order of the lower Court was made ; but in appeal to this Court they sought to adduce additional evidence which they might have put forward in the lower Court, but did not Clearly, they cannot be allowed to do that. It has been contended on their behalf that they were not served in E A No. 217 of 1946 We have perused carefully the B Diary, and it would seem that although it is true that they were not personally served ; yet they did instruct the counsel who appeared for them in the earlier proceedings to appear for them in E A No 217 of 1946 also When E A No 217 of 1946 was called, they and their pleader were however absent and so the matter was heard *ex parte*.

It is first argued that the words " contract to the contrary " in section 56 refer only to contracts between the mortgagor and the mortgagee The learned advocate in support of this argument has referred to *Ramabhadrachar* v *Srinivasa Aiyangar*[1], *Charan Singh* v. *Ganeshilal*[2] and other cases which held that the words

* A A O No 601 of 1946 12th August, 1949.

1. (1900) I L R. 24 Mad. 85
2. A I R. 1926 All 352

"contract to the contrary" in section 82 of the Transfer of Property Act related to contracts only between the mortgagor and the mortgagee It was held in *Ramabhadrachar* v *Srinivasa Aiyangar*[1], which was cited with approval in *Charan Singh* v *Ganeshilal*[2], that the law enunciated in section 82, Transfer of Property Act, was the same as the law in England, but it was nevertheless pointed out in that decision that if there was a contract between the mortgagors, that contract could be enforced, although it was not a contract contemplated in section 82 Since, however, a contract between co-mortgagors is not an agreement that runs with the land, it would not bind assignees from the mortgagors Assuming these decisions to have been rightly decided, we see no reason for thinking that the contracts contemplated in section 82 are precisely those contemplated in section 56 Many cases have been cited to us in which the question arose whether certain contracts between mortgagors and purchasers from them or other mortgagors were "contracts to the contrary" within the meaning of section 56 We need cite only *Pirthiraj Singh* v. *Rukmin Kuer*[3] and *Muhammad Abbas* v *Muhammad Hamid*[4], as examples Even if the "contract to the contrary" referred to in section 56 were a contract between the mortgagor and the mortgagee, *Ramabhadrachar* v. *Srinivasa Aiyangar*[1], would be an authority for the position that that contract could be enforced

The learned advocate for the respondents however argued that it would be beyond the province of the Court in bringing a property to sale in pursuance of a mortgagee's right to sell, to enforce a contract between mortgagors and their alienees, which can only properly be enforced in a suit for specific performance. In support of this argument he has read certain passages from one or two decisions cited by him In particular, he referred to *Karimul Rahman Khan* v *Saraswathi Sugar Syndicate*[5]. In the last paragraph of that judgment the learned Judges said :

"The case before us is not a case in which a subsequent transferee from the mortgagor invokes the assistance of the Court for the protection of the interest acquired by him in some of the items of the mortgaged properties This is a case in which the legal representatives of the mortgagor in effect seek the specific performance of an agreement entered into between them and their transferees for payment of a portion of the amount due on the basis of the decree for sale No authority has been shown to us which would justify our acceding to the request of the appellants *to fetter the rights of the decree-holders* in the present case by laying down the order in which the various items of the mortgaged properties are to be sold"

A reference to section 56, Transfer of Property Act, would show that the interest of the mortgagee remains dominant and that any right given to the purchaser of certain items of the hypotheca is subject only to the superior rights of the mortgagee, whose interest is not to be injured or jeopardised by any order which the Court might pass in favour of the purchasers, for that section reads

" the buyer is, in the absence of a contract to the contrary, entitled to have the mortgage debt satisfied out of the property or properties not sold to him *but not so as to prejudice the rights of the mortgagee*"

This passage seems only to emphasise the superior rights of the decree-holder, which cannot be fettered by an arrangement entered into between the mortgagors and their transferees It does not suggest that the mortgagors and their transferees should be driven to a separate suit

We are therefore left to consider the question whether we can spell out of the three contracts of sale entered into on 18th September, 1940, a "contract to the contrary" between respondents 2 to 4 on the one hand and the appellant on the other The learned advocate for the appellant placed a great deal of reliance on the decision of Chandrasekhara Aiyar, J, in *Sivaramayya* v. *Venkayyamma*[6], which is a case very similar to that which we are here considering The learned Judge based his decision on *Muhammad Abbas* v *Muhammad Hamid*[4], where it was held

1 (1900) I L R 24 Mad 85
2. A I R 1926 All 352
3. (1926) 95 I C 343 at 345
4 (1912) 9 All L J 499
5 I L R (1939) All 150
6. (1945) 2 M L J. 412.

that an agreement to discharge a mortgage was a "contract to the contrary" within the meaning of that term in section 82 Chandrasekhara Aiyar, J, held that since marshalling was the converse of contribution, the rules, principles and decisions which applied to contribution would apply equally to marshalling. It seems to us, however, that a clear distinction can be drawn between the effect of an arrangement entered into between a mortgagor and a purchaser from him to discharge the mortgage debt on a right to contribution and on a right of priority in the sale of the hypothecated items In the former case, the parties agree that the vendees shall bear the whole burden of the mortgage debt, which necessarily implies a contract that if there be a suit or other proceeding for contribution, the transferee shall not bear merely a *pro-rata* burden but the whole burden On the other hand, a bare promise to pay off the mortgage debt may not imply a willingness to have the promisor's property sold first in a Court sale, for such a contingency may never have been foreseen and its implications thought out Even if, therefore, section 56 may be said to be dealing with a principle which is the converse of that of section 82, it does not follow that from a contract entered into between the parties, whereby one agrees to pay off the mortgage amount, a "contract to the contrary" can be spelt out, within the meaning of section 56 One would have to consider in every case, upon an examination of the contract itself, whether expressly or by necessary implication, it was a contract to the contrary. In certain cases a "contract to the contrary" can be spelt out of the agreements entered into between a mortgagor and a transferee of his interests, as was the case in *Pirthiraj Singh* v *Rukmin Kuer*[1], but if Chandrasekhara Aiyar, J, intended to hold that a "contract to the contrary" would exist in all cases where a person had undertaken to discharge a mortgage debt and did not do so, we should have with due respect to express our dissent It is not however necessary for us to say whether on the facts of that particular case Chandrasekhara Aiyar, J, was justified in passing the order he did, for we have to decide this case upon a reading of the sale deeds entered into on 18th September, 1940 All that we find there which is relevant to the case is that the vendees promised to pay a certain sum of money to the mortgagee in part discharge of the mortgage debt. It was no doubt contemplated that the whole mortgage debt would be discharged if all the three vendees did pay as they promised to do Unlike the case dealt with in *Pirthiraj Singh* v *Rukmin Kuer*[1], however, no provision was made in these three sale deeds as to what was to happen in case the money was not paid promptly In fact, no time was fixed for payment of the money Reading through the sale deeds we have no material for thinking that the parties ever contemplated the possibility of the property being brought to sale and a question arising as to the priority of the sale of the various items In these circumstances, we are unable to spell out of these three sale-deeds themselves any "contract to the contrary" within the meaning of section 56

The appeal is therefore dismissed with costs

K S. *Appeal dismissed.*

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1. (1926) 95 I C 343

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. P. V. RAJAMANNAR, CHIEF JUSTICE AND MR. JUSTICE RAGHAVA RAO.

Sree Bhagavathi Amman Temple by Poojaris and Trustees and others .. *Appellants* *

v.

Krishna Goundar and others .. *Respondents.*

Grant—Inam land—Grant to temple—Letting out to tenants by pujari trustee—Produce rent utilised for naivedyam—*Fixed amount payable to Government—Grant of land or of melwaram—Persons in occupation—Acquisition of prescriptive title—Payment of rent provided for—Dealing by tenants as owners—Effect*

Where the grant in favour of a temple represented by its trustees was of a Sarvadumbala inam of lands specifically described by boundaries in respect of which the assessment payable to the Government but for the rent-free character of the grant was a particular sum, and the lands were being let out at the time of the Inam settlement by the pujari trustee in charge to the cultivators on a kandayam basis and were fetching produce rent which was utlised for *naivedyam* to the deity

Held, that the grant to the temple evidenced by the inam papers was of the land itself and not merely of the melwaram interest

Where in respect of inam lands persons in occupation assert their right to the lands themselve in a course of dealings otherwise sufficient to fulfil the requirements of a prescriptive title to the kudiwaram, there is nothing to prevent the Court from upholding such a title merely because they have described themselves in such course of dealings as owners of the property and not as holders of the kudiwaram in particular, and admit their liability to pay a fixed rent to the landlord

All that the Full Bench case in *Brahmayya* v *Sundaramma,* I L R 1948 Madras 757 : (1948) 1 M L J 96 (F B), decided, was that if a defence of occupancy right set up by the tenant failed, the land-holder could very well succeed in an action for eviction without proving more and that it was no answer to the suit that there had been a mere non-payment of rent for over the statutory period The Full Bench ruling does assume the possibility of the acquisition of a prescriptive title by the tenants.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore, dated 31st July, 1945, and passed in O S. No. 643 of 1943.

B. V Viswanatha Aiyar for Appellants.

T. V. Ramanathan for Respondents.

The Judgment of the Court was delivered by

Raghava Rao, J.—The appellants here—Sri Bhagavathi Amman Temple represented by three of its pujari trustees—sued in the Court of the Subordinate Judge of Coimbatore for recovery of the lands described in plaint *A* schedule and for profits in respect thereof. The three trustees representing the temple alleged that defendants 1 to 11 were tenants at will liable to be evicted and that defendants 13 to 15 were their co-trustees who not having joined them in suing were impleaded as *pro forma* defendants The 12th defendant was the Madras Hindu Religious Endowments Board who like defendants 13 to 15 supported the case of the plaintiffs-trustees that the suit lands which had been originally granted by a Mysore King and were later confirmed by the East India Company and later still by the British Indian Government at the time of the Inam Settlement belonged to the deity in both the warams It was also part of the plaint case that the decree of the District Munsif's Court of Dharapuram in O.S. No. 225 of 1939 on its file dated 27th September, 1940, was null and void, in so far as it wrongly held, in confirmation of the appellate order of the District Collector in certain proceedings for resumption of the suit lands under section 44-B of the Madras Hindu Religious Endowments Act, that the grant was only of the melwaram. The contesting defendants maintained *inter alia* that the grant was only of the melwaram as, according to them, rightly held by the learned District Munsif of Dharapuram in the former suit, that the former decision operated as *res judicata* in the way of the present action, and that they and their ancestors had been in possession of the suit land from time immemorial and in any event acquired a right to the kudiwaram by prescription. The learned Subordinate Judge in the Court below found against

* Appeal No. 645 of 1945. 18th February, 1949.

the plea of *res judicata* but otherwise upheld the defence and dismissed the suit. The plaintiffs have accordingly appealed.

Mr. B V Viswanatha Ayyar, the learned advocate for the appellants, has argued before us that the grant ought to have been, on the material available, chiefly furnished by Exhibits P-1, P-2, extracts of the inam statement and the Inam Fair Register relating to the suit inam, held to cover both the warams and that the finding of the learned Subordinate Judge that the defendants are entitled to the kudiwaram by adverse possession is erroneous in law as well as on the facts. On the other hand, Mr Ramanatha Ayyar, the learned advocate for the respondents, has not only maintained that the conclusions of the learned Subordinate Judge on these two points are correct but also urged that the learned Subordinate Judge ought to have accepted the plea of *res judicata*.

With the first contention of the appellants' learned advocate we agree. What is disclosed by the inam documents is that the grant was to the temple of a Sarvadumbala inam of lands specifically described by boundaries, in respect of which the assessment payable to Government but for the rent-free character of the grant would have been Rs 31-8-2 and which at the time were under letting by the pujari in charge to the cultivators on a kandayam basis and were fetching produce which the pujari utilised for *naivedyam* to the deity. The description of the income in Exhibit P-1 as Rs. 31-8-2 which is shown in Exhibit P-2 as in fact the assessment payable to the Government on the land but for the grant, does not, in our opinion, warrant the inference that the grant was in the nature of a mere remittance to the inamdar, the temple, of the rent payable to the Government by tenants already in occupation. There is no reference in either Exhibit P-1 or Exhibit P-2 to any such tenants. On the other hand, the only reference to tenants, which is to be found only in Exhibit P-1 is to tenants to whom the pujari himself leased out the lands on a kandayam basis and from whom he was in perception of profits which were however used " for distribution to the deity ". For the appellants it is further pointed out that there were permanent leases, Exhibits P-4, P-5 and P-6 of 6th May, 1890, each in respect of one-third share of the suit lands granted by the pujaris in their respective shares on the footing that the original grant was of the land covering both the warams and that under Exhibit P-3 Guruvayee, the widow of Vaduharandi, one of the members of the pujari family executed a deed of relinquishment in favour of the lessors under Exhibits P-4 to P-6, her pangalis, abiding by the leases granted by them. The evidence furnished by the inam papers being unequivocal in its nature, we are, even quite apart from Exhibits P-3 to P-6, clearly of opinion that the original grant was of the land itself. The conduct evidence furnished by the actings of the contesting defendants and their predecessors which begins only in 1899 is even less pertinent than Exhibits P-3 to P-6 to the determination of the question of the nature and scope of the original grant. We accordingly reject the conclusion of the learned Subordinate Judge based upon such conduct evidence that the grant originally made was of the melwaram only.

The second contention of Mr. Viswanatha Ayyar has not, after all the careful consideration that we have bestowed on it, commended itself to our acceptance. There is indubitable testimony furnished by the documents on record of enjoyment of the suit lands by the defendants and their predecessors in their own right beginning certainly as early as 1899. Exhibit D-3 of the 23rd of May of that year evidences a partition amongst members of the family of defendants 1 to 11 of S. No. 119, the suit property, amongst others. There is a subsequent division on 1st November, 1909, between the 9th defendant, minor reperesented by his mother and guardian, Govindammal, and his paternal uncle one Muthuswami Goundan, which is evidenced by Exhibit D-4 There have been dealings with the suit property by way of sales effected by members of the family of the defendants under Exhibits D-5 to D-8 ranging from 1918 to 1926. From 1932 to 1938 it is shown by Exhibit D-11 series that the defendants have been paying the kist on the suit land. Exhibit D-12 is the patta issued to the defendants for fasli 1349, and Exhibit

D-12 (*a*) is an encumbrance certificate filed by the defendants for showing the dealings with the suit property by themselves and their predecessors-in-title from the year 1865 to 1900

On these facts it seems to us obvious that the defendants have established their title by prescription to the kudiwaram interest in the land. But says Mr Viswanatha Ayyar, they have been all through asserting an animus pertinent to their absolute ownership of the land and not the animus relevant to or requisite for the acquisition of a kudiwaram interest only in the land in question. The distinction is, in our opinion, even if theoretically real, much too thin to all practical interests and purposes to affect the proper inference to be drawn from the facts disclosed by the evidence It is common knowledge that in zamindari areas where in respect of ryoti land the tenant is only a kudiwaramdar, as well as in ryotwari areas where the ryotwari pattadar is, alike in popular and legal parlance, the full owner, the ryots describe themselves as the owners of the land. That means nothing more than that they have a right of permanent occupancy in the land which carries with it the liability to pay rent to the zamindar, even as the ryotwari pattadar is under an obligation to pay the assessment to the Government. Likewise, where in respect of inam land persons in occupation assert their right to the lands themselves in a course of dealings otherwise sufficient to fulfil the requirements of a prescriptive title there is nothing in our opinion to prevent the Court from upholding such a title merely because they have described themselves in such course of dealings as the owners of the property. Mr. Viswanatha Ayyar also urges in answer to this point of view of prescriptive title that the defendants could not, in view of the Full Bench ruling of this Court reported in *Brahmayya* v. *Sundaramma*[1] acquire any occupancy right by prescription. But, far from supporting any such contention, the Full Bench ruling *does* assume the possibility of the acquisition of such a prescriptive right by persons in the position of the present defendants. In the Full Bench case the facts as found were that the tenant did not establish the occupancy right set up by him, but still contended that the plaintiff had to fail against him unless he proved that the tenancy between himself and the plaintiff was in the nature of a terminable tenancy which had been validly terminated. All that the Full Bench case decided was that if such a defence of occupancy right set up by the defendant failed, the landholder could very well succeed in an action for eviction without proving more and that it was no answer to the suit that there had been a mere non-payment of rent for over the statutory period. Such non-payment of rent, the learned Judges of the Full Bench held, does not by itself put an end to the tenancy admittedly in existence between the parties or convert the possession of the tenant into adverse possession against the landlord. In the pre ent case the defendants are not proved by the plaintiffs to have been inducted into possession of the suit property at any time as their tenants It is no doubt the case of the plaintiffs that defendants 1 to 11 are the pangalis of the lessees let into possession under the three permanent leases of the 6th of May, 1890 (Exhibits P-4 to P-6) ; but the defendants deny their relationship with the original lessees. It cannot on the evidence on record be held that such relationship stands clearly established There being therefore no evidence of any letting of the defendants or their predecessors-in-title by the plaintiffs or their predecessors-in-title at any time, it seems to us that it is perfectly competent to the defendants to prove by necessary evidence that they have acquired a right by prescripti n to the kudiwaram interest in the land. The *onus probandi* in regard to prescriptive title is, of course, on the defendants, but they have in our opinion sufficiently sustained it. The learned Subordinate Judge has discussed the evidence in regard to this matter in paragraphs 12 and 13 of his judgment and given reasons, with which we agree, in support of his conclusion in favour of the defendants. The learned advocate for the appellants has in this connection, no doubt rightly, pressed on our attention the fact that there is no clear or cogent proof of any payment of a uniform rate of rent by the defendants or their predecessors-in-title to the plaintiffs or their predecessors-in-title. But D W 1 in his evidence says that the defendants have

1. (1948) 1 M.L.J. 96 : I.L.R 1948 Mad. 757 (F B.).

been paying the Andis Rs. 31 per year, and there is no proof that there has been any variation of that amount of rent at the instance of the temple. The learned Subordinate Judge accepted this evidence and we cannot say that he was in error in so doing.

Such being the conclusion that we have reached in concurrence with the learned Subordinate Judge on this part of the case, it is unnecessary for us to deal with the question of *res judicata* on which the appellants have a finding in their favour from the learned Subordinate Judge. We may however observe that in view of the finding of the learned Subordinate Judge on issue No. 10 which stands unquestioned, the valuation of the suit on the file of the Court of the District Munsif of Dharapuram, O.S. No. 225 of 1939, must be regarded as an under-valuation, and that the suit, if properly valued, would have been beyond the jurisdiction of that Court The present suit which has been correctly valued and brought in the Court of the Subordinate Judge of Coimbatore cannot be regarded as a suit which could have been lawfully tried by the District Munsif's Court of Dharapuram. The plea of *res judicata* cannot therefore, in our opinion, avail the defendants. In this conclusion we are supported by the decision of the Allahabad High Court reported in *Hazari Singh* v. *Jhunna Singh*[1], to which our attention has been drawn by the learned advocate for the appellants. The learned advocate for the appellants also tried, in order to get over the plea of *res judicata,* to show that the former litigation was conducted by the pujaris, not exclusively as trustees in which capacity they have instituted the present suit but in their own personal capacity as pujaris as well, which would be in conflict with their capacity as trustees. We wish to say nothing in regard to the merits of this contention as we are inclined to hold against the plea of *res judicata* anyhow for the reason already given, and as in fact a finding on the question of *res judicata* is, as already pointed out by us, not strictly necessary for the disposal of this appeal in view of our conclusion on the merits which goes against the appellants with reference to the question of prescriptive title on the part of the defendants.

In the result the appeal fails and is dismissed with costs. The appellants will pay the Court-fee due on the appeal to the Government.

B V.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRY.

K. Rajagopala Rao and others .. *Petitioners**

Madras Maintenance of Public Order Act (I of 1947), section 2 (1) (a)—Persons arrested and kept in jail pending trial on a charge for offences under the Penal Code—Order for their detention under Act I of 1947 passed more than two months after prejudicial acts and during the time of their being kept in jail as under-trial prisoners but not given immediate effect to—Arrest of such persons under the order of detention immediately on their release on bail under orders of Court—Validity of detention—Jurisdiction of District Magistrate to pass orders of detention against persons kept in jail in another district under orders of Sub-Magistrate within his jurisdiction.

A case was registered under various sections of the Indian Penal Code against persons participating in various incidents on 31st January, 1948, and a number of persons were arrested and kept as under-trial prisoners in the sub-jail till 7th April, 1948, and then transferred to the Central Jail of another district On the 10th and 11th April, 1948, the District Magistrate of the district where the incidents occurred passed orders of detention under Madras Act I of 1947, against the accused persons but the orders however were not given immediate effect to as the persons ordered to be detained were already in custody On the 21st May, 1948, when those persons were released on bail after furnishing security under the orders of the High Court, they were re-arrested in pursuance of the orders of detention passed on 10th and 11th April, 1948.

In an application by the detenus under section 491 of the Criminal Procedure Code,

Held (1) No definite period can be fixed so as to restrict the activity of the person which would be open for consideration by the detaining authority, to pass an order of detention under section 2 (1) of the Madras Maintenance of Public Order Act (I of 1947) ; that must vary according to the

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1. A.I R. 1931 All. 21.

* Crl. M. Ps. Nos. 481 to 487 and 489 to 492 of 1949. 20th April, 1949.

circumstances of each case. Merely because there is an interval of more than two months between the date of the order of detention and the date on which the prejudicial acts were committed it cannot be said that the period is unreasonable so as to make the activity remote so as to preclude the District Magistrate from taking it into consideration

(ii) As the order of detention was passed by the District Magistrate long before the release of the arrested persons on bail was thought of, it cannot be said that the District Magistrate was actuated by the motive of circumventing or nullifying the effect of the order of the High Court directing the release of the accused on bail

(iii) Though the accused were transferred to the Central Jail of another district they were subject to the control and direction of the Sub-Magistrate who remanded them and practically for all purposes they must be treated to be persons within the jurisdiction of that Sub-Magistrate and the District Magistrate of that district had undoubted jurisdiction to take action under section 2 (1) of Madras Act I of 1947, notwithstanding the fact that the accused were in the Central Jail in another district The person whose activity is the basis of the order under section 2 (1) of Madras Act I of 1947 and whose action is sought to be prevented under the section must be within the jurisdiction of the District Magistrate proposing to take action under section 2 (1) of the Act

Petitions under section 491 of the Code of Criminal Procedure praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of *habeas corpus* for the production of the petitioners abovenamed who are at present confined in Camp Jail, Cuddalore and direct them to be set at liberty.

N S. Mani for *Row and Reddy* for Petitioners.

N. T. Raghunathan for the Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Order of the Court was made by

Satyanarayana Rao, J—These eleven applications raise common questions for consideration and also are based on facts which are common.

On the 30th of January, 1948, there was a rally of the members of the Rashtria Swayam Sevak Sangh at Vijayawada on which day Mahatma Gandhi died. On the next day, the 31st January, according to the grounds served on the detenus in these petitions, the petitioners and others conspired to attack the members of the Rashtria Swayam Sevak Sangh and in the various incidents that occurred that day, some members of that body were injured and a worker of the municipality was also killed. Some of the petitioners were arrested on the same day while others were arrested by the police on subsequent dates. A case was registered against 71 accused including the petitioners under various sections of the Indian Penal Code which was later numbered as P R.C. No. 1 of 1948 on the file of the Stationary Sub-Magistrate of Vijayawada. The petitioners and the other accused in the case after arrest were kept in the sub-jail of Vijayawada until 7th April, 1948, when they were transferred for some reason to the Central Jail, Rajahmundry. On the 10th and 11th April, 1948, the District Magistrate of Krishna under the authority delegated to him under section 15 of the Madras Maintenance of Public Order Act (Act I of 1947) passed orders of detention against the petitioners and seemed to have also prepared the grounds of detention on the said dates. The detention orders, however, were not given immediate effect as the applicants were already in judicial custody. The petitioners moved for bail in the District Court, Krishna, but they were unsuccessful; and thereafter they came up to this Court and on the 18th May 1948, the petitioners and others were directed to be released by Yahya Ali, J, on bail on their furnishing security each in his own bond for the sum of Rs. 500 with two sureties for each of the said accused for Rs. 500 for each surety to the satisfaction of the Stationary Sub-Magistrate of Vijayawada. The applicants in pursuance of this order, furnished the necessary bail and on the 21st May, 1949, they were released but immediately after their release, at the Central Jail, Rajahmundry, they were arrested in pursuance of the orders of detention passed earlier by the District Magistrate of Krishna on the 10th and 11th April, 1948.

The District Magistrate forwarded the grounds of detention to the Government on the 1st June, 1948, which were received by the Government on the next day and the grounds of detention were served on the applicants in June and July, 1948. They immediately submitted their representations to the Government in July, 1948,

and the Government seems to have taken a long time to send them to the Advisory Council which they did on the 14th March, 1949. The matter is still pending, it is said, with the Advisory Council, and so no final orders were passed by the Government These applications under Section 491 of the Code of Criminal Procedure were filed by the detenus on the 28th February, 1949

The first contention urged on behalf of the applicants is that as there is a long interval of time between the date of their arrest on the 31st January, 1948 and the passing of the orders of detention under section 2 (1) of the Act, it could not be said that the District Magistrate could have been satisfied that these applicants were acting in a manner prejudicial to public safety or maintenance of public order. The chief ground mentioned by the Government in the grounds served upon the detenus is the activity of these persons on the 31st January, 1948, and the active part alleged to have been taken by them on that day in the conspiracy to attack the members of the Rashtriya Swayam Sevak Sangh. This activity of theirs, it is alleged, is not proximate enough to justify an order of detention under section 2(1) of the Act. The interval, it would be seen, between the occurrence on the 31st January, 1948, and the order of detention is more than 2 months. The ground on which the order of detention was based is certainly within the purview of the Act and is such as would certainly justify an order of detention under section 2 (1) of the Act. No definite period can be fixed so as to restrict the activity of the person which would be open for consideration by the detaining authority to pass an order of detention under section 2 (1) of the Act; that must vary according to circumstances of each case The incident and the occurrence which are complained of, if true, is certainly a serious one and must have endangered the public peace on that date. The District Magistrate would certainly be within his jurisdiction to pass an order of detention on a prejudicial activity of that description. Merely because there is an interval of more than two months between the date of the order of detention and the date on which the offences were committed we cannot hold that the period is unreasonable so as to make the activity remote so as to preclude the District Magistrate from taking it into his consideration The delay between the date of receipt of the explanation and the date of sending the matter to the advisory council has been in a way explained by the District Magistrate and we may also take notice of the fact that perhaps he was also busy in dealing with the then existing trouble on the Hyderabad border

It was next contended that the order of detention was made with a view to circumvent the order of this court directing the release of the petitioners on bail. We had occasion to consider cases in which immediately after the order of release on bail was made the detaining authority proceeded to pass an order of detention under section 2 (1) with a view to prevent the person concerned from re-gaining his liberty. In such cases no doubt the action of the detaining authority cannot be justified and in those circumstances it must be presumed to be *mala fide*; but in these cases the order of detention was passed by the District Magistrate long before the release of these petitioners was thought of The order granting bail was passed by this Court on 18th May, 1948 and the District Magistrate passed the order of detention on the 10th and 11th April, 1948, on the material which was then available to him No doubt, as he now explains in the affidavit filed before us, he thought that as the petitioners were already in jail it was unnecessary to give immediate effect to the orders of detention When the applicants were released in pursuance of the order of this Court, the District Magistrate in the interests of public pease gave effect to the orders of detention which were passed by him long ago and got these applicants re-arrested and detained. We see no justification for inferring that the District Magistrate was actuated by the motive of circumventing or nullifying the effect of the order of this Court directing the release of the applicants on bail He forearmed himself with this order of detention to give effect to it whenever occasion arose for its use. We see, in the facts of this case, no justification for applying the principle of the cases decided by us where we held that in certain contingencies the order of detention was *mala fide*; in this

case we are perfectly satisfied that the District Magistrate acted *bona fide* in the matter.

The third contention that was urged before us was that there was considerable delay on the part of the Government in complying with the requirements of the Act. In the first place, it was said that the District Magistrate took considerable time in sending the grounds justifying the orders of detention to the Government. The detention order was passed in April and the grounds were sent to the Government only in June. The grounds themselves were signed by the District Magistrate on the 10th and 11th April, 1948 ; apparently he was under the impression that the grounds should be sent to the Government only after the persons concerned were arrested and the orders of detention were sought to be given effect to. We do not see anything wrong in this view which the District Magistrate must have taken and though it is obligatory under the Act to send the grounds forthwith, in the circumstances of this case we think that the delay on the part of the District Magistrate was not unreasonable or was not justified.

On behalf of the applicants it was suggested that the order of detention was the result of political animosity and was not *bona fide.* In justification of this contention reference was made to the grounds themselves which were served on some of the petitioners, particularly on Katragadda Rajagopal Rao. We do not see any basis for inferring from these grounds that the Government or the District Magistrate was actuated by political animosity to take action under the Act against these applicants Further, if the detenus intended to rely upon this as a ground of attack they ought to have expressly stated so in the affidavit filed in support of these applications so as to give to the Government an opportunity to meet such an allegation and show, if possible, that their action was justified and was *bona fide.* We, therefore, think that this contention does not deserve any serious consideration.

Lastly, an interesting question was raised on behalf of the applicants, namely, that as these applicants were in the Central Jail, Rajahmundry, on the date on which the orders of detention were passed by the District Magistrate, Krishna, he had no jurisdiction to take action under section 2 (1) of the Act. Under section 15 of the Madras Maintenance of Public Order Act, 1947, the power to take action under section 2 (1) (*a*) of the Act was delegated to the District Magistrates and the Commissioner of Police, Madras. The order of the Government of Madras is contained in G. O. No. Ms. 907, dated 21st March, 1947 It reads as follows :

> " In exercise of the powers conferred by section 15 of the Madras Maintenance of Public Order Act, 1947, Madras Act I of 1947, His Excellency the Governor of Madras hereby directs that the powers conferred on the Provincial Government by section 2 (1) (*a*) of the said act shall be exercised also by all the District Magistrates and the Commissioner of Police, Madras *within their respective jurisdiction* "

From this order it is clear that the jurisdiction of the District Magistrate under section 2 (1) (*a*) of the Act is confined to his ordinary jurisdiction, namely, the district, while under section 2 (1) of the Act, it is open to the Provincial Government to take action against a person wherever he may be in the presidency. The jurisdiction of the District Magistrates is confined to their respective jurisdictions. Under the Criminal Procedure Code, ordinarily the jurisdiction of the District Magistrate is confined to the district But what is the test on which the jurisdiction to act under section 2 (1) of the Act should be decided Section 2 (1) of the Act after amendment of 1948 refers to the satisfaction of the detaining authority with respect to the particular persons that he " is acting " or is " about to act " or is " likely to act " in any manner prejudicial to the public safety or maintenance of public order. The District Magistrate, therefore, has to be satisfied on this question. The person concerned may be acting, or may be about to act, or is likely to act ; and this must have reference only to the person who is within the jurisdiction of the District Magistrate. If it is a case of acting, the acting as well as the person who acts must be within the jurisdiction. Even if the activity was outside the jurisdiction

but the person is within the jurisdiction of the District Magistrate, the District Magistrate would have the power to take action under section 2 (1) if the person concerned is about to act or is likely to act in a manner prejudicial to public safety ; he is within the jurisdiction of the District Magistrate. In either case, it seems to be necessary that the person whose activity is in question must be a person within the jurisdiction of the Magistrate taking action under section 2 (1). This is emphasised also by a reference to the latter part of the section as the object is to prevent a person by an order of detention from acting in a manner prejudicial to public safety or the maintenance of public order The District Magistrate is charged with the duty of maintaining public peace in the district which is in his charge The power to make an order of detention with a view to prevent breach of the peace can only be with reference to the area which is in his charge, that is, the district. From these indications in the section, it is clear that the person whose activity is the basis for the order under section 2 (1) and whose action is sought to be prevented under the section must be within the jurisdiction of the District Magistrate proposing to take action under section 2 (1) of the Act.

Applying this interpretation of the section to the facts in these applications it would *prima facie* seem that the District Magistrate of Krishna had no jurisdiction to make an order of detention under section 2 (1) of the Act as on the date when the detention orders were passed these applicants were actually in the Central Jail, Rajahmundry, East Godavari District. But on a close scrutiny of the facts, it would be seen that this *prima facie* view of the case is not sound. Till 7th April, 1948, these applicants were in the sub-jail, Vijayawada, as under-trial prisoners in P. R. C. No. 1 of 1948, on the file of the Stationary Sub-Magistrate of Vijayawada. The trial of the case did not commence by that date and under section 344 of the Code of Criminal Procedure they must have been kept in remand which was being renewed every 15 days by the Magistrate. For some reason the Stationary Sub-Magistrate instead of keeping these persons in Vijayawada Sub-Jail sent them to the Central Jail, Rajahmundry. They have necessarily to be brought for further remand after the expiry of the 15 days and therefore they are for all purposes in the judicial custody of the Sub-Magistrate, Vijayawada, though they were in the Central Jail, Rajahmundry. The applicants at that stage had no freedom of movement of their own and were subject to the control and direction of the Stationary Sub-Magistrate of Vijayawada It was open to him (The Stationary Sub-Magistrate, Vijayawada), to have called them back at Vijayawada in time when he wanted and therefore, practically for all purposes they must be treated to be persons within the jurisdiction of the Stationary Sub-Magistrate, Vijayawada, on that date. If this is the correct view of the situation on that date it follows that the District Magistrate had undoubted jurisdiction, to take action under section 2 (1) of the Act. A similar contention was considered by the Allahabad High Court in *Rex* v. *Tilak*[1], though under a different section. Under the United Province Maintenance of Public Order Act, the power of extending an order of detention was conferred upon the District Magistrates within their respective jurisdiction In that case the original order of detention was passed by the District Magistrate of Muzaffarnagar and the accused were taken to the Jail at Muzaffarnagar. Subsequently, they were transferred to the Central Jail at Agra where they continued in custody ever since. Agra was within the jurisdiction of a different District Magistrate. Notwithstanding the fact that the detenus were in different district, the District Magistrate of Muzaffarnagar passed an order of extension, exercising the power under the authority that was conferred upon him by the Provincial Government exercising its powers of delegation. It was there pointed out that the detenu even though he was in another jail was held in that jail under the order of the District Magistrate of Muzaffarnagar and so he was for all purposes a prisoner of that District Magistrate. The District Magistrate at Muzaffarnagar alone had jurisdiction to revoke the order before the period fixed in it had expired and he had also the power to extend

1. (1948) A.L.J. 399.

the period of detention. The principle behind this decision is that the custody of a person in jail is really the custody of that Magistrate who has the power and the right to give direction regarding the custody of the prisoner. The physical presence of the person in a different jail would not affect the power of the Magistrate to control the movements of the person The Stationary Sub-Magistrate, Vijayawada, in these cases held the judicial custody of these persons and the custody in the Central Jail, Rajahmundry, was subject to his direction and control The temporary absence from Vijayawada in such circumstances under the direction of the Stationary Sub-Magistrate, Vijayawada, cannot affect the power of the District Magistrate to act under section 2 (1) of the Act. We are therefore of opinion that the District Magistrate of Krishna had authority to take action under section 2 (1) of the Act notwithstanding the temporary absence of these applicants on the 10th April, 1948, at Rajahmundry

For all these reasons we think that no case has been made out for interference by this Court with the orders of detention passed by the District Magistrate, Krishna.

These applications are therefore dismissed

K.S. *Applications dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SATYANARAYANA RAO AND MR. JUSTICE VISWANATHA SASTRI.

Arunachala Reddiar .. *Appellant**

v.

Muthusadasiva Mudaliar and another .. *Respondents.*

Limitation Act (IX of 1908), *Article* 182 (5) *and Civil Procedure Code (V of* 1908), *Order* 21, *rule* 11 (2) *and* (3) *and Civil Rules of Practice, rules* 142 *and* 143—*First execution petition filed without the copy of the decree—If an application in accordance with law—Rules* 142 *and* 143 *of the Civil Rules of Practice cannot override the provisions of the Civil Procedure Code*

Rule 142 of the Civil Procedure Code is a mere re-numbering of the old rule 164 framed under the Civil Procedure Code of 1882 Rule 142 has not been made or promulgated in accordance with the procedure prescribed by Part X of the Civil Procedure Code of 1908 According to section 157 of the Civil Procedure Code of 1908, the rules made under the Code of 1882, shall so far as they are consistent with the Code of 1908 have the same force and effect as if they have been made under the new Code The necessary corollary is that if the Civil Rules of Practice framed under the old Code are, to any extent, inconsistent with the provisions of the Civil Procedure Code of 1908, they *pro tanto* cease to have operation after the coming into force of the Code of 1908 Order 21, rule 11 is part of the Code of 1908 and in so far as rule 142 of the Civil Rules of Practice is inconsistent with it, the latter must stand abrogated

Bademian Saheb v *Jankan Saheb,* (1938) 1 M L J 495 . I L R 1938 Mad 734 (F B), relied on

According to the provisions of Order 21, rule 11, the production of a certified copy of the decree sought to be executed as an annexure to the first execution application is not necessary and a certified copy need be furnished only if and when the Court requires the applicant to produce it Rule 142 of the Civil Rules of Practice in so far as it requires an applicant who first applies to execute his decree to produce along with his application a certified copy of the decree is not only inconsistent with the provisions of Order 21, rule 11 (2) and (3) but is diametrically opposed to them and the two provisions cannot stand together.

Where in a first application to execute a decree, the certified copy of the decree is not filed, it cannot, for that reason, be said that the application is one not in accordance with law under Article 182 (5) of the Limitation Act

Venkatarama Sastri v *Venkatanarasimhan,* (1937) 2 M L J 881, followed

Kamalammal v *Rajarathna Naicker,* (1949) 1 M L J 66, overruled

Appeal against the order of the District Court of South Arcot, dated 11th February, 1947, and made in E P No 35 of 1946 in O. S No. 13 of 1935.

T. K. Subramania Pillai for *A. C. Sampath Aiyangar* for Appellant.

K. Srinivasan for Respondents.

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*A. A. O. No. 278 of 1947. 4th July, 1949.

The Court delivered the following

JUDGMENTS: *Satyanarayana Rao, J.*—This appeal was referred to a Bench as Govinda Menon, J., was of opinion that as it raised a question of importance it should be considered by a Bench, particularly in view of the conflict between two decisions, one of a Bench and the other of a single Judge on the question raised in the appeal. The Bench decision is *Venkatarama Sastri* v. *Venkatanarasimhan*[1] and the decision of the single Judge is *Kamalammal* v. *Rajarathna Naicker*[2].

The facts out of which this appeal arises may be shortly stated. The respondents obtained a final decree in a mortgage suit on 11th February, 1941. The first execution petition was filed on 5th February, 1944, for the sale of the properties. That application was returned from time to time for the filing of the sale papers and the encumbrance certificates, and while the decree-holder was praying for extension of time to comply with those requirements, the executing Court required the decree-holder to produce also a copy of the final decree. The order directing production of a copy of the final decree was made nearly two months after the filing of the application. The decree-holder obtained a month's time to produce a copy of the final decree, but as he was not in a position to produce the copy, the application was ultimately rejected by the Court on 28th June, 1944. The second execution petition was filed on 31st January, 1946. The judgment-debtor filed a counter in which he raised the contention that execution was barred by limitation as the previous execution application was not one in accordance with law, as no decree copy was filed along with the application.

This contention was overruled by the learned District Judge who heard the application, and he directed execution to proceed. The defendant filed this civil miscellaneous appeal. The matter came up for admission before Rajamannar, J., as he then was, and while admitting the appeal, the learned Judge made the following note:—

"The point in this C.M.A. is directly governed by *Venkatarama Sastri* v. *Venkatanarasimhan*[1], but it is contended that the effect of rules 142 and 143 of the Civil Rules of Practice has not been considered in that decision. The point is arguable. Notice."

By the time the appeal came up for hearing before Govinda Menon, J., there was the decision of Somasundaram, J., in *Kamalammal* v. *Rajarathna Naicker*[2], in which he considered the decision of the Bench in *Venkatarama Sastri* v. *Venkatanarasimhan*[1], and was of opinion that rules 142 and 143 of the Civil Rules of Practice are mandatory and as a decree copy was not filed along with the first execution petition, the application was not one in accordance with law and would not save limitation for the succeeding execution petition. In view of this decision which is in conflict with the Bench decision, Govinda Menon, J., thought that the matter should be considered by a Bench. He, however, expressed his opinion that he was inclined to agree with the judgment of Somasundaram, J.

In view of these conflicting decisions, it becomes necessary for us to examine the effect of the Civil Rules of Practice and canvass the correctness of the decision of the Bench in *Venkatarama Sastri* v. *Venkatanarasimhan*[1], which is in accordance with an earlier decision of this Court in *Pachiappa Achari* v. *Poojali Seenan*[3], which, however, was pronounced before the Code of 1908 and under the Civil Rules of Practice made in the year 1905.

Before dealing with the decisions on the point, it is necessary to bear in mind the history of the Civil Rules of Practice, Nos. 142 and 143, with which we are now concerned. Under the Code of 1882, the High Court was vested with the power of making rules of procedure. Section 652 runs as follows:

"The High Court may, from time to time, make rules consistent with this Code to regulate any matter connected with its own procedure or the procedure of the Courts of Civil Judicature subject to its superintendence. All such rules shall be published in the local official Gazette and shall thereupon have the force of law."

1. (1937) 2 M.L.J. 881.
2. (1949) 1 M.L.J. 66.
3. (1905) I.L.R. 28 Mad. 557.

By virtue of this power vested in the High Court, this Court framed Civil Rules of Practice, 1905, which came in o force on 1st April, 1905. Rules 164 and 165 are word for word the same as rules 142 and 143 which are now found printed in Vol I of the Civil Rules of Practice complied by Mr Satyamurthi Ayyar. Under the Code of 1908 the rule-making power of the High Court is contained in Part X of the Code By section 122, the High Court is empowered to make rules from time to time regulating its own procedure and the procedure of the Civil Courts subject to its superintendence, and may by such rules annul, alter, or add to all or any of the rules in the First Schedule. Section 123 authorises the constitution of a Rule Committee for the Province. The procedure for framing the rules is provided in subsequent sections Under section 126, the rules require the previous approval of the Government and have to be published under section 127 in the Official Gazette After the Code of 1908 came into force on 1st January, 1909, no steps were taken by the High Court to re-enact the rules then in force, including rules 142 and 143, with which we are now concerned, under the procedure prescribed in Part X of the Code From the Secretary of the Rule Committee, we gather that the proceedings of the Rule Committee show that in 1910, the Registrar of this Court was of opinion that these rules should be re-enacted by the Code of 1908 but the Rule Committee did not think it necessary in view of section 157 of the Code. Under that section, it will be seen, that the old rules continue in force, and have the same effect as if they had been made under the Code of 1908, unless they are inconsistent with any provision of the Code This section was construed by a Full Bench of this Court in *Bademian Saheb* v *Jankan Saheb*[1], and it was there held that, if a rule is inconsistent with a provision in the Code it is invalid At page 741 of the report, it was pointed out by the Full Bench that after the Code of 1908 was enacted, the Civil Rules of Practice then in force were not re-enacted and published in accordance with the provisions of Part X and that the validity of those rules therefore depended entirely on the provisions of section 157 of the Code of 1908.

It will be seen from the foregoing that if a rule in the Civil Rules of Practice in force before 1908 is inconsistent with any provision of the Code of 1908, such a rule would be invalid and would have no operative force

Rules 11 to 14 or Order 21 of the Code lay down the requirements of an execution application, and rule 17, parts of which were amended by this Court under its rule-making power lays down the procedure which the Court should follow on receiving an application for execution of a decree. If the requirements of rules 11 to 14 are complied with, then the Court would proceed with execution of the decree But if they have not been complied with, under clause (1) of rule 17, the Court may reject the application, if the defect is not remedied within a time to be fixed by the Court. Of the provisions in rules 11 to 14, it has been held by the Privy Council and by this Court that non-compliance with a permissive provision like rule 14 regarding the production of a Collector's certificate does not make the application one not in accordance with law, but if a mandatory provision like sub-clause (2) of section 11 requiring the number of a suit to be given in the application is not complied with, then the application would not be one in accordance with law. The decision of the Judicial Committee is *Govind Prasad* v. *Pawankumar*[2] It was considered by this Court in *Satyanarayana* v. *Kajireddi*[3].

In *Venkatarama Sastri* v *Venkatanarasimhan*[4], which was a case in which a copy of the decree was not produced, it was held by a Bench that non-compliance with the order of the Court directing the decree-holder to produce a copy of the decree would not make the application one not in accordance with law No doubt in that decision, no reference was made to Civil Rules of Practice 142 and 143. The earlier decision of this Court in *Pachiappa Achari* v. *Poojali Seenan*[5], which was also a case relating to non-production of the copy of a decree dealt with rules 164 and

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1. (1938) 1 M L J 495 · I L R 1938 Mad. 734 (F B)
2 (1943) 2 M.L J 121 L R 70 I A 83 I L R. 1943 Nag. 669 (P C)
3 (1945) 2 M L J 427 I L.R 1946 Mad. 542
4 (1937) 2 M L J 881.
5. (1905) I L R 28 Mad. 557.

165 of the Civil Rules of Practice, and it was there held that the application, notwithstanding the non-production of a copy of the decree was one in accordance with law. It was there pointed out that there being no omission or error in the contents of the application itself, it was perfectly in accordance with law, and the defect of the non-production of a copy of the decree was only an extraneous circumstance, the failure to produce which would not affect the validity of the application. It was also pointed out that if a decree-holder does not comply with the order of the Court directing him to produce a copy of the decree, it would be perfectly open to the Court not to proceed with the further execution until the defect is remedied by the production of the copy.

Relying on the decision in *Harish Chundra Chowdhury* v. *Kali Sundari Debia*[1], which considered the effect of section 610 of the Code of 1877 corresponding to Order 45, rule 15, of the present Code, the learned Judges were also of opinion that notwithstanding the mandatory nature of the language of rule 164 of the Civil Rules of Practice which is the same as rule 142 of the present rules, the non-compliance with the requirement would not affect the validity of the application. I may point out in this connection that this decision, though it was pronounced under the rules as they stood before 1908, these rules have the same force as the present rules, since under section 652 of the Code of 1882, the rules published in the local Gazette have upon such publication the force of law. Under the present Code, section 127 also contains a similar provision. It states that from the date of publication or from such other date as may be specified, the rules have the same force and effect as if they have been contained in the First Schedule. The effect of the language in both the provisions is substantially the same No distinction can therefore be made merely on the ground that there is no similar or corresponding provision like section 127 of the present Code in the old Code of 1882, as did Somasundaram, J., in *Kamalammal* v. *Rajarathna Naicker*[2].

The question therefore reduces itself to this. As the rules 142 and 143 now relied on were made under the Code of 1882, would they have the effect of overriding the provision in Order 21, rule 11 (3) In other words, is the provision in rule 142 inconsistent with Order 21, rule 11 (3) within the meaning of section 157 of the Code ? If it is inconsistent, as stated already, the rule must be ignored and the provision in the Code must prevail Under Order 21, rule 11 (3), the Court is given an option to require the applicant to produce a certified copy of the decree. Under rule 142 of the Civil Rules of Practice, the judgment-creditor shall, together with his petition for execution of transmission of the decree, file in Court a certified copy of the decree sought to be executed. The provision in the rule 142 is not only inconsistent with sub-clause (3) of rule 11 of Order 21 but is diametrically opposed to it. While the one gives an option to the Court the other makes it obligatory on the part of the applicant to file a certified copy of the decree along with the application. I have therefore no hesitation in rejecting the argument of the appellant that there is no inconsistency between the two provisions and that therefore under section 157 of the Code the rule must be given effect to. As there is a clear inconsistency and as under the Code the production of the copy of the decree is only optional, I am of opinion that the first execution petition in the present case is one in accordance with law and that notwithstanding the omission on the part of the learned Judges who decided *Venkatarama Sastri* v. *Venkatanarasimhan*[3] to refer to these two rules, 142 and 143, the correctness of it is not in any way affected by such omission. We think that the distinction pointed out in the decision in *Kamalammal* v. *Rajarathna Naicker*[2] that *Venkatarama Sastri* v. *Venkatanarasimhan*[3] was a case which related to an application for execution and not for transmission of a decree is of no consequence for the reason that under rule 142, whether it was an application for execution or one for transmission of the decree, the requirement is the same, and the word used is " shall " and not " may ". The attention of the learned Judge who decided *Kamalammal* v. *Rajarathna Naicker*[2] was not apparently drawn to section

1. (1882-1883) L.R. 10 I.A. 4 : I.L.R. 9 Cal. 482 (P.C.).
2. (1949) 1 M.L.J. 66
3. (1937) 2 M.L.J. 881.

157 of the Code and to the fact that the Civil Rules of Practice which were in force at the time *Pachiappa Achari* v *Poojali Seenan*[1] was decided are the same as are now found in Vol. I of the Civil Rules of Practice compiled by Mr. Satyamurthi Aiyar. As pointed out by Mr. Satyamurthi Aiyar himself, the numbering of the rules and the arrangement and the reference to the corresponding provisions of the old Code were all introduced by him and it is not as if the High Court under its rule-making power had, under the Code of 1908 exercising its powers under Part X of the Code, altered the number of the rules. The alteration of the numbers from 164 to 142 and from 165 to 143 was not made by the High Court but presumably by Mr. Satyamurthi Aiyar The assumption underlying the decision of the learned Judge (Somasundaram, J.) that the present rules as now found in Vol. I were enacted after the Code of 1908, is not correct As pointed out already, even under the old Code, the rules framed under it have the force of law and stand on the same footing as rules framed under the present Code Apparently, the attention of the learned Judge was not drawn to the language of section 652 of the Code of 1882

We are therefore of opinion that the decision of the Bench in *Venkatarama Sastri* v. *Venkatanarasimhan*[2] was correctly decided and that the decision of the single Judge in *Kamalammal* v. *Rajarathna Naicker*[3] is erroneous. We uphold the decision of the learned District Judge that the execution petition is not barred by limitation and the appeal is dismissed with costs.

Viswanatha Sastri, J —I would be content merely to express my concurrence with the judgment just delivered but for the fact that we are differing from the considered opinion of Somasundaram, J , shared as it is by Govinda Menon, J., in his order of reference In the case of *Kamalammal* v. *Rajarathna Naicker*[3], Somasundaram, J., decided that, under the present Civil Procedure Code, it was obligatory upon a decree-holder making his first application for execution to file along with the execution application a certified copy of the decree sought to be executed and that a first execution petition filed without a certified copy of the decree was not one in accordance with law within the meaning of Article 182, clause (5) of the Limitation Act. The learned Judge considered that rule 142 of the Civil Rules of Practice was the governing provision and that its language was so mandatory as to render a first execution application filed without a certified copy of the decree, an application not in accordance with law. There is an earlier decision of a Bench of this Court to the contrary reported in *Venkatarama Sastri* v. *Venkatanarasimhan*[2], under the present Civil Procedure Code, but Somasundaram, J , considered that the learned Judges of the Division Bench had not considered or discussed the relevant provisions of the Civil Procedure Code or rule 142 of the Civil Rules of Practice, an omission which, in his opinion, apparently detracted from the weight due to the judgment of the Division Bench It is true that the learned Judges of the Division Bench rested their decision solely on the language of Order 21, rule 11, Civil Procedure Code and did not refer to the provisions of sections 121, 122 and 127 of the Civil Procedure Code, or rule 142 of the Civil Rules of Practice on which Somasundaram, J , has rested his decision. The question, however, is whether the decision of Division Bench in *Venkatarama Sastri* v *Venkatanarasimhan*[2], which is binding on us and which governs this case, requires to be reconsidered (if necessary by a Full Bench) by reason of its conflict with the decision of Somasundaram, J., in *Kamalammal* v *Rajarathna Naicker*[3] I am respectfully of the opinion that the decision of the Division Bench in *Venkatarama Sastri* v. *Venkatanarasimhan*[2] lays down the law correctly. I may observe, lest it should be supposed that the point was overlooked, that the application before Somasundaram, J., was one for transmission of a decree for execution while here, as in *Venkatarama Sastri* v. *Venkatanarasimhan*[2], the application was for execution to the Court which passed the decree. This difference is, however, immaterial in view of the terms of rule 142

1. (1905) I.L R. 28 Mad 557.
2. (1937) 2 M.L.J. 881.
3. (1949) 1 M.L J. 66.

of the Civil Rules of Practice and the effect attributed to that rule by Somasundaram, J., in his judgment above referred to

Rule 142 of the Civil Rules of Practice is a mere re-numbering of the old rule 164 framed under the Civil Procedure Code of 1882 It is material to point out that rule 142 has not been made or promulgated in accordance with the procedure prescribed by Part X of the Civil Procedure Code of 1908 The question that arises is, how far the provisions of the Civil Procedure Code of 1908 override or are overridden by the Civil Rules of Practice framed under the Civil Procedure Code of 1882. Section 157 of the Civil Procedure Code furnishes the answer and provides that rules made under the Civil Procedure Code of 1882 shall, so far as they are consistent with the Code of 1908, have the same force and effect as if they had been made under the new Code. The necessary corollary is that if the Civil Rules of Practice framed under the old Code are, to any extent, inconsistent with the provisions of the Civil Procedure Code of 1908, they *pro tanto* cease to have operation after the coming into force of the Civil Procedure Code of 1908 Order 21, rule 11 is part of the Civil Procedure Code of 1908 and in so far as rule 142 of the Civil Rules of Practice is inconsistent with it, the latter must stand abrogated. This is the decision of the Full Bench of this Court in *Bademian Saheb* v. *Jankan Saheb*[1], a case evidently not brought to the notice of Somasundaram, J

The next question is whether rule 142 of the Civil Rules of Practice is inconsistent with or repugnant to Order 21, rule 11 of the Civil Procedure Code of 1908 Order 21, rule 11, clause (2) lays down with minute particularity the formalities required for a valid execution application. In the reported decisions some of these requirements have been considered to be of a mandatory character and non-compliance with them has been held to render the application one not in accordance with law. Among the formalities so enumerated in Order 21, rule 11, clause (2) as essential for an execution application, the production of a certified copy of the decree sought to be executed is not one Further, sub-clause (3) of rule 11 provides that

"The Court to which an application is made under sub-rule (2) may require the applicant to produce a certified copy of the decree."

The necessary implication is that the production of the certified copy of the decree sought to be executed as an annexure to the first execution application is not necessary and a cretified copy need be furnished only if and when the Court requires the applicant to produce it Rule 142 in so far as it requires an applicant who first applies to execute his decree to produce along with the application a certified copy of the decree is, in my opinion, inconsistent with Order 21, rule 11, sub-rules (2) and (3) and the two provisions cannot stand together By virtue of section 157 of the Civil Procedure Code of 1908, rule 142 of the Civil Rules of Practice must give way and Order 21, rule 11, sub-rules (2) and (3) alone must govern the decision of this question. On this part of the case, therefore, I regret I am unable to agree with the opinion of Somasundaram, J

Even when the Civil Procedure Code of 1882 was in operation and rule 164 of the Civil Rules of Practice (corresponding to rule 142) framed under that Code was in full force, it was held by a Division Bench of this Court in *Pachiappa Achari* v. *Poojali Seenan*[2], that the provisions of rule 164 of the Civil Rules of Practice (now rule 142) were merely directory and that non-compliance with them did not render an application for execution one not in accordance with law. Reliance was placed by the learned Judges on the analogous provisions of section 610 of the Civil Procedure Code of 1877 corresponding to Order 45, rule 15 of the present Civil Procedure Code, providing for the transmission of decrees of the Judicial Committee for execution by Subordinate Courts and requiring a copy of the decree sought to be executed to be filed along with the application for transmission. In *Hurrish Chunder Chowdry* v. *Kali Sundari Debia*[3], the Judicial Committee observed that

1. (1938) 1 M.L.J 495 : I.L.R. 1938 Mad. 734 (F B).
2. (1905) I.L.R. 28 Mad. 557.
3 (1882-1883) L R. 10 I A 4 at pp 15 and 16 I L.R. 9 Cal. 482 (P C).

the requirement of section 610, Civil Procedure Code, 1877, was merely of a directory nature intended to supply proper information about the Order in Council. Their Lordships in *Pachiappa Achari* v. *Poojali Seenan*[1], placed reliance on this decision of the Privy Council and came to the conclusion that the provisions of rule 164 (now rule 142) of the Civil Rules of Practice were merely directory and that the omission to file a certified copy of the decree sought to be executed along with the first execution application did not detract from its validity Somasundaram, J, distinguished the case in *Pachiappa Achari* v *Poojali Seenan*[1], on the ground that rule 164 (now rule 142) of the Civil Rules of Practice had not the force of law under the Code of 1882 while it has acquired such force by reason of the enactment of sections 121, 122 and 127 of the Civil Procedure Code of 1908 With all respect there is no warrant for this assumption which is a subversion of the true position. Section 652 of the Civil Procedure Code of 1882 gave the rules made under that Code statutory force as if enacted in the body of the Code itself and rule 164 (now 142) of the Civil Rules of Practice had the force of law when *Pachiappa Achari* v. *Poojali Seenan*[1] was decided Indeed, the position is that rule 142 of the Civil Rules of Practice (old rule 164) was legally operative at the time when *Pachiappa Achari* v *Poojali Seenan*[1] was decided and has now ceased to be such by reason of its repugnance to Order 21, rule 11, sub-rules (2) and (3) of the Civil Procedure Code of 1908. The distinction between a mandatory and a directory provision is not always easy to draw and *Pachiappa Achari* v. *Poojali Seenan*[1], having held that the requirement as to the production of a certified copy of the decree was of a directory nature, might well have been allowed to stand on the principle of *stare decisis* especially as the matter is one relating to procedure

For these reasons, I agree with my learned brother that a first application for execution which is not accompanied by a certified copy of the decree cannot, for that reason, be considered to be one not in accordance with law under Article 182, clause (5) of the Limitation Act I also agree with his conclusion as regards the result of this appeal.

V. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE VISWANATHA SASTRI.

Pentakota Naryudu and others .. *Petitioners* *

v

Yellapu Venkata Ramanamurthi and others .. *Respondents.*

Madras Estates Land Act (I of 1908), *sections* 3 (10) (*a*) *and* 185 (2) *and* (3)—*What is private land—Civil Procedure Code (V of* 1908), *section* 115—*Scope of—Interference by High Court—Principles governing.*

Direct or personal cultivation may be and is often a useful test for determining the character of land in an estate that is to say whether it is private land or ryoti land, but leasing by itself is not fatal to the claim that the land in question is private land

The notion of the private land of a zamindar being confined to land surrounding his residence is not accurate

If land had been let specifically as private land before 1898, such letting is relevant and admissible evidence of its character as private land and other evidence to prove its character as private land is also admissible

Where there is documentary evidence dating from a period anterior to 1898 showing that the land in a zemindari was dealt with as private land and there have been yearly leases now and then since 1891, the leases certainly indicate that the landholder continued to deal with the lands as private lands liable to be reduced to his physical possession whenever he required them for his own personal cultivation

Section 115 of the Civil Procedure Code is intended *inter alia* to keep Subordinate Courts within the limits of their jurisdiction Neither the trial Court can give jurisdiction to itself, nor can the appellate Court give jurisdiction to the trial Court, by an erroneous decision and in either case the High Court is competent to interfere in revision

Where the very basis and foundation of the jurisdiction of the Court below rests on the correctness of the conclusion of the lower Court as regards the character of the lands in question, if the High Court finds that the Court below assumed jurisdiction to try the suit for rent on an erroneous finding as to the character of the land, it can interfere under section 115, Civil Procedure Code

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1. (1905) I.L.R. 28 Mad 557

* C.R.P. No. 573 of 1945. 8th July, 1949.

Case-law discussed

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Vizagapatam, dated 28th December, 1944, in A.S No 145 of 1944 preferred against the decree of the Court of the District Munsif, Chodavaram, in O S No 150 of 1941.

B. V. Ramanarasu and *T V. R. Tatachari* for Petitioners.

E Venkatesam for Respondents

The Court delivered the following

JUDGMENT —This civil revision petition has been filed against the decision of the Subordinate Judge of Vizagapatam in A S No 145 of 1944 affirming the decree of the District Munsif in a suit for rent for 1939-1940 and 1940-41 in respect of certain lands situated in the zamindari village of Madgole The amount of the claim was less than Rs 500 and hence the case comes to this Court by way of a civil revision petition. The contention of the defendants, here petitioners, is that the lands in respect of which rent is claimed are ryoti lands, that they are tenants with a permanent right of occupancy and that the suit for rent was cognizable only by a revenue Court The respondent's case, accepted by the Courts below, is that the lands are his private lands and the suit for rent was therefore rightly filed in the Civil Court. It is stated for the petitioners that this finding is erroneous and that the lower appellate Court has misdirected itself in law in arriving at this conclusion

There was some discussion at the bar as regards the scope of the revisional jurisdiction of this Court in cases like the present, the respondents' contention being that the findings of the lower appellate Court on the issues of fact and law are not open to review by this Court under section 115 of the Civil Procedure Code. Reliance was placed on their behalf of the recent decision of the Privy Council in *Venkatagiri Iyengar* v *Hindu Religious Endowments Board*[1], where the Board upset the decision of a Division Bench of this Court in the exercise of its revisional jurisdiction, the ground of reversal being that even the misconstruction of a vital document governing the rights and liabilities of the parties were merely an error of law which, however grave, did not justify interference in revision under section 115 of the Civil Procedure Code. In so holding, the Judicial Committee reiterated their earlier views in *Amir Hasan Khan's case*[2] and *Balakrishna Udayar* v *Vasudeva Aiyar*[3]. What the Judicial Committee laid down in this triology of cases was that where a Court had jurisdiction to determine a question of fact or law and it determined that question, it cannot be said that it had acted illegally or with material irregularity, however erroneous its determination might be and the High Court could not correct the error in the exercise of its revisional jurisdiction The position here is different. The suit was for rent due in respect of lands situate in an " estate " and was tried and decreed by the District Munsif and his decree was affirmed on appeal by the Subordinate Judge Neither of the lower Courts would have had jurisdiction to try the case unless the lands in question were proved to be " private lands " of the landholder, the presumption being that they are not The objection here is to the jurisdiction of the lower Courts based both on the character of the Tribunal and the nature of the subject-matter of the dispute and does not rest merely on the ground that the lower appellate Court has erroneously found a fact or point of law, which though essential to the validity of its decree, it was competent to enquire into and decide If the Court below has, by a decision which is found to be erroneous, given itself jurisdiction to try a suit which it has no power to entertain, this Court can interfere under section 115, Civil Procedure Code The recent decision of the Judicial Committee referred to above deals with a different situation, namely, an erroneous decision on a question of law after jurisdiction had been legally assumed Here the vary basis and foundation of the jurisdiction of the Court below rests on the correctness of the conclusion of the lower Court as regards the character of the lands in question and if I find that the Courts below

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1. (1949) 1 M L J 505

2. (1884) L.R. 11 I.A. 237 : I.L R. 11 Cal. 6 (P.C.).

3. (1917) 33 M L J. 69 : L.R 44 I A 261 : I.L.R 40 Mad. 793 (P C)

assumed jurisdiction to try the suit for rent on an erroneous finding as to the character of the lands, I can interfere under section 115, Civil Procedure Code. See *Atchayya* v. *Seetharamachandra Rao*[1]. Both in *Amir Hasan Khan's case*[2] and in *Venkatagiri Iyengar* v. *Hindu Religious Endowments Board*[3], the Subordinate Court had jurisdiction to decide the dispute and while exercising that admitted jurisdiction, came to an erroneous conclusion on questions of law like limitation and the construction of a document In *Balakrishna Udayar* v. *Vasudeva Iyer*[4], the District Judge by a misconstruction of a statutory provision had given himself jurisdiction to direct an election to a temple committee. This Court set aside in revision the order of the District Judge accepting the result of the election and recognising and confirming the person elected as a member of the temple committee. The Privy Council held that as a question of jurisdiction was involved the High Court had power to interfere in revision and reverse the order of the District Judge Section 115, Civil Procedure Code, is intended *inter alia* to keep Subordinate Courts within the limits of their jurisdiction Neither the trial Court can give jurisdiction to itself, nor can the appellate Court give jurisdiction to the trial Court, by an erroneous decision and in either case, this Court is competent to interfere in revision. See a recent decision of the Privy Council in *Joychand Lal Babu* v. *Kamalakshan Chowdry*[5], reported after the arguments were heard in this case.

The crucial question, therefore, in the case is whether the lands in respect of which rent is claimed are " private lands ". If they are, the Courts below would have had jurisdiction to try the suit. In arriving at a conclusion on this question, the Courts below have not disclosed in their judgments whether they had in view the relevant considerations or the governing provisions of the Madras Estates Land Act This omission is partly responsible for the length of the arguments and of my judgment in this case

It is common ground that the lands are situate in the zamindari village of Madgole. Section 3 (10) (*a*) of the Madras Estates Land Act defines " Private land " as the domain or home-farm land of the landholder by whatever designation known such as *kambhattam*, *khas*, *sir* or *pannai* The rest of the definitions has no application to the present case, because it is not the case of the landlords that the lands have been cultivated as private land by themselves or by their own servants for a continuous period of 12 years immediately before Act I of 1908 came into operation Under section 185 (2) and (3) of the Madras Estates Land Act, in determining whether any land is the landholder's private land, regard shall be had to the question whether the land was before the 1st day of July, 1898, specially let as private land and any other evidence that may be produced. There is a proviso that the land shall be presumed not to be private land until the contrary is proved. There has been, in my judgment, some amount of misconception as regards the meaning of the words " domain " or " home-farm land " of the landholder—expressions found in section 3 (10) (*a*) of the Act To interpret these words as confined to " land immediately surrounding the mansion or dwelling house, the park or chase of a Lord " which would be the dictionary meaning of these English words, is to the import feudal ideas of mediæval E gland into the system of land tenures in this country without adequate justification The English draftsman of the Bill which afterwards became the Madras Estates Land Act as well as the English Revenue Member of the Executive Council of the day who piloted the Bill through the Legislature employed the expression " domain " and "home-farm" as the nearest English equivalents of the Tamil and Telugu words " pannai ", " kambhattam ", " seri ", etc. It is all very well when talking of the demesne lands of an English Duke or Marquis to use the term as denoting the land appurtenant to the mansion of the Lord of the manor. The manorial system was not

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1. (1912) 24 M L J 112 I L R 39 Mad 195 (F B)
2 (1884) L R. 11 I.A. 237 . I.L R. 11 Cal 6 (P.C).
3 (1949) 1 M L J 505
4 (1917) 33 M L J 69 L.R 44 I A. 261 : I L R 40 Mad 793 (P C.)
5 (1949) 2 M L J 6.

prevalent in this country. Zamindars lived in cities and forts for reasons of security and their private lands were not confined to the vacant spaces surrounding their palaces or residences It is a far-fetched construction to impute to the Madras Legislature an intention to incorporate the English conception of " demesne land " as a test for differentiating the public domain from private land in a zamindari I very respectfully venture to think that Wadsworth, O C J, unduly narrowed the meaning of the expression " private lands " when he defined it as " land appurtenant to the landholder's residence and kept for his enjoyment and use " and " as land which the landholder farms himself as distinct from land which he leases out to tenants to be farmed " (*Jagadesam Pillai* v *Kuppammal*[1]) Direct or personal cultivation may be and is often a useful test for determining the character of land in an estate that is to say whether it is private land or ryoti land but leasing by itself is not fatal to the claim, that the land in question is private land

It is unnecessary for the purpose of this case to trace the origin and history of the conception of " private land " in a zamindari The topic will be found discussed with reference to the different parts of the country in Baden Powell's Land System, Vol I, pages 166, 167, 449, 515, 695 and Vol 3, page 624 In the Northern Circars from which this case comes, home-farm lands are sometimes referred to as Savaram lands whose origin and characteristics will be found discussed in *Lakshmayya* v *Varadaraja Apparao*[2] Suffice it to say that this notion of the private land of a zamindar being confined to land surrounding his residence is not accurate. The distinction between public domain and private land in zamindari areas lay in this, that if land was private land, occupancy right could not be acquired in it unless the zamindar himself voluntarily transferred it to the category of ryoti land. " Private land " was the freehold of the zamindar All other cultivable lands within the ambit of the zamindari were ryoti or jereoyiti as they were called in the Northern Circars, *i e*, lands which a tenant could occupy on the customary terms and in respect of which he became a co-owner with the zamindar under the common law of the country as developed by the decisions of this Court in *Venkatanarasimha Naidu* v *Dandamudi Kotayya*[3] and the *Cheekati Zamindar case*[4] and embodied later in Madras Act I of 1908 So far as I know, in no case prior to *Zamindar of Chellapalli* v *Somayya*[5], was it suggested that a zamindar's private land must be confined to land surrounding his palace or residence as in the case of demesne land of an English Lord of the manor

Again, it is not an indispensable condition that private lands should be proved to have been cultivated by the landowner himself or his hired labourer within recent times It is recognised by sections 19 and 185 of the Madras Estates Land Act that private lands could be leased without impairing their character as private lands The relations between the lessor and lessee of private lands are governed by the contract of tenancy and not by Act I of 1908 As early as the celebrated case of the *Cheekati Zamindar*[4], Sir Subramania Aiyar, J, referred to the distinction between the terms of the leases granted in respect of *seri* lands and pattas granted in respect of ryoti lands The Judicial Committee in *Yerlagadda Mallikarjuna* v *Somayya*[6] appear to have approved of the observations of Sir John Wallis in *Zamindar of Chellapalli* v *Somayya*[5], that private land is land which a zamindar has cultivated himself and intends to retain as resumable for cultivation by himself even when from time to time he demises it for a season Under section 3 (10) (*a*) of the Madras Estates Land Act " private land " means lands styled as sir, khambattam, or pannai and also includes, by an extended application, land that had been cultivated by the landholder himself by his own servants or by hired labour with his own or hired stock for 12 years before Act I of 1908 came into force, even though in its origin it might not have been private land. There are two categories

1. (1946) 1 M L J 23 I L R 1946 Mad 687
2. (1912) 23 M L J 624 I L R 36 Mad 168
3. (1897) 7 M L J 251 I L R 20 Mad 299.
4 (1899) I L R. 23 Mad, 318 (325, 326).
5 (1914) 27 M L J 718 I L R 39 Mad 341
6 (1918) 36 M L J 257, L R, 46 I A 44; I L R 42 Mad. 400 (P C).

of private lands in zamindari areas contemplated by section 3 (10) (*a*), namely, private land properly so-called and land deemed to be private land by reason only of direct cultivation by the landholder for 12 years before the Act In the case of private land strictly so-called, leasing does not affect or impair its character as private lands In the case in *Chinnarigadu* v *Rangayya*[1], Madhavan Nair, J, held that the lands in question in that case were private lands by reason of their description as "kambattam" and "samasthanam khanigi" in spite of the facts that there was no evidence of direct cultivation by the zamindar at any time, that the lands had been leased to tenants under leases commencing from 1877 and styled as Sagubadi pattas and that the tenants were never turned out of the lands by the zamindar but were allowed to continue in occupation hereditarily If land had been let specifically as private land before 1898, such letting is relevant and admissible evidence of its character as private land and other evidence to prove its character as private land is also admissible *See* section 185 of Act of 1908 There has been a difference of opinion in this Court as to whether leases subsequent to 1898 are admissible to prove letting as private land, see for example *Chintan Reddi Sanyasi* v *Sri Rajesaji*[2], *Yarlagadda Mallikarjuna* v *Subbiah*[3], *Appurao* v *Kaveri*[4], *Zamindar of Chellapalli* v *Somayya*[5] The reasoning of the decision of the Judicial Committee in *Bindeswari Prasad Singh* v *Maharaja Kesho Prasad*[6], a case decided on the analogous provisions of the Bengal Tenancy Act, would seem to render admissions by tenant in leases subsequent to 1898 also admissible in evidence whatever be their probative value

In the light of the above principles, I have to consider whether the lands with which we are concerned in this suit are private lands The lands are situate in the village of Madgole itself and have been referred to as part of the Rajuseri lands of the Madgole zamindari in several documents dating from 1877 to 1939 This would show *prima facie* that the lands were regarded as the *seri* or private land of the Raju, *i e*, Zamindar of Madgole It may be that the expression "*seri*" is used in different senses in different parts of the Northern Circars, and that the use of the term "*seri*" in documents would not conclude the matter See *Lakshmayya* v *Varadaraja Apparao*[7], *Seshayya Garu* v *Rajah of Pitapur*[8] and *Apparao* v. *Sreeram Reddi Sanyasayya*[9] But the documents filed in the case show, in my opinion, that the expression "*seri*" was used to denote the private land of the Madgole zamindar

Exhibit P-4, dated 6th March, 1877, is a usufructuary mortgage for Rs 4,500 of "Rajuseri" lands of which the suit lands form a part The lands are described as "our private *seri* from a very long time till now" The mortgagee is empowered either to lease out the said land or carry on private cultivation Exhibit P-5, dated 25th August, 1892, is a permanent cowle of the suit lands and the rest of the "Rajuseri" lands granted by the zamindarini of Madgole to Venugopala Bhupathi the predecessor-in-title of the plaintiffs. The rent fixed is Rs 150 per annum and the grantee was authorised to enjoy the lands permanently either by cultivating himself or leasing them out Exhibit P-5 recites that the lands had been granted under yearly leases for the previous year and for the current year to three individuals and that the lands had been in the possession of the grantor till then Exhibit P-7, dated 21st May, 1893, is a deed of relinquishment executed by the three lessees referred to in Exhibit P-5 in favour of the grantee Venugopala Bhupathi on receipt of a sum of Rs 600 for the crops on the land and the cultivation expenses incurred by the lessees This document recites that the lands are to be taken back to the "*sontha seri*" of Venugopal Bhupathi These are also the documents prior to 1898 and the recitals therein show that the lands in question were regarded as the private lands of the Madgole zamindar

1 A I R 1925 Mad 789
2 1914 M W N 766
3 (1919) 39 M L J 277
4 (1917) 7 I W 271
5 (1914) 27 M L J 718, I L R 39 Mad. 341.
6 (1926) 51 M L J 587 L R 53 I A 164: I L R 5 Pat 634 (P C)
7 (1912) 23 M L J 624 I.L R 36 Mad. 168
8 (1916) 31 M L J 214
9. (1935) 69 M L J 25.

After Venugopal Bhupathi got the lands under the permanent cowle Exhibit P-5, there are two kadapas Exhibits P-8 and D-10, dated 26th June, 1901, each in respect of a portion of the Rajuseri lands for a period of five years executed in his favour by certain lessees The recital in these two documents is that the lessees were to carry on cultivation according to custom and that if Venugopal Bhupathi, the lessor, notified at the end of any Telugu year within the period of five years, his intention to resume direct cultivation of the land, the lessees would surrender possession to him without reference to the term of the lease. The term of the kadapas Exhibit P-8 and Exhibit D-10 expired in 1906 and no lease of the land from 1906 to 1917 is put in evidence. There is a cowle Exhibit D-1, dated 20th April, 1947, for one year executed by Venugopal Bhupathi in respect of a portion of the Rajuseri lands which are described as *sarva mokhasa* The lands are referred to as being in the cultivation of the lessor Objection was taken to the identity of this document and nobody connected with it has been examined to prove the nature or the enjoyment by the lessee under this lease deed though such evidence was stated to be available

On 22nd March, 1932, Venugopal Bhupathi and his sons usufructuarily mortgaged a two-third share of the Rajuseri land under Exhibit P-10 and executed a simple mortgage in respect of a third share under Exhibit P-12, dated 7th June, 1922 There was a further simple mortgage of the entire land under Exhibit P-12 (*c*), dated 20th October, 1924, and a usufructuary mortgage of the one-third share under Exhibit P-11, dated 23rd February, 1927, by Venugopal Bhupathi and his sons Under Exhibit P-1, dated 22nd March, 1939, that part of the Rajuseri lands which is now in question, was purchased by the present plaintiffs while other portions of the said lands not in question in this suit, were purchased under Exhibits P-13 and P-14. On 29th April, 1939, the defendants in the present suit executed a kadapa Exhibit P-2 in favour of the plaintiffs for a period of one year. It is on foot of this kadapa that the present suit for rent for 1939-40 is filed along with a claim for damages for use and occupation for the subsequent period.

It is admitted by the contesting defendant examined as D.W. 1 in the case that the lands in question were personally cultivated by the usufructuary mortgagees under Exhibits P-10 and P-11 and that subsequent to the sales in their favour by Venugopal Bhupathi, the vendees were themselves cultivating the lands personally except Ramu Naidu who used to lease out a portion of the lands purchased by him but not the lands now in question Mr. Venkatesam, the learned counsel for the respondents, naturally laid great stress on this evidence of the defendant himself as showing personal cultivation by the landholder for a period of about 17 years, immediately preceding the kadapa Exhibit P-2 There is also other oral evidence to the same effect to which it is unnecessary to refer in view of the defendant's own statement.

Thus, there is documentary evidence dating from a period anterior to 1898 showing the land in question was dealt with as private land. There have been yearly leases and term leases now and then since 1891. The leases however are not continuous The tenants have changed as well as the rents payable in respect of the lands. These leases certainly indicate that the landholder continued to deal with the lands as private lands liable to be reduced to his physical possession whenever he required them for his own personal cultivation From 1922 till 1929 there has been personal cultivation by the mortgagees and vendees from the original landholder. On this evidence, I am unable to say that the Courts below erred in law in arriving at the conclusion that the lands in question were private lands.

In view of my conclusion that the lands are private lands, it is unnecessary for me to consider at length two other questions which were argued at the bar Mr. Ramanarasu, for the petitioners, contended that the most that could be claimed for the plaintiffs in this case is that the grant in favour of Venugopal Bhupathi under Exhibit P-5 of 1892 was of both the warams. In that event, the grantee and

his successor-in-title would be "landholders" within the meaning of section 3 (5) of the Madras Estates Land Act and the present suit for rent would lie in the Revenue Court He relied on the decisions in *Brahmayya* v *Achiraju*[1] and *Narayanaraju* v *Suryanarayadu*[2] in support of his contention Mr. Venkatesam for the respondents contended that even on the assumption that the zamindarini of Madgole merely owned both the warams in the Rajuseri lands and that the lands were not private lands, the grantee Venugopal Bhupathi became a ryot under the terms of Exhibit P-5 and the subsequent acquisition of the melwaram interest under the terms of the compromise Exhibit P-7 would not affect his status as a ryot. He referred to the decision in *Manikyamba* v *Mallayya*[3] He contended that under section 19 of the Estates Land Act, the relationship between a ryot and his lessee is not governed by the Act, but by the terms of their contract In view of my conclusion that the lands in question are private lands, it is unnecessary to refer to these contentions further

I hold therefore that the conclusion of the Courts below that the lands in question in this suit are private lands is supported by the evidence in the case and is not shown to be erroneous in law I dismiss the civil revision petition with costs.

V P S ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE VISWANATHA SASTRI

The Udipi Municipal Council, represented by its Commissioner, T Harichandra Rao .. *Appellant**

v

K Vasudevacharya and others . *Respondents*

Madras District Municipalities Act (V of 1920), sections 81 (3) *and* (4) *and* 354 (1)—*Vacant site with shrubs of spontaneous growth green leaves of which were used for manure —If " used exclusively for agricultural purposes "—Assessment under section* 81 (3)—*Interference by Court with assessment—When permissible.*

Section 81 (4) of the Madras District Municipalities Act is not confined to cultivable or agricultural land and applies to land exclusively used for agricultural purposes. Where the evidence is that dried leaves of the shrubs of spontaneous growth on vacant plots are collected and used as fuel while the green leaves are used as bedding for cattle and manure for cultivable lands and that the shrubs and plants on the land may grow into trees fit for firewood, it cannot be said that the land was " used exclusively for agricultural purposes " and an assessment of such land to property tax under section 81 (3) and not under section 81 (4) cannot be assailed

In any event where the municipal council determined the question of fact (whether the site assessed was or was not used exclusively for agricultural purposes) on the evidence and materials available, the Civil Court cannot assume the powers of the assessing authority and investigate the facts afresh to find out whether its conclusion on the facts is correct

If on the facts proved, assumed or admitted by the assessing authority, the assessment is found to have proceeded on an erroneous basis, the Civil Court can step in and declare the invalidity of the assessment on the ground that the provisions of the Act have not been in substance and effect complied with

Appeal against the decree of the Court of the Subordinate Judge, South Kanara, in A S No 308 of 1945, preferred against the decree of the Court of the District Munsiff, Udipi, in O S No 334 of 1943.

K Kuttikrishna Menon for Appellant

K Srinivasa Rao for Respondents.

The Court delivered the following

JUDGMENT —This second appeal has been preferred by the Udipi Municipal Council whose suit for the recovery of Rs 103-5-9 as arrears of property tax due from the three defendants has been dismissed by the Courts below The tax is sought to be levied under section 81 (3) of the Madras District Municipalities Act (hereinafter referred to as the Act) on 6 acres and 38 cents of vacant land belonging to the defendants and situate within the limits of the Municipality. The defendants,

1 (1922) 43 M.L.J 229 I L R 45 Mad 716 (F B).
2 (1939) 2 M L J 901 : L R 66 I A. 278 · I.L R 1940 Mad 1 (P C).
3 (1924) 47 M L J. 393 I L R 47 Mad 942

* S. A. No. 1271 of 1946 4th August, 1949.

here respondents, resist the claim on the grounds that they should have been assessed to property tax under section 81 (4) of the Act and not under section 81 (3) and they should have been separately and individually assessed on the share of the property held by each of them Their contentions were accepted by the Courts below. It is unnecessary to set out other defences which are not now material.

The appellant urged two points before me (i) the assessment in this case was rightly made under section 81 (3) of the Act, and (ii) even otherwise, it is not open to the civil Court to decide on the propriety of the assessment in this case Lands which are not used exclusively for agricultural purposes are taxable on a percentage of their capital value under section 81 (3), while lands used exclusively for agricultural purposes are taxable on a proportion of their annual value under section 81 (4) The burden of the tax is lighter in the latter case than in the former. The property in question is a vacant land overgrown with a few wild plants and shrubs of spontaneous growth whose leaves are said to be used as manure for cultivable lands The question is whether when the vacant site in question has never been ploughed, tilled or sown at any time and no tree or shrub has been planted by the owner, it could be said that the land has been used exclusively for agricultural purposes merely because the leaves of the shrubs growing on the plot are used for manuring other lands

It has been held that income derived from forest trees of spontaneous growth and jungle fruits is not "agricultural income" within the meaning of the Income-tax Act *Yuvaraja of Pitapuram* v *Commissioner of Income-tax*[1], *Province of Bihar* v. *Maharaja Pratab Udainath Sahi Deo*[2] Under the Income-tax Act "agricultural income" means income derived from land which is used for agricultural purposes. In *Kaju Mal* v *Saligram*[3], the Judicial Committee affirmed a decision of the Lahore High Court to the effect that a bit of natural forest which did not lie within a village site was exempt from pre-emption as it was not agricultural land or land used for purposes subservient to agriculture. In *Kesho Prasad Singh* v. *Sheo Prakash Ojka*[4], it was held that a mango tope was not land used for agricultural purposes within the meaning of section 79 of the Agra Tenancy Act, 1901 "Agriculture" in its ordinary and primary sense implies the tillage or cultivation of the soil by human effort with or without the aid of animal or mechanical power It is also used in a wider sense to cover the allied pursuits of harvesting and gathering in the crops and the rearing of live stock, see *Kadirvelsami Naicker* v *Sultan Ahmed*[5]. An anthology of Indian decisions on this topic will be found in *Sarojini Devi* v *Subramaniam*[6], where this Court held that mango grove was "agricultural land within the meaning of the Hindu Women's Property Act" The meaning of the expressions "agricultural", "agricultural land" and "agricultural purposes" would depend upon the definitions of these terms in various enactments and the object and purpose of such enactments In *Emperor* v. *Alexander Allen*[7], it was held that pasture lands must be considered to be lands used solely "for agricultural purposes" within the meaning of section 63 of the Madras District Municipalities Act of 1884 as amended in 1897 which was then in force The language of section 81 (4) of the Act is similar and applies to land used "exclusively for agricultural purposes". If a piece of urban vacant site is exclusively used as a granary for storing the produce of agricultural land or as a cattle shed for plough bulls or as a storehouse for manure or agricultural implements or even for the purpose of growing plants to be used as manure for agriculture, it must be held to be used for "agricultural purposes" within the meaning of section 81 (4) See *Murugesa Chetti* v *Chinnathambi Goundan*[8] The land itself need not be tilled or cultivated

1 (1946) 1 M L J 120 I L R 1946 Mad 745
2 (1941) I L R 20 Pat 699
3 (1923) 46 M L J 536 L R 51 I A 11 I L.R 5 Lah 50 (P C)
4. (1924) 47 M L J 824 . L R. 51 I.A. 381 I.L.R. 46 All. 831 (P.C.)
5 (1946) 2 M L J 371 I.L R 1947 Mad 466
6 (1944) 1 M.L J 361 I L.R 1945 Mad 61
7 (1901) 12 M L J. 393 . I L R. 25 Mad. 627
8. (1901) I L R. 24 Mad. 421 at 424.

nor need any produce be raised therein by human effort Section 81 (4) is not confined to cultivable or agricultural land and applies to land exclusively used for agricultural purposes In this case it is in evidence of P W 1 that dried leaves of the shrubs on vacant plots like the present one are collected and used as fuel while green leaves are used as bedding for cattle and manure for cultivable lands D W 1 admits that the shrubs and plants on this land may grow into trees fit for firewood and that the dry leaves of the plants are used as fuel. On this evidence it cannot be said that the land now sought to be assessed is used exclusively for agricultural purposes.

Further I consider that the Court had no power to interfere with the assessment levied by the Municipal Council or its executive authority in this case. Section 354 (1) of the Act omitting portions not now relevant, is as follows :—

"No assessment or demand made and no charge imposed, under the authority of this Act shall be impeached or affected by reason of any mistake in respect of the amount assessed, demanded or charged, provided that the provisions of this Act have been, in substance and effect, complied with"

It has no doubt been held by this Court that where the basis of the assessment is itself erroneous, the levy of tax on that basis is illegal and it is open to the Court to interfere and prevent the unauthorised levy or order a refund if the tax has been collected under compulsion *Municipal Council, Mangalore* v *The Codial Bail Press*[1], *Sankaranarayana Reddi* v *Taluk Board, Aruppukottai*[2], *Balasuryaprasada Rao* v. *Taluk Board, Chicacole*[3], *Kamaraja Pandia Naicker* v *Secretary of State*[4]. But these cases have, in my opinion, no application to the facts of the present case. The Municipal Council was empowered to levy an assessment under section 81 (3) and (4) of the Act on vacant lands If the land was used exclusively for agricultural purposes, the assessing authority had to proceed under section 81 (4) and if not, under section 81 (3) It had power to determine and determined the question of fact on the evidence and materials available and its conclusion was that the land in question was not used exclusively for agricultural purposes. It may be that a different view on the facts is possible. All that can be said for the respondents is that the executive authority of the Municipal Council came to a wrong conclusion on a matter of fact which it was within its competence to decide If so, their remedy was by way of an appeal to the Municipal Council The Civil Court cannot assume the powers of the assessing authority and investigate the facts afresh to find out whether its conclusion on the facts is correct. If on the facts found, assumed or admitted by the assessing authority, the assessment is found to have proceeded on an erroneous basis, the Civil Courts can step in and declare the invalidity of the assessment on the ground that the provisions of the Act have not been in substance and effect complied with No statutory body can give itself power to impose a tax on citizens by an erroneous interpretation of the taxing provisions in the statute and if it does so, the aggrieved taxpayer has a right to get redress in the ordinary Courts In the present case, however, I am of the opinion that the assessment cannot be assailed on this ground The error, if any, related to the appreciation of the materials available for arriving at a conclusion on a question of fact which the assessing authority had to determine in the course of making an assessment

Lastly there remains the question of the liability of the different defendants in respect of the tax demanded by the Municipality It has been found by the Courts below that respondents 1, 2 and 3 have distinct and separate shares in the lands sought to be assessed and they have been separately assessed to property tax for many years in the past The lower appellate Court has held that the clubbing together of the three assessments into one and the removal of the names of respondents 2 and 3 from the assessment register without notice to them was improper and that there was no demand in respect of the property tax on respondents 2 and 3 On these grounds respondents 2 and 3 have been exonerated from

1 (1903) 14 M L J 410 I L R. 27 Mad 547
2. (1937) 2 M.L.J 903
3 A I R 1931 Mad. 822.
4 (1934) 69 M.L J 695.

liability by the lower appellate Court irrespective of the correctness of its conclusion on the other points in the case Mr K Kuttikrishna Menon, the learned counsel for the appellant, could not dispute the correctness of the decision of the lower appellate Court on this last point

I reverse the decision of the lower appellate Court and remand the appeal for disposal on the merits There will be no order as to costs in this second appeal.

ORDER —It is represented that the first respondent has deposited the amount payable by him and that a remand is unnecessary. I therefore direct that the second appeal be dismissed

K.S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE MACK.

Bhagavathula Venkatachalapathi *Petitioner**

v

The Province of Madras represented by the Collector of Guntur *Respondent*

Court-Fees Act (VII of 1870), Schedule I, Article 12 (Madras)—Succession certificate—Application for —Stamp duty payable on the aggregate and not on the individual debts specified in the certificate.

The aggregate of the debts and securities specified in the certificate must determine the stamp duty payable under Article 12 (Madras) of Schedule I of the Court-Fees Act. It cannot be said that such duty is payable on the individual debts only

In re *Sunderji Lalji,* A I R 1947 Bom 30 and In re *Nalinikanta Pal,* (1933) I L R 60 Cal. 1262, followed.

Pirthwi Nath Bhargava v *Estate of late Triloknath Bhargava,* (1934) I L R 10 Luck 196, not followed

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court, Guntur, in unregistered C.F.R. No. 3822 of 1948 in O P. No of 1948.

Neti Subrahmaniam for Petitioner

The Government Pleader (*K Kuttikrishna Menon*) for Respondent

The Court delivered the following

JUDGMENT —The petitioner who applied for a succession certificate seeks to revise an order by the learned District Judge, Guntur, directing him to pay stamp duty on the aggregate amount of debts and securities for which the certificate was applied rejecting his contention that he should pay stamp duty under Schedule I, Article 12 of the Court-Fees Act on the individual debts Schedule I, Article 12 prescribes a stamp of 2 per cent. "on the amount or value of any debt or security specified in the certificate ", if less than Rs 5,000, and 3 per cent on the amount or value of any debt or security to which the certificate is extended.

There is no Madras decision on this point My attention has been drawn to a ruling by the learned Master of the High Court in 1937 in which following the Bench decision of the Lucknow High Court in *Pirthwi Nath Bhargava* v. *Estate of late Triloknath Bhargava*[1], he took the view that stamp duty was payable on the individual debts and securities and not on the aggregate. It is said that this practice continues on the Original Side of the High Court

Two views have been taken about the interpretation of the words " on the amount or value of any debt or security specified in the certificate ". Meredith, J., of the Patna High Court followed the opinion of the learned Bench in the Oudh decision In a more recent Bench decision of the Bombay High Court, In re *Sunderji Lalji*[2], Stone, C J and Kania, J , as he was then, held that the words " any

* C R P. No 1634 of 1948 2nd September, 1949.

1. (1934) I.L.R. 10 Luck. 196.
2. A.I.R. 1947 Bom 30.

debt or security" in this context embraced all the debts and securities specified in the certificate and that it must be the aggregate of all which determines the amount of the stamp to be paid and not each of the items as specified in the application I have no hesitation in adopting the view of the learned Bombay Bench. In the first place it is extremely difficult to base the interpretation that individual debts were contemplated by Schedule I, Article 12, on any recognised fiscal principle An elementary rule of taxation is to graduate the scale of fees payable in proportion to the relief sought or the benefit to be reaped It appears to me quite immaterial from the point of view of the person applying for succession certificate whether he collects Rs 50,000 from one person, two persons or 50 persons He still gets Rs 50,000 It is reasonable on accepted fiscal and equitable considerations that he should pay stamp duty on Rs 50,000 whether he seeks to collect from one, two or 50 persons If we adopt the alternative interpretation of which I am bound to say at first sight the words are also capable, *viz*, individual debts or securities, I find it difficult to give this article any fiscal meaning In Bombay and also in Calcutta (In re *Nalinikanta Pal*[1]), learned Benches have taken the view which I prefer to follow, there being no decision by any Madras Judge on this point that the aggregate of the debts and securities must determine the stamp duty. I hold that the learned Judge has adopted the correct view as regards the stamp payable, *viz*, on the aggregate and not on individual debts under Schedule I, Article 12. The petition is dismissed, but in the circumstances without any order as to the costs

K S — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE MACK.

Naranamangalath Manakkal Parameswaran Nambudiripad . *Petitioner**

v.

Kuttah Narayanan and others .. *Respondents.*

Madras Temple Entry Authorization Act (V of 1947), section 6—Scope and object of—Reference to Provincial Government as to whether a place is a temple as defined in the Act—Who is bound to make reference—Suit if barred

Section 6 of the Madras Temple Entry Authorization Act, 1947, does not cast on the Court in which a suit is filed to enforce rights created by the Act, any obligation to stay such a suit and make a reference to the Provincial Government to decide whether the place in dispute is or is not a "temple" as defined in the Act. The section lays a mandatory obligation on the parties concerned in a dispute, as to whether a place is or is not a temple, to refer it first to the Provincial Government and is designed to give the parties affected an easy remedy free from court-fee and to assist them in the enforcement or resistance of rights claimed under the Act without compelling them to go to Court Section 6 will not be a bar to the maintainability of a suit for the purpose

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif, Ponnani, dated 31st March, 1948, in O S. No. 413 of 1947.

N. Sundara Aiyar for Petitioner

Respondents not represented

The Court delivered the following

JUDGMENT.—This petition raises a question of the scope of section 6 of Madras Act V of 1947, which authorised entry into Hindu temples and the offer of worship therein by certain classes of Hindus who by custom or usage were previously excluded from such entry and worship. Section 3 of the Act declared the rights of excluded classes to enter into a Hindu temple and offer worship therein and also the right to bathe in any sacred tank situated within or outside the precincts of

1. (1933) I.L R 60 Cal. 1262

* C. R. P. No. 914 of 1948. 22nd August, 1949.

the temple. The petitioner is the defendant in a suit filed by the respondents who have made no appearance on this petition They are two Thias, one Nambudiri Brahmin and two Nayars, who joined in a suit to enforce the right of entry into the temple and to bathe in a tank attached to it impleading the petitioner as the defendant The petitioner pleaded that the temple was a private one belonging to his family and also *inter alia* that under section 6 the Court was bound to refer for the determination of the Provincial Government the question raised in his written statement, *viz*, whether the place in question was or was not a temple as defined in the Act On a preliminary issue the learned District Munsif held that section 6 was not a bar to the maintainability of the suit

Section 6 reads as follows

"If any question arises as to whether a place is or is not a temple as defined in this Act, the question shall be referred to the Provincial Government and their decision shall be final subject, however, to any decree passed by a competent civil Court in a suit filed before it within six months from the date of the decision of the Provincial Government"

It is argued that the section is silent as to when the question arises and that whether it arises before or after the institution of the suit, the question shall be referred to the Provincial Government According to the plaint allegations defendant put up a fence to stop the plaintiffs from entering the temple or tank, presumably therefore prior to the suit the defendant took the position that the temple and tank were the private property of his own family Section 6 appears to lay down an obligation on him also, in the circumstances, to refer the question as to whether the temple and the tank claimed by the petitioners as places of public worship and usage was or was not a temple as defined under section 2 (2) of the Act This obligation defendant failed to perform, nor has he taken any steps in this direction even after the suit was filed. It is argued that there is a mandatory duty cast upon the Court to make the reference to the Provincial Government and stay the present suit until their decision is reached If this position is accepted the stay of the suit will have to be continued still further as the decision of the Provincial Government is subject to a decree passed by a competent Civil Court in a suit filed within six months of the Provincial Government's decision The learned District Munsif fully appreciated the absurd position which would result if he stayed the suit and made a reference to the Provincial Government. Section 6 does not cast on the Court in which a suit is filed to enforce rights created by Madras Act V of 1947 any obligation to stay such a suit and make a reference to the Provincial Government to decide whether the place in dispute is or is not a temple. Section 6, as it appears to me, lays a mandatory obligation on the parties concerned in a dispute, as to whether a place is or is not a temple, to refer it first to the Provincial Government and is designed to give the parties affected an easy remedy free from court-fee to assist them in the enforcement or resistance of rights claimed under the Act without compelling them to go to Court

There appears to have been no suit notice issued by the plaintiffs to defendant before the suit was filed A regrettable characteristic of such litigation is the absence of any preliminary correspondence between the lawyers on both sides with a view to bring the parties, if possible, together In this case a suit appears to have been filed by the plaintiffs without any notice of suit at all The result has been that the avenue of section 6 which ought and could have been explored before a suit was filed has been grossly neglected by both sides While deprecating the impulsiveness of the vakil for the plaintiffs in rushing to Court with this suit, I see no grounds for any interference with the order passed by the learned District Munsif which appears to me correctly to interpret the scope of section 6.

It is noteworthy that ultimately under section 6 the authority to decide whether a place is or is not a temple is the Civil Court itself. In the present case it is extremely difficult to say who ought to have performed the obligation under section 6 in the first instance, whether plaintiffs on their rights to use the temple being obstructed

by the putting up of the fence or the defendant who obviously knew of the intentions of the plaintiffs to use the temple as places of worship in spite of his protests and obstruction Section 6 is not an easy one to interpret but when the possible interpretations give one the choice between one which is reasonable, and one which is unreasonable and likely to involve a protracted delay which the framers of the Act could never have, in my view, contemplated, the Court would be justified in giving the section the more reasonable interpretation which the learned District Munsif has in the present case given I find myself in complete agreement with the view he has taken of section 6 The petition is dismissed but with no order as to costs

K S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HORWILL AND MR JUSTICE BALAKRISHNA AYYAR

Nishtala Subrahmanya Somayajulu . *Appellant* *

v

Kannepalli Lakshmi Somi Devi *Respondent*

Provident Funds Act (XIX of 1925), section 5—Nominee predeceasing the subscriber—Whether nomination still effective as to vest moneys in the heirs of the nominee—Subscriber also dying prior to amendment of section 5 in 1946—Right if affected

Where a person who was a subscriber to a Government Provident Fund, died before the amendment of section 5 of the Provident Funds Act in 1946 and his nominee, his wife, had also predeceased him, on the question whether his nominee's heir was entitled to a succession certificate,

Held, That since the nomination was never revoked at any time, the result was under the section, the nominee became entitled absolutely to the money deposited in the Fund In the revised rules of 1935 there was no rule to the effect that a predeceased nominee's nomination became null and void as a result of the new rules

Sitaramaswamy Patnaik v *Venkatarama Rao Patnaik*, (1944) 1 M L J 198 and *Mon Singh* v *Mothi Bai*, (1935) 71 M L J 790 I L R 59 Mad 855, followed

The amendment made to section 5 of the Provident Funds Act in 1946 will not affect the heirs of the nominee as it has no retrospective effect

Appeal against the order of the District Court, Vizagapatam, dated 31st August, 1948, in O P No 45 of 1948

B V Ramanarasu for Appellant

P Somasundaram and *P Suryanarayana* for Respondent

The Judgment of the Court was delivered by

Balakrishna Ayyar, J—The appellant is the brother of the respondent. Both of them are the children of one Anandaraya Sastri, who was a Sub-Inspector of Police and a subscriber to the General Provident Fund. He nominated his wife, Satyavathamma, to receive the amount standing to his credit in the provident fund in the event of his dying before the money was paid over to him , but Satyavathamma predeceased him She died in August, 1938, while Anandaraya Sastri survived till 8th March, 1946 The appellant applied for a succession certificate in the Court of the District Judge of Vizagapatam. The respondent who is his sister opposed the application claiming that she was entitled to the money. The learned Judge dismissed the application of the appellant and directed that a succession certificate should be issued in favour of the respondent Hence this appeal.

Note 2 to rule 17 of the rules regulating the General Provident Fund as they stood in 1926 provided,

" when a person named in a Form of Declaration dies before the subscriber, the Declaration shall, in the absence of a direction to the contrary in the Form of Declaration, become null and void in respect of that person "

It was therefore argued that as Satyavathamma predeceased the subscriber, the nomination in her favour became null and void, that Satyavathamma got no

* A.A.O. No. 31 of 1949. 11th August, 1949.

benefit under the nomination form, and that therefore the respondent, who is her daughter cannot get the money which the subscriber had deposited in the provident fund. This argument overlooks the fact that in 1935 the provident fund rules were revised and the previous rules expressly superseded In the rules framed in 1935 no clause corresponding to the Note just quoted is to be found That apart, section 5 of the Provident Funds Act as it stood at the time that Anandaraya Sastri died contained this provision,

"............notwithstanding anything contained in any law for the time being in force or any disposition, whether testamentary or otherwise, by a subscriber to, or depositor in, a Government or railway provident fund of the sum standing to his credit in the fund, or of any part thereof, any nomination, duly made in accordance with the rules of the fund, which purports to confer upon any person the right to receive the whole or any part of such sum on the death of the subscriber or depositor, shall be deemed to confer such right absolutely, until such nomination is varied by another nomination "

The nomination made in favour of Satyavathamma was not revoked at any time, and the result is that under that section she became absolutely entitled to the money deposited in the fund The respondent who is her daughter would therefore be entitled to this money

This question was considered in *Mon Singh* v *Mothi Bai*[1], where it was ruled that,

"the right to receive the money which was conferred by the provident fund rules meant a vested right in the money which passed to the heir of the nominee at his death "

This decision was followed in *Sitaramaswamy Patnaik* v. *Venkata Rao Patnaik*[2] That was a case where a person employed in a railway company had a deposit standing to his credit in the provident fund He had nominated his first wife as the person entitled to the amount after his death The woman predeceased him, and he subsequently did not vary the nomination. It was held that the amount in deposit vested in the nominee absolutely An attempt was made in that case to make a distinction between nomination in favour of a dependent and nomination in favour of a person who was not a dependent ; but it was held that there was no substance in such a distinction

It was argued that on the death of the nominee it must be deemed that the nomination had been revoked ; but no authority for such a view can be found either in the Act or the rules On the other hand, the language of the section which has just been referred to is very clear that notwithstanding the death of the nominee the right would vest in him absolutely. The amendment made in 1946 to the Provident Funds Act does not affect the present case, since it is not retrospective in its operation The proviso to sub-section 3 of section 5 of the amended Act makes it clear that the amendment

"shall not affect any case in which before the said date any sum has been paid or has under the rules become payable in pursuance of any nomination duly made in accordance with those rules "

The amendment came into force on 18th April, 1946, and Anandavaraya Sastri died on 8th March, 1946.

It was finally argued that the respondent was not entitled to a succession certificate in her favour, as she was only a respondent and had made no independent application in her own behalf, but in view of the fact that in her counter which is a verified statement she has included a prayer that a certificate might be issued in her favour—and that all the parties were before the Court,—this objection becomes an extremely technical one There is nothing to be gained by setting aside the order of the learned District Judge and directing the respondent to file a fresh application ; the result is bound to be the same In the circumstances there is no need to interfere with the order of the learned District Judge.

The appeal is therefore dismissed with costs

K.C. ——— *Appeal dismissed.*

1. (1935) 71 M.L.J. 790 : I.L.R. 59 Mad. 855. 2 (1944) 1 M.L.J. 198.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAGHAVA RAO.

Chunduru Krishnayya . *Appellant* *

v

Kolluri Subba Rao and another . *Respondents.*

Promissory note—Promissory note executed by lawful guardian—Debt binding on minor's estate—Suit by endorsee of the promissory note—Suit on promissory note without assignment of debt—Whether promissory note could itself be sued upon or only the debt evidenced thereby.

There is nothing in principle which renders the analogy of the Full Bench ruling in *Maruthamuthu Naicker* v *Kadir Batcha Rowther*, (1938) 1 M L J 378 I L R. 1938 Mad 568, inapplicable to a case of a suit by the endorsee of a promissory note executed by the guardian-*de jure* of a minor and the only question is whether the actual wording of the endorsement precludes relief to the plaintiff on the basis of the debt apart from the promissory note The fact that the endorsement bears no stamp such as is required in law for the debt to be validly assigned is not a conclusive circumstance

Obiter Although the proposition that the distinction between a suit on a promissory note executed by a lawful guardian of a minor for a debt binding on his estate and a suit on the debt evidenced thereby is merely verbal and not of substance, requires some qualification in certain cases, the court must, where such qualification is not called for accept the proposition as a rule of sound common sense and substantial justice

Appeal against the decree of the Court of the Subordinate Judge, Bapatla in A S No. 202 of 1945, preferred against the decree of the Court of the District Munsif, Ongole, in O.S No 318 of 1944.

V. Subrahmanyam for Appellant

K. Umamaheswaram, K Ramaseshayya and *K Kanniah* for Respondents

The Court delivered the following

JUDGMENT —In this case two interesting questions of law have been argued before me at some length, *viz*, (1) whether a promissory note executed by a lawful guardian of a minor for a debt binding on his estate can itself be sued upon or only the debt evidenced thereby can be sued for, and (2) whether an endorsee of such a promissory note can without any assignment of the debt sue on the promissory note for the recovery of the debt evidenced thereby

The Courts below dismissed the suit out of which this second appeal arises. The plaintiff has appealed The ground of the dismissal of the suit by the Courts below is that although by means of an amendment of the original plaint the plaintiff has raised the case of relief on the basis of the debt quite apart from and in addition to the promissory note basis, the endorsement of the promissory note does not *per se* carry with it the right to recover without an assignment of the debt itself which there is not It is common ground before me that if this suit is to be decreed the case must go back to the lower appellate Court for a determination of the exact amount due on an application of the Madras Agriculturists Relief Act which was not done by the Courts below.

On the first point the appellant's learned counsel relies on the observations in the judgment of a Full Bench of this Court delivered by Ramesam, J, in a case reported in *Satyanarayana* v *Mallayya*[1]. The observations are at page 742 of the report and are as follows :—

"It was suggested that in such a case the suit should be on the debt and not on the note. But this seems to be a merely verbal distinction and not one of substance ; *Krishna Chettiar* v. *Nagamania Ammal*[2]. A note is only evidence of a debt It is true that in the case of insufficiently stamped promissory notes parties are not allowed to fall back upon the debt where the debt and the making of the note were simultaneous. Such a principle is necessary to protect the interests of public revenue It is not necessary to extend the principle beyond such a case".

The respondents' learned counsel relies, as against the appellant's argument founded on these observations, on the adverse comment made on them by Varadachariar, J.,

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* Second Appeal No. 1692 of 1946 7th September, 1949

1. (1934) 68 M L J 540, I L.R. 58 Mad. 735. 2. (1915) I.L R. 39 Mad. 915.

in *Narayanarao* v *Venkatapayya*[1], to the effect that it seemed to his Lordship too sweeping to say that for all purposes the distinction was unsubstantial To take one instance, his Lordship stated, the difference would be very material when the Court is called upon to apply the provisions of sections 120 and 121 of the Negotiable Instruments Act The learned advocate for the respondents has also drawn my attention to the ruling of a Full Bench of five Judges of this Court in *Sivagurunatha* v *Padmavathi*[2], as shaking the authority of the Full Bench of three Judges reported in *Satyanarayana* v *Mallayya*[3]

With reference to the first of these submissions of learned counsel I am of opinion that although the proposition of Ramesam, J , does require qualification in certain cases as instanced by Varadachariar J , the Court must, where such a qualification is not called for, accept the proposition as a rule of sound common-sense and substantial justice Understood in this sense the view of Ramesam, J , is not, in my opinion, liable to rejection merely because of the observations of the learned Chief Justice in the Full Bench decision reported in *Pundarikakshayya* v *Sreeramulu*[4], on which strong reliance has been placed for the appellant I may point out in this connection that the decision in *Satyanarayana* v *Mallayya*[3], is referred to at page 252 of the report of the case in *Pundarikakshayya* v *Sreeramulu*[4], but without any disapproval whatsoever

With reference to the second of the submissions made by Mr Umamaheswaram, I am perfectly clear that it is erroneous because what the Full Bench of five Judges did in *Sivagurunatha* v *Padmavathi*[2], was to overrule *Satyanarayana* v *Mallayya*[3], not at all on the point at present under discussion but on another point altogether, *viz*, whether the Court can look into the surrounding circumstances when deciding whether the maker of a promissory note has executed it as the agent or representative of another so as to exclude personal liability on his own part

So much with reference to the first question in this appeal on which I do not find it necessary however to express my final opinion in view of the conclusion which I have arrived at on the second question

On this second question Mr Umamaheswaram for the respondent urges that a Full Bench of this Court has ruled in *Maruthamuthu Naicker* v *Kadir Batcha Rowther*[5], that the endorsee of a promissory note executed by the managing member of a joint Hindu family is limited to his remedy on the note and is not entitled to sue the non-executant coparceners on the ground of their liability under the Hindu law, unless the endorsement is so worded as to transfer the debt as well, and the stamp law is complied with and that since the wording of the endorsement in the present case does not cover the debt as apart from the promissory note and the endorsement does not comply with the requirements of the stamp law, the plaintiff must of necessity fail There is nothing in principle which renders the analogy of the Full Bench ruling inapplicable to the present case which is one of a suit by the endorsee of a promissory note executed by the guardian-*de jure* of a minor and the only question is whether the actual wording of the endorsement, Exhibit P 1 (a), precludes relief to the plaintiff on the basis of the debt, apart from the promissory note In my opinion, the wording is susceptible, although perhaps by a slight stretch which I am prepared to make, if necessary, in the interest of justice, of the view which I am taking, *viz*, that the parties intended thereby that the debt should stand assigned so that it might be recovered from the party liable and that the liability not merely on the promissory note but on the debt evidenced thereby as well should be enforced by the endorsee. Mr Umamaheswaram contends that that could not be the intention because the endorsement bears no stamp such as is required in law for the debt to be validly assigned. I do not consider

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1 (1937) 1 M L J 543 I L R 1937 Mad 299 at 310

2 (1941) 1 M L J 441 I L R 1941 Mad. 513 (F B)

3. (1934) 68 M.L J 540, I.L R 58 Mad 735 (F B)

4 (1945) 2 M L J 375 I L R. 1946 Mad 242 (F B)

5. (1938) 1 M.L J 378 : I L.R. 1938 Mad. 568 (F B).

that circumstance by any means conclusive That can only involve the appellant in the necessity to pay the requisite stamp duty and penalty on Exhibit P. 1 (a) which the appellant is quite ready and willing to do. The amount will be found by the appellant within a month peremptorily, failing which, the second appeal will be dismissed with costs. On his doing so there will be a remittal of the case to the trial Court for the due scaling down of the debt and for the passing of a fresh decree. The trial Court when hearing the case under this order of remittal that I am-making will make due provision for the costs of the proceeding that has to take place before it for the purpose of determining the amount due as on a scaling down

Each party shall bear his own costs in all the three Courts No leave

The case having been posted to be mentioned this day the Court passed the following Order —

Court fee paid on the memorandum of second appeal as also on the memorandum of appeal to the lower appellate Court will be refunded Since the endorsement of the promissory note falls under Article 50 of the schedule to the Stamp Act a fixed stamp duty of Rs 7-8-0 shall be collected together with the penalty due Time for payment will be one month from today.

V P S *Appeal Allowed Case remitted to trial Court on payment of requisite penalty.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE RAGHAVA RAO

Sri Muthangi Butchi Ramayya . *Appellant* *

v.

Gurrala Venkata Subbarao and others *Respondents*

Partition Act (IV of 1893), S 4—Applicability—Conditions—Share-holder-defendants not availing themselves of the chance to buy up the share of the transferee-plaintiff—Claim of son of one of such share-holders in a subsequent suit by him to buy up the share of the transferee—Maintainability

For section 4 of the Partition Act to apply there must be a suit at the instance of a transferee of a dwelling-house for partition , and then, if any member of the family being himself a share-holder in respect of the dwelling-house, undertakes to buy the share of the transferee-plaintiff, the Court shall make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share-holder

Where in a prior suit by the transferee, the share-holder-defendants were given the chance to buy up the share of the transferee but they did not avail themselves of it, it is not open to a son of one of such share-holders to claim in a subsequent suit by him to buy up the share of the transferee

The equity of a statute cannot override its plain language

Satyabhama v *Jatindra Mohun*, A I R 1929 Cal 269 , *Laxman* v. *Mt Lahana Bai*, A I R. 1937 Nag 4, distinguished

Appeal against the order of the Court of the Subordinate Judge of Rajahmundry, dated 15th December, 1947, and made in A S No 156 of 1947, preferred against the decree and judgment of the Court of the District Munsif of Rajahmundry, dated 7th February, 1947, and made in O.S No 33 of 1946

M S Ramachandra Rao and *M Krishna Rao* for Appellant

Y. Suryanarayana for Respondent

The Court delivered the following

JUDGMENT —The appellant before me was the sixth defendant in the original suit which was laid for recovery of a one-tenth share out of a two-third share of a whole property of the other one-third of which the sixth defendant had become owner by virtue of a Court auction purchase of the interest of one Krishna Rao, a member of the family of the plaintiff and the other defendants to the present suit, by the sixth defendant himself as his execution creditor. After the purchase, the sixth defendant in fact filed his own suit for partition and recovery of his one-

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* A A. O. No. 107 of 1948. 6th September, 1949.

third share in the right of Krishna Rao and before the final decree in that suit w actually passed, defendants 1 to 5 in the present suit, of whom the second defenda is the father of the plaintiff in the present suit, applied to buy up the share of th present sixth defendant who was the plaintiff in the former suit, under the provisio of section 4 of the Partition Act Defendants 1 to 5 in fact were given the chanc to buy up the share in accordance with the provision of that section of the Ac but, they did not avail themselves of it The present plaintiff who is the responde before me, claims that he is entitled to assert his own right to buy up the sha of the present sixth defendant by force of the provision of section 4 of the A which, according to him, confers upon him an individual right of his own irre pective of the rights of his father the second defendant or of the other membe of his branch of the family who were parties to the former action

This claim of the plaintiff is answered by the sixth defendant in a two-fol way, firstly, by saying that there is no individual right as is sought to be asserte by the plaintiff who must be held bound by the conduct of his father, the secon defendant, who actually along with his brothers did not avail himself of the righ given by the decree in the former suit under section 4 of the Partition Act an secondly, by saying that the present suit is not within the purview of section of the Partition Act and that consequently there is no right such as is claimed by th plaintiff which can be asserted by him The learned District Munsif who trie the suit gave effect to both the pleas which were made by the sixth defendant an accordingly dismissed the suit as against him. On appeal taken to the Subordi nate Judge he rejected both the pleas and decreed the suit

Both the points taken in the original suit by the sixth defendant are repeate here by his learned counsel, but, it is not necessary for me to deal with the firs of them, as on the second I have come to the distinct conclusion that the plaintif respondent must fail The view that I take of the section is that there must b a suit at the instance of a transferee of a share of a dwelling-house for partition an then, if any member of the family being himself a share-holder in respect of th dwelling-house, undertakes to buy the share of the transferee-plaintiff the Cour shall make a valuation of such share in such manner as it thinks fit and direc the sale of such share to such share-holder This is the view which necessarily follow on the language of the section, and, if effect were given to the language, as indee has been done in a Bombay case reported in *Khanderao Dattatraya* v *Balakrishn Mahadev*[1], there is no doubt but that this appeal must succeed and the plaintif must fail as there is no suit by a stranger-purchaser of a share here and now. It i said, however, by Mr. Suryanarayana the learned counsel for the respondents that there are two other decisions, one of the Calcutta High Court and the othe of the Nagpur High Court, reported respectively in *Satyabhama* v. *Jatindra Mohan*[2] and *Laxman* v *Mt Lahana Bai*[3], which support what has been described in th latter of the two decisions as a more liberal interpretation of the section on whic he is placing reliance I have examined the two decisions and I do not thin that they afford any real assistance to the learned counsel for the respondents wit reference to the contention that he has advanced, namely, that although there is n suit now and here by a stranger-transferee of a share, his client may be allowed t buy up the sixth defendant's share on the spirit, if not on the letter of the section. Even without deciding that a more liberal construction of the section is permissibl than is warranted by its letter as virtually held in those cases, I am still of opinio that the present case can well be distinguished from them on the facts. In fact neither of the cases actually dissents from the case in *Khanderao Dattatraya* v. *Balakrishna Mahadev*[1] The Nagpur case makes no reference at all to the Bomba case while the Calcutta case which refers to it does not disapprove of it but onl distinguishes it In both the cases there is one peculiar feature which distinguishe them from the case before me, *viz*, that the stranger-transferee happened in thos cases himself to apply for partition with the result that it became open to the Court

1 (1921) I L R 46 Bom 341.
2. A I.R. 1929 Cal 269.
3 A.I.R. 1937 Nag 4

notionally and virtually to regard him as plaintiff and thereafter to regard the original plaintiff as himself or herself entitled to ask for the relief under section 4 on the basis that there was a suit in the eye of law by the stranger-transferee himself for a partition I am not sure that this sort of strain put upon the situation in those cases was rightly put It is hardly necessary for me however to pronounce on the exact soundness in this respect of the two cases which, as I have pointed out, are on the view of facts taken therein distinguishable The case before me does not accordingly attract the Calcutta or the Nagpur case I may state however that the view of law taken by the learned Chief Justice in the Bombay case seems to my mind, if I may say so with respect, to be the only sound view possible, which accords with the spirit as well as the letter of the section and which, unlike the view taken in the Nagpur and Calcutta cases does not extend the spirit of the section beyond its letter. The equity of the statute, as it is sometimes called cannot override its plain language and the contention of the respondents' learned counsel must accordingly be repelled

In these circumstances, I have no hesitation in reversing the judgment and decree of the lower appellate Court on the basis of my decision on the point which I have dealt with, and in allowing the Civil Miscellaneous Appeal and restoring the decree of the trial Court with costs to the appellant throughout

No leave

V S ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SUBBA RAO AND MR JUSTICE KRISHNASWAMI NAYUDU.

K M S Kumarappa Chettiar .. *Appellant* *

v

The Official Receiver, West Tanjore . *Respondent.*

Letters Patent (Madras), clause 15—Order refusing leave to file Letters Patent Appeal against judgment of single Judge in second appeal—If appealable

An order refusing leave to appeal under the Letters Patent against the judgment of a single Judge in second appeal is a part of the judgment in the second appeal itself, and against such an order there is no appeal under clause 15 of the Letters Patent

Balu Harshet Shetye v *Shri Krishna Govind Kulkarni*, (1929) I L R. 54 Bom 331, *Anumanchi Ramanayya* v *Thubati Kotayya and another* (1929) 57 M L J 398 and *Mangalam Govinda Rao*, In re, (1935) I L R 59 Mad 293, followed

Appeal against the order of the Hon'ble Mr Justice Satyanaravana Rao, dated 4th August, 1948, refusing leave to file a Letters Patent Appeal against his judgment in A A A O No 31 of 1946, preferred to the High Court against the order of the District Court, West Tanjore, dated 3rd September, 1945, and made in C M A No 42 of 1944, preferred against the order of the Court of the Subordinate Judge of Tanjore, dated 12th August, 1944 and made in O P No 133 of 1942, in I P No 2 of 1939

V V Srinivasa Aiyangar for Appellant

N Rajagopala Aiyangar for Respondent

K Bashyam Aiyangar for the Madras Advocates' Association

The Judgment of the Court was delivered by

Krishnaswami Nayudu, J —This is an appeal against the refusal of leave to file a Letters Patent Appeal against the judgment of a single Judge in second appeal. The appellant was the respondent in C M S A No 31 of 1946, which was heard by Satyanarayana Rao, J The appeal was allowed and on the motion of the counsel who appeared for the appellant herein for leave to file a Letters Patent Appeal against his judgment leave was refused As against the refusal this appeal is now filed. Notice of this appeal was ordered to the respondent and to the President

* L. P. Appeal No 65 of 1948. 12th August, 1949.

of the Madras Advocates' Association probably, for the reason that this involves a matter of interest to the legal profession and the litigant public An objection is taken that no appeal lies against the refusal of leave by the second appellate Judge The learned counsel for the appellant argues that he is entitled to file an appeal as this is an appeal against the judgment of a single Judge under clause 15 of the Letters Patent and the order refusing leave is not part of the judgment itself in second appeal and is independent of it and that therefore the appeal lies It is an accepted principle of law and also laid down by the Privy Council that a right of appeal in every matter must be given by the enacted law or equivalent authority and does not lie unless given by any express legislative enactment We have had to consider whether the appellant is entitled to file an appeal under any legislative enactment and the only provision relied upon by the appellant is clause 15 of the Letters Patent It was further argued that so far as the granting or refusing of leave was concerned the Judge should use independent discretion and such discretion must be exercised judicially and that in this case there was no such exercise of that independent discretion and therefore the appellant was entitled to have the question examined whether the learned Judge was right in refusing to grant leave to file a Letters Patent Appeal Mr K Bashyam on behalf of the Advocates Association argued that the order granting or refusing leave is not a judgment or part of the judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and only judgments that are passed in the exercise of the appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court are appealable ; and that the order declaring that the case is not a fit one for appeal is not part of that judgment and in any event not a judgment passed in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and as such the order refusing or granting leave in so far as it is concerned is a judgment by itself of a single Judge against which there is a right of appeal under clause 15 of the Letters Patent The second contention of Mr Bashyam is that this restriction as regards the right of appeal as against the judgment of a single Judge in a second appeal was introduced by an amendment of 3rd November 1927 and of 12th December, 1928, and since being an amendment restricting the right of appeal which existed prior to the amendment, Courts should view with favour the right of the appellants to file an appeal since the original right has been restricted by way of an amendment

As regards the first contention the learned counsel pointed out that there are two Bench decisions against the maintainability of the appeal, namely, the case in *Anumanchi Ramanayya* v *Thubati Kotayya and another*[1] and *In the matter of Mangalam Govinda Rao*[2] Apart from this we are unable to agree with the contention of the learned advocate that the order granting or refusing leave, that is, the order declaring whether the case is a fit one or not for appeal is not in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court or is independent of the judgment passed in a second appeal The judgment in a second appeal is passed in the exercise of the appellate jurisdiction of the High Court and it is in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court and the question whether the judgment passed by the High Court in a second appeal against the appellate judgment of a subordinate Court is one which is fit to be taken up for appeal or not cannot but form part of the judgment itself The High Court in a second appeal has to consider whether the decree or judgment passed by the subordinate Court in the exercise of its appellate jurisdiction is correct or not and whether in its view the judgment so passed is one which can be conclusive or one which can be taken up by way of further Letters Patent Appeal The order refusing or granting of leave canno

1. (1929) 57 M L J 398 2. (1935) I.L.R. 59 Mad. 293

be independent of the judgment itself in so far as that order could only be passed on the merits of the appeal itself and as such it is not independent of the judgment but only a part of it, for, in coming to a conclusion whether it is a fit case for granting leave the second appellate Judge has only again to go into the merits of the appeal which appeal itself is in respect of the merits of the case and the case being in respect of a decree or order passed by a subordinate Court in the exercise of its appellate jurisdiction This aspect was considered by a Bench of the Bombay High Court in *Balu Harshet Shetye* v *Sri Krishna Govind Kulkarni*[1], and we are in agreement with the observations of Justice Murphy The following are his observations —

> " It is clear that the intention of the amendments was to make such judgments final, where the condition for a further appeal does not exist, and that to allow an appeal from a refusal to make the declaration would defeat its object, for the ground of such an appeal against a refusal could only be something to be found in the judgment appealed against But I think the clause itself contains the prohibition Matters mentioned within the brackets already referred to are excepted from the positive provisions of the clause, and if a refusal to make the required declaration amounts to a judgment or order, it is a judgment or order made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the High Court I am not overlooking the fact that it is the refusal to make the declaration after the single Judge's judgment has been recorded which is sought to be appealed against, but the declaration required is that the " case is a fit one for appeal " which is in effect a part of the judgment on the merits of the case passed in second appeal "

We are, therefore, of the opinion that the order refusing leave in this case is a part of the judgment itself against which there is no appeal under clause 15 of the Letters Patent This question was considered in *Anumanchi Ramanayya* v *Thubati Kotayya and another*[2], where it was held that no appeal lies under clause 15 of the Letters Patent against the refusal of a single Judge of the High Court to grant leave to appeal from the judgment passed by him in a second appeal In *Mangalam Govinda Rao*, In re[3], their Lordships held that the order of a single Judge of the High Court refusing to grant leave to appeal even if it could be regarded as a judgment under the first part of clause 15 of the Letters Patent, an order to a different effect by a Division Bench on appeal therefrom would not suffice to give the applicant a right of appeal against the second appellate decree because under the second part of the clause 15, the second appellate decree will be appealable only on a certificate granted by the Judge who heard the second appeal In that case the second appeal was dismissed and after the dismissal of the second appeal the petitioner applied to the same learned Judge by an independent petition for leave to file an appeal under the Letters Patent He dismissed it Another petition was filed asking for review which was also dismissed and the petition before the Bench was that the petitioner may be granted leave to appeal against the judgment of the Judge who heard the second appeal despite His Lordship's refusal to grant leave In the circumstances it was held that the certificate being a condition precedent to the filing of the appeal the appeal was not maintainable There is a similar provision in the Supreme Court of Judicature Act of 1873 and under section 45 of the said Act it is provided that the determination of such appeals respectively by such Divisional Courts shall be final, unless special leave to appeal from the same to the Court of Appeal shall be given by the Divisional Court by which any such appeal from an inferior Court shall have been heard Though the language of clause 15 of the Letters Patent and section 45 of the Supreme Court of Judicature Act, 1873, are not identical the principle that unless the Judge who hears the appeal certifies or declares it as a fit one to be taken up in appeal no appeal would lie is common to both the enactments In *Kay* v *Briggs*[4], the Court of Appeal held that

> " Where a Divisional Court has refused special leave to appeal under section 45 of the Judicature Act, 1873, from their decision given in an appeal from a County Court, the Court of Appeal has no jurisdiction to hear an appeal from such refusal "

and Lord Esher, Master of Rolls observed that the practical effect of overruling the discretion would be to allow an appeal in every case because the facts of each case would be brought before the Bench in order to enable them to decide whether

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1 (1929) I L R. 54 Bom 331
2 (1929) 57 M L J 398
3. (1935) I L R 59 Mad 293
4 (1889) 22 Q B.D. 343

or not the discretion exercised by the Judge who heard the appeal should be overruled and that the real meaning of section 45 was to confine the power to give leave to appeal absolutely to the Judge who heard the appeal Similar would be the effect if the contention of the appellant is to be upheld It would be impossible for the Bench to consider whether the exercise of the discretion by the Judge who refused the grant was judicial without going into the merits of the appeal itself and that would amount to hearing the second appeal and passing its own judgment against the judgment of the second appellate Judge which should be final by virtue of the provision in clause 15 of the Letters Patent The learned counsel for the respondent referred to the similar principle that has been adopted in appeals under section 205 of the Government of India Act *Pashupati Bharti* v *The Secretary of State for India*[1] *and Guba* v *The Honourable The Chief Justice and Judges of the High Court, Lahore*[2], were the authorities relied upon where it was held that a certificate under section 205 of the Government of India Act was a necessary condition precedent to all appeals to the Federal Court and if a High Court refuses to grant a certificate it is not for the Federal Court to enquire into the reasons for refusal against which no appeal lies to the Federal Court, and that the Federal Court cannot question the refusal of a High Court to grant a certificate or investigate the reasons which prompted the refusal The language of the clause 15, Letters Patent, is clear and unambiguous in asmuch as it states that an appeal shall lie to the said High Court from the judgment of one Judge of the said High Court made in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court only where the Judge who passed the judgment declares that the case is a fit one for appeal The declaration by the learned Judge that the case is a fit one for appeal is a condition precedent to the maintainability of the appeal and that condition being absent in this case no appeal would lie

The other contention of Mr. Bashyam that this condition was introduced by way of an amendment to what was originally an unrestricted right of appeal does not appeal to us since His Majesty thought it fit to introduce the amendment with a view to alter the then existing law and this argument far from being in favour of the appellant would support the respondent's contention that the intention is clear that the existing law was to be altered and the unrestricted right of appeal must be restrained by a certain condition, the condition being a declaration by the Judge that the case is a fit one for appeal Obviously, the object of this amendment is to prevent unnecessary appeals after the case was heard by two Subordinate Courts and a Judge of the High Court has applied his mind as to the correctness or otherwise of the judgment of the Courts below The language of the amendment is clear and if it was the intention of the framers of the amendment, provision similar to that contained in section 75 (3) of the Provincial Insolvency Act would have been introduced where the power to grant leave is conferred both on the original Court and on the appellate Court In Ex parte *Stevenson*[3], which was a case under the Housing of the Working Classes Act, 1890, the Judge at Chambers refused to grant leave under schedule II, clause 26 (*a*) of the said Act, it was held by the Court of appeal that in the absence of the leave no appeal lay We are in agreement with the following observations of Fry, L J, in that case

"The object clearly was to prevent frivolous and needless appeals If, from an order refusing leave to appeal, there may be an appeal, the result will be that, in attempting to prevent needless and frivolous appeals, the Legislature will have introduced a new series of appeals with regard to the leave to appeal"

In the absence of any such provision we see no reason to infer something which is not contained in the language of the statute. We will be frustrating the object of the amendment if we are to concede the argument on behalf of the appellant. In the result, we hold that this appeal is not maintainable and is dismissed The appellant will pay the costs of the party respondent

V S ——— *Appeal dismissed.*

1 (1939) F C R. 13. (1941) F C R. 54.
2. (1942) 1 M L J. 74: (1941) F.L.J. 33 · 3. (1892) 1 Q B D. 609

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE SOMASUNDARAM.

Ahamed Abdul Sukkoor .. *Petitioner**

v

Vallabhadas Kanji Firm and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Section* 151—*Inherent Powers—Stay of proceedings—Court other than High Court, whether could exercise*

Where the lower Court ordered stay in a suit for damages for malicious and wrongful institution of insolvency proceedings on the ground that the existence of plaintiff's liability to the defendants was itself the subject of appeals before the High Court, on the question whether a Court other than a High Court could invoke power under Section 151 of the Civil Procedure Code and stay the suit,

Held, that there was no reason why the powers should be restricted to the High Court. The word 'court' in section 151 is wide enough to include any court and that in the circumstances, the order of stay passed by the lower Court was well within its competence

Case-law reviewed.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Coimbatore in I. A No 159 of 1948, in O S No 80 of 1946

R. Rangachari for Petitioner

Respondent not represented.

The Court delivered the following

JUDGMENT —This petition is by the plaintiff aginst the order of the Subordinate Judge of Coimbatore in I. A. No 159 of 1948, in O S. No. 80 of 1946 of his file

The plaintiff has filed this suit against the respondents for damages for malicious and wrongful institution of insolvency proceedings against him by the defendants. I. P. No 20 of 1942 was filed by the defendants against the plaintiff and the same was dismissed on the ground that no debt was payable by the plaintiff to the defendants The defendants thereupon filed two suits, O. S Nos 132 and 133 of 1945 against the plaintiff for the recovery of the sums due under the contract The two suits were dismissed on the ground that the contracts were of a wagering character. The defendants have filed appeals against the decision in the two suits and they are A. S Nos. 164 and 188 of 1948 pending in this Court. This suit, as already stated, is for recovery of damages for instituting the insolvency proceedings. One of the questions that will have to be determined in this suit will be whether any sum was due by the plaintiff to the defendants, and the question whether the defendants were justified or had reasonable or probable cause for instituting the insolvency proceedings will depend largely on the liability or otherwise of the plaintiff to the defendants This latter question is now pending decision in the appeal As pointed out by the learned Subordinate Judge, a good deal of time will be saved by the decision of that question by this Court

Apart from this, as the learned Judge has stated in paragraph 8 of his judgment that if on the evidence to be adduced, the Court comes to a different conclusion on the question of indebtedness of the plaintiff, it will lead to conflict of decisions There is no doubt therefore that the ends of justice require that the suit should be stayed pending the decision of the appeals by this Court.

But it is contended by the learned advocate for the petitioner that under section 151, Civil Procedure Code, the lower Court has no power to stay such proceedings. His contention is that either section 10 applies or if it does not, section 151 does not apply In *Balajirao* v *Natesa Chetti*[1], and *Komarappa Goundan* v *Ramaswami Goundan*[2], Yahya Ali, J, has held that the High Court has jurisdiction under

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* C R P. No 1429 of 1948 — 9th September, 1949.

1 (1947) 1 M L J 330

2. (1947) 1 M.L J. 365.

section 151, Civil Procedure Code, to stay the trial of a suit out of which the proceedings in the High Court do not arise. In *Balajirao* v. *Natesa Chetti*[1], the learned Judge has held that the :

"only limitation that can be placed upon the exercise of jurisdiction would be that the applicant has no other remedy available to him in law which he can seek in a competent civil court"

and points out that if he can get a particular suit stayed under section 10, he must adopt that remedy and if he does not adopt that, we were not entitled to invoke the provisions of section 151, Civil Procedure Code The other condition for the application of section 151 is that the ends of justice require it, or it must be to prevent the abuse of process of Court.

The learned advocate for the petitioner does not dispute the correctness of the decision but his contentions are (1) that the High Court only has such power in the course of other proceedings pending before it and (2) that such power does not vest in the lower Court. He relies for this and bases his contention on *Karuppayya* v. *Ponnusami*[2] In that case it was contended that the High Court has extraordinary powers, which powers it derives from the Supreme Court The learned Judge in that case has held that such extraordinary powers are vested in the High Court in the exercise of its original jurisdiction and so far as the appellate or revisional jurisdiction is concerned, it can only apply such law or equity and rule of good conscience as would be applied by the mofussil Court. In short, in that particular case, the learned Judge held that the High Court has no greater power than that conferred on the mofussil Courts under Order 39 As already stated it is not disputed that the High Court has powers to stay under section 151 and if so I see no reason why such powers should be restricted to the High Court alone The word "Court" used in section 151 is wide enough to include any Court under the Code.

Another contention is that such powers are exercised by the High Court only in the course of proceedings pending before it. No doubt in the decisions of this Court referred to above, such power has been exercised only in the course of proceedings pending before it, but there is nothing either in the Code or in those decisions to warrant a limitation to that exercise No authority is cited in support of this contention. On the other hand *Mulchand* v *Jiwandas*[3], referred to by learned counsel and the observations in *Hukumchand Boid* v *Kamalanand Singh*[4], show that under section 151 the lower Court can exercise such powers In the result I hold that the order passed by the lower Court was well within its competence. It is a just and reasonable order and I see no reason to interfere with it.

I must say that the learned advocate for the petitioner has been very fair in placing before me all the decisions against him though the respondent was *ex parte*. The petition is dismissed.

K.C. *Petition dismissed.*

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1. (1947) 1 M.L J 330.
2. (1932) 64 M L J. 112 I.L R. 56 Mad. 563.
3 A.I R 1933 Lah 50.
4 (1905) I L R 33 Cal 927.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE SATYANARAYANA RAO, AND MR. JUSTICE VISWANATHA SASTRI.

Krishnammal . *Appellant* *

v.

R. Lakshmi Ammal . *Respondent*

Succession Act (XXXIX of 1925), *Section* 371—*Deceased ordinarily resident in Trivandrum with no fixed residence in British India—Government securities held by the Reserve Bank of India (Public Debt Office), Madras—Jurisdiction of Madras High Court to grant succession certificate—Point of time when property should be found to be within jurisdiction to confer jurisdiction—Assignee of debt from heir of deceased—If entitled to apply for succession certificate—*Situs *of debts—Test*

The first part of section 371 of the Succession Act (1925) must necessarily refer to ordinary residence within the jurisdiction of a British Indian principal Civil Court of original jurisdiction When the section refers to the deceased having no fixed place of residence it must also refer to residence in British India, as the same words " resided " and " residence " occurring in the section must receive the same interpretation in the absence of anything to indicate the contrary Accordingly where the deceased had no fixed place of residence in British India at the time of his death (though he had such a residence in Trivandrum) the Court within whose jurisdiction any part of the property of the deceased may be found has jurisdiction to grant a succession certificate

Observations of West, J , in *Mir Ibrahim Alikhan* v *Ziaulunissa Ladli Begum Sahib,* (1887) I L R. 12 Bom 150, considered to be obiter and not followed

Sri Goswami Gopal Lalji v *Sri Goswami Jaidas Lalji,* (1885) 5 A W N 40 and *Amar Singh* v *Sham Singh,* A I R 1935 Lah 646, relied on

The material point of time at which property once owned by the deceased should be found within jurisdiction is the date of the application for certificate and not the date of his death

Even an assignee of a debt from the heir of the deceased creditor is bound and entitled to apply for succession certificates

Karuppasami v *Pichu* (1892) 2 M L J 116 · I L R 15 Mad 419 , *Vairavan Chettiar* v. *Srinivasachariar* (1921) 40 M L J 481 44 Mad 499 , *Gulshan Ali* v *Zakir Ali,* (1920) I L R 42 All 548 , *Banwari Lal* v *Maksudan Lal,* (1929) I L R 52 All 252, relied on

Where Government securities belonging to the deceased have been registered in the Reserve Bank of India (Public Debt Office), Madras, even though the Reserve Bank has several branches at different places, the Public Debt Office, Madras, is clothed with authority to deal with the securities and the debt is certainly recoverable at Madras and the *situs* of the debt is at Madras so as to confer jurisdiction on the High Court to grant a succession certificate

On appeal against the judgment and decree of Subba Rao, J , dated 26th August, 1948, in the original testamentary jurisdiction of the High Court in O P. No. 142 of 1948.

The Advocate-General (*K Rajah Aiyar*) and *P S Sarangapani Aiyangar* for Appellant

C. R Pattabhiraman and *R Ramasubba Aiyar* for Respondent.

The Judgment of the Court was delivered by

Satyanarayana Rao, J—This is an appeal by the respondent in O P No 142 of 1948, against an order of Subba Rao, J , granting a succession certificate to the petitioner in the original petition in respect of the Government securities, more particularly specified in the schedule attached to the petition

The securities originally stood registered in the name of one Subramania Ayyar. He died on the 11th December, 1911, leaving behind him his father, Anantarama Iyer, his widow Ammani Ammal, and two daughters, Krishnammal and Rajammal The respondent in this appeal, who was the petitioner in the original petition is Lakshmi Ammal, the daughter of Rajammal. On the 26th September, 1912, Anantarama Iyer executed a deed of settlement whereunder he provided that after his death his daughter-in-law, Ammani Ammal should enjoy the securities for her life and after her death they should be possessed and enjoyed in equal half shares by his grand-daughters, Krishnammal and Rajammal for life. On the death of any of the said granddaughters, it was provided by the deed that the properties possessed and enjoyed by each granddaughter should devolve upon her male issue absolutely, if any, then living, and in default of such

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O. S. A No 62 of 1948 and C M P No 4048 of 1949. 19th August, 1949.

male issue the female issue should take absolutely After the death of Subramania Aiyar, Ammani Ammal applied for a succession certificate in respect of these securities, and with the consent of Anantarama Iyer a succession certificate was issued in her favour, the power being limited to realisation of interest on the securities. There is an endorsement to this effect on the Government promissory notes. Ammani Ammal died on the 28th September, 1944. Rajammal predeceased Ammani Ammal and left behind her her only daughter, Lakshmi Ammal, the respondent in the appeal Basing her claim on the settlement deed of Anantarama Aiyar the respondent claimed that she was entitled to one half of the total value of the Government securities mentioned in the schedule and also to receive her share of the interest payable thereon. In paragraph 3 of the petition the respondent alleged that the Government of India bonds and securities were held by the Reserve Bank of India (Public Debt Office), Madras Branch, and that she was informed by the Reserve Bank of India, Madras Branch, in their communication dated 19th February, 1948, that she should obtain from the High Court of Madras a succession certificate in support of her claim to deal with the securities and forward the same to them. In paragraph 9 of the petition she however alleged that the original bonds were in the custody of Krishnammal, daughter of Subramania Aiyar. In paragraph 4 she disclosed the relationship between the various persons and stated that Krishnammal alone was alive and that she resided at South Street, Fort, Trivandrum She stated in the petition the substance of the settlement deed, and the facts entitling her to the certificate claimed by her

Krishnammal filed a counter affidavit formulating her objections to the grant of a succession certificate in favour of Lakshmi Ammal, chief among which were that the Hgh Court had no jurisdiction to entertain the application, and that as she was not the heir of the deceased Subramania Aiyar, in whose name the securities stood she was not entitled to the grant of succession certificate under the provisions of the Succession Act She put the petitioner to strict proof of the allegation contained in paragraph 3 of the petition that the securities in question were held by the Reserve Bank of India (Public Debt Office), Madras and also disputed the correctness of the construction that was put upon the settlement deed of 28th February, 1912, by Lakshmi Ammal, the petitioner To meet some of the all gations in the counter affidavit filed by Krishnammal, Lakshmi Ammal in her turn filed a reply affidavit

The petition was tried by Subba Rao, J. and before him the question of jurisdiction of the Court to entertain the petition was argued on the basis of certain agreed facts, and the learned Advocate-General appearing for the appellant confined his arguments before the learned Judge to the question of jurisdiction of the Court to entertain the petition Judgment was pronounced by the learned Judge on the question of jurisdiction on 5th August, 1948 At that time it was represented to the learned Judge that the learned Advocate-General when he argued the question of jurisdiction was under the impression that he was arguing only a preliminary point, and that there were also other contentions raised in the counter affidavit which had to be argued. On this representation being made the learned Judge naturally directed the matter to be posted for fresh arguments on 12th August, 1948. When this matter came up for further hearing before the learned Judge, the respondent in the petition, *i e*, the present appellant, through her counsel stated that she had no objection for the succession certificate being issued to the petitioner, Lakshmi Ammal, without prejudice to the rights of the parties. Mr. Pattabhiraman appearing for Lakshmi Ammal also agreed to withdraw his allegation in paragraph 7 of the petition, that the petitioner would be entitled to the other half of the securities also on the death of Krishnammal, as it was not necessary for the disposal of the application On this admission the learned Judge directed the issue of a succession certificate to the petitioner, as he had already found by his order, dated 5th August, 1948, that this Court has jurisdiction to entertain the application

In this appeal by Krishnammal, two questions were raised on her behalf by her learned advocate, firstly that the High Court had no jurisdiction to enter-

tain the application ; secondly that on the allegations contained in the petition, the application should not have been entertained, as Lakshmi Ammal who was not the heir of the deceased Subramania Aiyar and who claimed rights only under the settlement deed of Anantharama Aiyar could not apply for a succession certificate under the provisions of the Succession Act In view of the unequivocal admission made on behalf of the appellant before the learned trial Judge that the respondent, Krishnammal, had no objection to the succession certificate being issued to the petitioner, we are clearly of opinion that the appellant is not now entitled to agitate the second point, the decision of which depends to some extent at least on an investigation of the facts We have, however, considered that question also on its merits in this judgment

The most important question for decision is whether the view of the learned Judge that this Court had jurisdiction to entertain the application is correct The judgment of the learned Judge proceeded on the assumption that the Government securities were in the custody of Krishnammal at Trivandrum As it appeared to us that the question of the custody of the bonds would have a material bearing on the points in controversy, we thought it necessary to direct the Reserve Bank of India (Public Debt Office), Madras, to cause the Government securities to be produced before us They were accordingly produced, and a photostat copy of one of those bonds was marked by consent of parties as Exhibit P-1 in the case The other bonds are similar to Exhibit P-1 Ammani Ammal who had only a life interest in these securities, and who had no right to negotiate them received a deposit receipt to enable her to draw the interest on the securities and allowed these bonds to remain in the custody of the Public Debt Office This appears from the endorsements on the bonds themselves Though interest was payable according to the original terms of the bonds at the general treasury office there was an endorsement in 1908 making the interest payable at Trivandrum which was subsequently cancelled in 1927, and interest was made payable at Madras, and those bonds were registered at the Public Debt Office, Madras and were given a number The deposit receipt issued to Ammani Ammal enabled her to draw interest at Travancore From the affidavit of the respondent filed in C M P No 4048 of 1949, for amendment of the succession certificate, it appears that these securities were notified even as early as 16th September, 1946, by the Government for repayment, and therefore the Reserve Bank of India (Public Debt Office), Madras Branch could not renew the bonds in the name of Lakshmi Ammal pursuant to the order of this Court granting a succession certificate , but the bank promised to pay the principal and interest upto the date of the notification, namely, 15th September, 1946, provided the succession certificate was amended in an appropriate manner On the date of the application, therefore, the situation as it now turns out, was that these securities were not available *in specie* to be transferred or dealt with and had been substituted by the principal and interest due under them to the rightful owner or owners thereof and the money representing such principal and interest upto 15th September, 1946, is now in the hands of the Reserve Bank of India (Public Debt Office), Madras branch We think that the question of jurisdiction should be decided in the light of these facts and not on the assumption that the original bonds are still with Krishnammal at Trivandrum To a specific question put by us to the learned counsel for the appellant the appellant could not now assert in the light of these facts that the original bonds were still in the custody of Krishnammal. The fact therefore is that the bonds or the money represented by those bonds was in the hands of the Reserve Bank of India (Public Debt Office), Madras, on the date of the petition and continues to be held by them till now. Section 371 of the Succession Act (XXXIX of 1925) defines the Court having jurisdiction to grant a certificate It reads as follows :

"The District Judge within whose jurisdiction the deceased ordinarily resided at the time of his death, or, if at that time, he had no fixed place of residence, the District Judge, within whose jurisdiction any part of the property of the deceased may be found, may grant a certificate under this Part."

"District Judge" is defined by section 2 (*b*) of the Act as meaning the Judge of a principal Civil Court of original jurisdiction. This definition of "District Judge" was introduced into the Succession Act by the Succession Amendment Act (XVIII of 1929) so as to make it clear that the High Court acting in its Original Civil Jurisdiction is also clothed with the jurisdiction to issue a succession certificate. Under the section, the jurisdiction of the Court is made to depend on one of two circumstances, *i e*, either the ordinary residence of the deceased at the time of his death, or in the absence of such residence, any part of the property of the deceased being found within the jurisdiction of the District Judge. In the present case, the deceased person with whom we are now concerned is Subramania Aiyar At the time of his death, it is common ground, he was ordinarily residing at Trivandrum in the Native State of Travancore. The second part of the section which confers jurisdiction on the Court in whose jurisdiction any part of the property is situate can be invoked only if at the time of the death the deceased had no fixed place of residence. The argument of the appellant is that as Subranmia Aiyar had a fixed place of residence at the time of his death in the Native State of Travancore, the second part of the section cannot be invoked to clothe the High Court with jurisdiction to deal with the matter The question therefore for decision is, when the section speaks of ordinary residence and fixed place of residence, does it contemplate residence anywhere even outside British India (Indian Union) or residence within British India ? If the proper construction of the section is that as the deceased had no fixed residence or ordinary residence within British India the situation of the property may be taken advantage of to confer jurisdiction, then the High Court would have jurisdiction, provided it is established that part of the property of the deceased is situate within the Ordinary Original Jurisdiction of the High Court If, on the other hand, the section is construed as referring to residence in any part of the world, then, of course, the appellant's contention will be well founded, and the respondent will not be entitled to invoke the aid of the second part of the section From the definition of the expression "District Judge" in the Act, it is a proper inference to make that the Court indicated is a Court situate within British India. It could not have referred to a Civil Court of original jurisdiction outside British India, for example, a Native State, or in any other part of the world The first part of the section therefore must necessarily refer to ordinary residence within the jurisdiction of a British Indian principal Civil Court of original jurisdiction From this it follows that when the section refers to the deceased having no fixed place of residence it must also refer to residence in British India, as the same words "resided" and "residence" occurring in the section must receive the same interpretation in the absence of anything to indicate the contrary. To put a different construction on the section would lead to anomalous results If the respondent in an original petition for a succession certificate should raise the objection in a case like the present that the deceased had his ordinary residence in some remote corner of the world, the Court should embark on an enquiry into the truth or otherwise of that allegation, notwithstanding the fact that within the jurisdiction of the Court there is property of the deceased. Section 372 which lays down the particulars to be set out in an application for a succession certificate requires by clause 1 (*b*) that the petitioner should state the ordinary residence of the deceased at the time of his death and, if such residence was not within the local limits of the jurisdiction of the Judge to whom the application is made, then the property of the deceased within those limits, thereby indicating that what is contemplated is residence within the jurisdiction of a British Indian Court and not residence outside it The appellant relies in support of his submission upon the observations of West, J., in *Mir Ibrahim Alikan* v *Ziaulnissa Ladli Begum Sahib*[1], where the learned Judge observes that,

"The necessity for a certificate under Act XXVII of 1860 is not clearly established (It may be mentioned that the Act XXVII of 1860 was the earliest Succession Certificate Act) Section 3 of the Act seems to contemplate the issue of a certificate under it only for the estate of a British subject

1 (1887) 12 Bom 150

neither resident within the district where a certificate is sought, or else having no fixed place of residence Here, the deceased Mir Baker Ali was a *sardar* of Baroda, resident there, where also he died: The representation of such a person would properly be sought in the country he belonged to and the constituted representative would then sue, or empower some one to sue, in the British Courts. The Act does not make provision for the administration of the effects of a foreigner domiciled abroad."

In that case Mir Baker Ali, the deceased, was a *sardar* of Baroda and resided within the Gaekwar State and died there After his death one Mr. Lely, the Assistant Collector of Surat, was appointed administrator of Mir Baker Ali's estate under a Regulation then in force in Bombay Presidency. When the administrator went to England on furlough the heirs of Mir Baker Ali instituted a suit to recover a debt due to the estate of the deceased. The decision in the case was that when there was a duly appointed administrator the heirs at law were incompetent to sue. The observations therefore of the learned Judge are *obiter*, and not necessary for the decision of the case , nor does the learned Judge consider the language of the section The learned Judge's attention was not drawn to the earlier decision of the Allahabad High Court to the contrary in *Sri Goswami Gopal Lalji* v. *Sri Goswami Jaidas Lalji*[1]. This decision of the Allahabad Court and a later decision of a single Judge of the Lahore Court in *Amar Singh* v. *Sham Singh*[2], support the contention of the respondent The Bombay and the Allahabad decisions were considered by the Lahore High Court in this last mentioned case, and the view taken by the Lahore Court accords with the interpretation which we think is the correct one. We are not prepared to follow the *obiter dictum* of West, J , in *Mir Ibrahim Ali Khan* v. *Ziaulnissa Ladli Begum Sahib*[3], though the opinion of that learned Judge is entitled to great weight.

It therefore follows that Subramania Aiyar had no fixed place of residence in British India at the time of his death. This leads us to a consideration of the question whether any part of the property of the deceased is to be found within the original jurisdiction of this Court. We may here advert to a contention faintly urged on behalf of the appellant that the deceased must have left the property which confers jurisdiction, within the jurisdiction of this Court at the time of his death, and that it is not enough that such property is now found within the jurisdiction of this Court On the clear language of sections 331 and 372 (1) (*b*) the material point of time at which property once owned by the deceased should be found is the date of the application and not the date of his death.

The respondent contends that the *situs* of the debt evidenced by the securities was at Madras, and that therefore this Court had jurisdiction. Subba Rao, J., was of opinion that even if the bonds were actually in the hands of Krishnammal at Trivandrum it would not make any difference having regard to the other factors mentioned in his judgment to determine the *situs* of the debt. We have already found that in fact the bonds and the money representing the bonds were on the date of the application in the hands of the Reserve Bank of India (Public Debt Office), Madras branch It is on that footing that we proceed to determine the question regarding the *situs* of the debt The locality of debt is important for several differing purposes particularly under English law. The decision of the question of jurisdiction, the liability to pay death duties, and the grant of probate or letters of administration, depends mostly upon the situation or the locality of the debt The test by which the locality of a debt is usually determined is stated by *Atkin, L.J*, in *New York Insurance Co* v. *Public Trustee*[4] in the following words :

"The question as to the locality, the situation of a debt, or a chose in action is obviously difficult, because it involves consideration of what must be considered to be legal fictions A debt, or a chose in action, as a matter of fact, is not a matter of which you can predicate position , nevertheless, for a great many purposes it has to be ascertained where a debt or chose in action is situated, and certain rules have been laid down in this country which have been derived from the practice of the ecclesiastical authorities in granting administration, because the jurisdiction of the ecclesiastical authorities was limited territorially The ordinary had only a jurisdiction within a particular territory, and the question whether he should issue letters of administration depended upon whether or not assets

1 (1885) 5 A.W.N 39
2 A.I R 1935 Lah. 646.
3 (1887) 12 Bom. 150
4 (1924) 2 Ch D. 101 at 119.

were to be found within his jurisdiction, and the test in respect of simple contracts was . Where was the debtor residing? Now, one knows that, ordinarily speaking according to our law, a debtor has to seek out his creditor and pay him , but it seems plain that the reason why the residence of the debtor was adopted as that which determined where the debt was situate was because it was in that place where the debtor was that the creditor could, in fact, enforce payment of the debt. I think that is a very material consideration The result is that in the case of an ordinary individual by that rule for a long time, the situation of a simple contract debt under ordinary circumstances has been held to be where the debtor resides , that being the place where under ordinary circumstances the debt is enforceable, because it is only by bringing suit against the debtor that the amount can be recovered "

To this rule that the residence of the debtor is the determining factor in deciding the locality of the debt must be added the qualification that if under the contract the debt is payable at a particular place notwithstanding that the debtor resided elsewhere, the *situs* of the debt is also at the place where the debt is recoverable. See *Swiss Bank Corporation* v *Bochimsche Industrial Bank*[1] and *Russo-Asiatic Bank* In re : *Russian Bank of Foreign Trade* In re[2] If a bank has several branches and a customer has an account at a particular branch, the locality of the debt is at the place where the branch is situate at which the customer has an account. See *Joachimson* v *Swiss Bank Corporation*[3] In England, however, there is a further distinction between simple debts and specialty debts The locality of a specialty debt is at the place where the specialty is found It has been held therefore that such a debt was *bona notabilia* where it was conspicuous, *i e* , within the jurisdiction within which the specialty was found at the time of death (*Commissioner of Stamps* v *Hope*[4]) For the purpose of this rule relating to specialty, debts due from the Crown and debts arising under a statute are treated as specialties, even though the bonds are not under seal (*Royal Trust Co* v *Attorney-General for Alberta*[5]). In India there is no difference between simple debts and specialty debts. A suit for recovery of a debt may be instituted at the place where the debtor resides or where the cause of action in whole or in part arises *Vide* section 20, Civil Procedure Code

It is here necessary, in order to determine the *situs* of the debt now in dispute, to bear in mind some of the provisions of the Public Debt Act (XVIII of 1944) and the rules framed thereunder, and the machinery provided by the Central Government for effectively dealing with these securities and for payment of interest. The Indian Securities Act of 1920 has practically been replaced by the Public Debt (Central Government) Act, 1944 (XVIII of 1944) "Bank" in the Act means the Reserve Bank of India, and under the rules framed under section 28 of the Act, "Public Debt Office" means the office of the Reserve Bank of India on the books of which a Government security is registered or may be registered. There are four Public Debt Offices for dealing with decentralised loans (loan covered by the securities in question is a decentralised loan) at Bombay, Calcutta, Delhi and Madras, and the securities in question were registered at the Madras Public Debt Office. Section 9 of the Act empowers the Bank to determine the person or persons entitled to security on the death of a person if the aggregate value of the securities does not exceed Rs. 5,000 Section 11 provides for issue of duplicates, section 12 provides for a summary determination by the Bank of title to Government securities in case of dispute. Section 13 states,

"Notwithstanding that as a matter of convenience the Central Government may have arranged for payments on a Government security to be made elsewhere than in British India, the rights of all persons in relation to Government securities shall be determined in connection with all such questions as are dealt with by this Act by the law and in the Courts of British India"

Section 22 deals with the discharge of interest on Government securities and section 18 relates to vesting of title. Under section 13 therefore the rights of all persons to the securities should be determined only by the Courts in British India and by the law of British India This would exclude the determination of the title to the securities even in a summary fashion by the courts outside British India. The further question that has to be solved is which of the courts in British India

1. (1923) 1 K B 673 at 678.
2. (1934) 1 Ch D 720.
3. (1921) 3 K B. 110 at 127.
4. (1891) A C. 476
5. (1930) A C 144

could have jurisdiction. This aspect was not considered by Subba Rao, J., in the judgment apparently because having regard to the course of the argument before him it was assumed by counsel that if the jurisdiction of the Courts in Travancore is excluded by section 13 of the Public Debt Act, it did not matter which of the British Indian Courts tried the petition In the arguments, however, before us it was strenuously argued on behalf of the appellant that the Madras High Court has no jurisdiction whether other British Indian Courts might or might not have had jurisdiction to entertain the application It has therefore become necessary to examine not only the terms of the bonds but also the sections and the rules framed under the Public Debt Act to decide the question whether the debt is one which can be recovered at Madras

According to the terms of the bonds the interest is payable at Madras. The Reserve Bank of India (Public Debt Office), Madras Branch, is the office to which all matters connected with these bonds have been assigned to be dealt with Apart from the endorsements on the bonds, under rule 9 of the rules framed under the Act, where interest on a Government promissory note is payable at a place where a Public Debt Office is located, the note shall be presented at the Public Debt Office which shall issue an interest warrant in favour of the holder payable at the local office of the bank To discharge the security under rule 25 the security including a Government promissory note has to be presented at the office at which the interest on the security is payable or at the Public Debt Office of domicile. An application for grant of information has to be made under rule 28 to the Public Debt Office, Madras In other words, the discharge of the Principal, the payment of interest and all the other matters connected with the securities have to be dealt with by the Public Debt Office, Madras, even though the Reserve Bank has several branches at different places, and under the Act and the rules, the Public Debt Office, Madras, which is the Reserve Bank, is clothed with the authority to deal with the securities The debt is certainly recoverable at Madras, and added to this, the securities have already been notified for payment, and it is now really the money in the hands of the Public Debt Office that is recoverable by the person entitled to it. In those circumstances it is not difficult to hold that the *situs* of the debt is at Madras within the meaning of the principles referred to in the earlier portion of this judgment; and the debt is recoverable at Madras (*vide* section 20 of the Civil Procedure Code) The property therefore of the deceased is within the jurisdiction of this Court and the application therefore has been properly entertained The objection of the appellant that this Court has no jurisdiction to entertain the application must be overruled.

On the second question even if it is open to the appellant to raise the contention notwithstanding the admission made by her learned counsel before Subba Rao, J, we think that on the allegations contained in the application a succession certificate could be granted to the applicant under the Act. No doubt, ordinarily speaking it is the heir of the deceased that is bound and is entitled to apply for a succession certificate under the Act In *Karuppasami* v *Pichu*[1], Muthuswami Iyer and Parker, JJ., held that even an assignee of a debt from the heir of the deceased creditor was bound to apply for a succession certificate under section 4 of the Act VII of 1889, Succession Certificate Act It was contended before the learned Judges that there was no obligation on the part of an assignee to apply for a succession certificate and produce it as a condition precedent for realising the debt It was pointed out that the title derived from the heir was as much within the purview of the Act as the right to succeed set up by the heir himself and an assignee of a creditor's heir was also a person who claimed part of the effects of the deceased creditor. The learned Judges observed,

"It is not inconsistent with the language of section 4 of Act VII of 1889, for a person claiming a debt under an assignment made by the creditor's heir certainly claims part of the effects of such creditor There is nothing in the section to show that the title derived from the heir is not as much within its purview as the right to succeed set up by the heir himself It would further be unreasonable to hold that the assignee is in a better position than the assignor If it were so held, the heir

1 (1892) 2 M L J 116 : I L R 15 Mad 419

might assign the debts due to the deceased person to others and thereby evade the statutory duty imposed upon him by section 4 The intention was to afford protection to parties paying debt owing to deceased persons, and the construction suggested for the petitioner would frustrate tha intention The heir of a deceased person cannot by his own act deprive the debtors of the protectio guaranteed to them by the Act "

This was also the view taken in later decisions of this Court. In *Vairavan Chettiar* v *Srinivasachariar*[1], the plaintiff was the assignee of a promissory note in favour o one Veeraraghava Aiyangar Veeraraghava Aiyangar died and his adopted sor Narasimha Aiyangar succeeded to his properties The widow of Veeraraghava Aiyangar as the adoptive mother and guardian of the minor, Narasimha Aiyangar, endorsed the note to the plaintiff for collection. One of the questions in the suit was whether the promissory note was or was not the self-acquired property of the deceased and whether a succession certificate was necessary to maintain the suit. It was found that the promissory note was self-acquired property of Veeraraghava Aiyangar and that the plaintiff could not maintain the suit without a succession certificate Construing section 4 of the Act, Oldfield, J , observed at page 503 as follows

"The Act is, as its preamble states, intended to 'afford protection to parties paying debts to the representatives of deceased persons' The reference is section 4 is generally to persons 'claiming to be entitled to the effects of the deceased person or any part thereof', and under section 6 (1) the applicant for a certificate must specify in his application the debts, in respect of which he applies. All this indicates that the succession certificate procedure is obligatory on any person claiming debts or a debt, the property of the deceased, not only by succession, but under any title whatsoever. If the cases of assignment from the deceased's legal representatives were excluded, evasion of the Act would be easy and the protection afforded to the debtor would be illusory "

The other learned Judges concurred in this view. To the same effect is the decision in *Gulshan Ali* v. *Zakir Ali*[2] *Banwarilal* v. *Maksuden Lal*[3] lays down that

"there is no legal bar to the granting of a succession certificate to a member of a joint Hindu family who gets the property by right of survivorship and not as an heir "

As pointed out by the learned Judges in that case the expressions "legal representatives " and "successors " may not strictly be applicable to the case of persons taking by survivorship in a joint Hindu family They may not be under an obligation to take out a succession certificate in order to obtain a decree in a suit for recovery of a debt It does not necessarily follow from this that persons who take property by survirorship are not entitled to take advantage of the provisions of the Act and obtain a succession certificate by calling themselves legal representatives We think that the interpretation placed by the Allahabad High Court is correct.

The petitioner in her petition set out fully all the facts entitling her to a succession certificate. No doubt it is not stated in the petition that Anantharama Aiyar who took the property of his son by survivorship and who executed the settlement deed really assigned the debts by virtue of the settlement deed But all the facts are there, and it will be hypertechnical to rule out a contention based on the facts found in the petition, and say that as the petitioner did not put forward that she really stood in the position of an assignee of the debt due to the deceased, therefore she should be non-suited. Even if the father, Anantharama Aiyar, had taken the property by suvivorship after the death of his son, the assignees of Anantharama Aiyar would be entitled to take advantage of the provisions of the Act and styling themselves as the legal representatives of the deceased claim the right to a succession certificate It is said that according to the allegations in the petition Subramania Aiyar was merely a benamidar for Anantharama Aiyar and therfore the petitioner is not now entitled to say that Subramania Aiyar was the real owner and claim the right to a succession certificate Even if the allegations are true, the legal title to the debt is in Subramania Aiyar whoever may be the beneficial owner of it, and the question of benami cannot be gone into in these proceedings. The legal title which vested in Subramania Aiyar devolved upon Anantharama Aiyar after the death of the former, and under the settlement deed the petitioner would be an assignee of the debt entitled to apply

1 (1921) 40 M L J 481 I.L R 44 Mad. 499 (F.B).
2 (1920) I L R 42 All. 549
3. (1929) I L R. 52 All. 252

under the Act. We therefore hold that the application is maintainable and that the contention of the appellant that the petitioner was not entitled to apply under the Act is without any force.

There is an application for amendment of the succession certificate granted by the trial Court The certificate granted by the trial Court is in these terms,

"The certificate is accordingly granted to the said R Lakshmi Ammal, the abovenamed petitioner herein, in pursuance of an order of this Court made herein and dated the 26th day of August, 1948 and empowers the said petitioner to collect one half of the debt mentioned in the schedule"

It now turns out that as a matter of fact even in 1946 the Government notified the securities for repayment, and that the securities do not now exist as securities and they have taken the shape of money payable towards the principal and interest up to 15th September, 1946, under the bonds. According to the allegations in the affidavit filed in support of the application this fact was not known to the petitioner at the time she made the application for the issue of a succession certificate. When on behalf of the petitioner a letter was addressed to the Reserve Bank of India (Public Debt Office), Madras Branch, to transfer the bonds in her name and pay the interest in accordance with the succession certificate issued by the Court, the Reserve Bank of India by their letter, dated 2nd March, 1949, intimated to the petitioner that the bonds were already notified for repayment, that they ceased to bear interest from 16th September, 1946 and that the bonds could not be renewed, the only right of the heirs being to receive the payment of principal and interest up to 15th September, 1946 The petitioner therefore asks for amendment of the succession certificate by substituting the word "debts" for the word "securities" in the preamble to the certificate and by substituting in the operative portion the following words

"empowers the said petitioner to collect one half of the debts mentioned in the schedule and receive the interest and dividends payable thereon"

for the words already quoted above The contention urged on behalf of the appellant is that this petition really proceeds entirely on a new basis, namely of a debt recoverable from the bank by the petitioner and that therefore the amendment ought not to be ordered We see no force in this contention Unknown to the petitioner the securities became practically converted into or substituted by the money in the hands of the Public Debt Office, Madras. The order of the learned Judge will operate upon the money into which the securities were converted instead of the securities themselves No question of any variation of the basis of the application arises, and the contention urged on behalf of the appellant seems to us baseless. The application therefore for amendment should be granted, and we accordingly grant it in terms of the petition that has been filed. The amendment application is allowed.

The result is that the appeal fails and is dismissed with costs.

K S *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE MACK.

Sankati Pedda Chenniah .. *Petitioner**

v

Mahaboob Bee .. *Respondent*

Landlord and tenant—Lease of land for cultivation—Expiry—Tenant if bound to formally surrender possession—Holding over—Criterion

Where the fields leased are open fields on which there was no homestead or any moveable property to be surrendered there is no necessity for any ceremony of giving and taking All that the landlord had to do was to enter on the land after the expiry of the lease and take possession either by himself or by a new lessee The sole criterion for finding out whether a lessee was holding over in such a case is whether he did or did not cultivate the lands as a tenant holding over If he did not cultivate he cannot be made liable as tenant holding over merely because there was no surrender by him

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* C. R P. No 1699 of 1947. 9th September, 1949.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree of the District Court of Cuddappah, dated 26th November, 1946, made in A S. No 74 of 1946 (O. S. No. 154 of 1945, District Munsiff's Court, Cuddappah).

K Kameswara Rao and *U. Sethumadhava Rao* for Petitioner.

K. Umamaheswaram for Respondent

The Court delivered the following

JUDGMENT —The petitioner is the defendant who took on lease some land from the plaintiff for 1942-1943. The plaintiff sued him to recover Rs 190 as damages for use and occupation for the years 1943-1944 and 1944-1945 on the ground that the defendant continued in occupation and cultivation. The learned District Munsiff found that defendant did not cultivate subsequent to the expiry of his lease and dismissed the suit with costs The learned District Judge found that the land was not actually cultivated by anybody in 1944-1945 He considered some evidence as regards cultivation in 1943-1944, but gave no finding at all as to who actually cultivated it during this year. He decreed the suit in plaintiff's favour on the ground that the defendant failed to surrender possession after the expiry of his lease.

I am quite unable to follow what kind of surrender of possession the learned District Judge contemplated. These are open fields on which there was no homestead or any moveable property to be surrendered and there was no necessity for any ceremony of giving and taking. All that the plaintiff had to do was to enter on the land after the expiry of the lease and take possession either by herself or by her new lessee The sole criterion in such a suit is whether the defendant did or did not actually cultivate the lands as a tenant holding over As regards this the learned District Munsiff who heard the witnesses has clearly found that the defendant did not cultivate in 1943-1945 D W 2 deposed that P W 1, the brother of the plaintiff who was looking after her affairs, leased out these lands to him on Koru for 1943-1944 and that he actually raised Kusuma crops and paid him Koru rent. According to the evidence of P W 2, the karnam, Kusuma crop was raised in the suit lands in 1943-1944 Rather curiously though karnam he says that he does not know who cultivated the lands. I do not think it is necessary to remand this suit for a finding by the learned District Judge as to whether the defendant did or did not cultivate the lands in 1943-1944

It is stated that this is really a small cause suit which was tried on the original side and this being so, the decree was reversed in appeal without any jurisdiction by the appellate Court There is authority for this position in *Kollipara Seethapathi* v. *Kantipati Subbayya*[1], where it was held that in such a case the High Court was bound to set aside the appellate Court's order as having been passed without jurisdiction In that case, it was conceded by all the parties that the suit was a small cause suit Here no one can explain to me why this was tried as a original suit and why no objection to such a trial was taken either in the trial Court or in the appellate Court. It is taken for the first time here. I do not propose to restore the District Munsiff's decree solely on this technicality I have therefore gone into the merits There is a clear error of law in the learned District Judge's order in his insistence on a formal giving and taking of open lands as between the lessee and the tenant on the expiry of a lease

The petition must succeed and the trial Court's decree dismissing the suit with costs restored I make however no order as to costs on this petition, in view of a position taken here which was not taken in the Courts below

K S. *Petition allowed.*

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1. (1909) 20 M.L J. 718 . I.L.R 33 Mad. 323 (F B.).

[PRIVY COUNCIL.]

(On appeal from the High Court of Judicature at Patna)

PRESENT —LORD OAKSEY, LORD REID, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

Sri Sri Shiba Prasad Singh, deceased, now represented by Kali Prasad Singha . . . *Appellant**

v.

Maharajah Srish Chandra Nandi and another . *Respondents.*

Contract Act (IX of 1872), section 72—Scope of—Payment under a mistaken belief that it was legally due—If can be recovered

Section 72 of the Contract Act makes no distinction between mistakes of fact and mistakes of law, but it must be read together with the rest of the Act and in particular with sections 21 and 22, which also deal with mistake Payment "by mistake" in section 72 must refer to a payment which was not legally due and which could not have been enforced the "mistake" is thinking that the money paid was due when in fact, it was not due There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid

Pannalal v *Produce Exchange Co, Ltd*, A I R 1946 Cal 245, approved

Wolf & Sons v *Dadyba Khimji & Co*, (1919) I L R 44 Bom 631 and *Appavoo Chettiar* v *South Indian Railway Co*, (1928) 56 M L J 269, disapproved

It cannot be said that every sum paid under a mistake is recoverable no matter what the circumstances may be There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise

The lessee under a mining lease had been paying his lessor on a wrong view of his rights based on a misconstruction of the terms of the lease, larger sums by way of royalty than what was really due on a proper construction of those terms On a question whether the lessee could set off the amount of this over-payment against royalties which became subsequently due by him,

Held The money was paid under the belief that it was legally due This belief was mistaken and that is sufficient to bring the case within section 72 of the Contract Act and therefore the lessee was entitled to succeed

W W K Page, K C, *Dingle Foot* and *Alfred Stone* for Appellant

J. M Pringle, K C and *R K Handoo* for Respondents

Their Lordships' Judgment was delivered by

LORD REID —The appellant is the owner of the Jharia estate In 1898 his predecessor granted a mining lease of a part of that estate to the predecessor of the first respondent The terms of that lease are set out in a Kabuliyat of 22nd October, 1898, which begins

"This Kabuliyat regarding Mouruski Mukarrari, *i e.*, permanent settlement on commission of coal land is executed to the following effect"

The provision, the meaning of which is in dispute in the present litigation, is as follows :

"1 That for the quantity of coal which I shall raise from the leasehold entire 1103 bighas 13 kathas of coal land of Ekra I shall pay commission, *i e*, royalty on steam coal, rubble coal, hard coke and soft coke at the rate of 3 annas per ton and for rubble and dust for burning bricks at 1 anna 6 pies per ton Be it stated that I shall pay royalty at the present rate for the coals, which will be despatched by the East Indian Railway line But in future if the Bengal Nagpur Railway line is constructed and the freight of coal becomes less by 2 annas at least or more than what is fixed at present per ton, I shall pay royalty for those coals, which shall be despatched in the aforesaid manner at the said reduced freight, at 5 annas per ton on steam coal, steam rubble, soft coke and hard coke and 2 annas 6 pies per ton on rubble and dust for burning bricks. But if the said railway freight becomes less than 2 annas per ton, the amount which will be reduced will be enhanced on the rate of royalty at present fixed on steam coal, steam rubble, soft coke and hard coke and enhanced by half thereof on rubble and dust for burning coal"

There follows a number of other provisions for an annual minimum royalty, for interest, for hypothecation of the tenant's property at the colliery and for other matters which need not be farther referred to at this point

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* 18th July, 1949.

In 1898, when the lease was granted the only railway available for transport of coal from this district was the East Indian Railway but it was contemplated that the Bengal Nagpur Railway might be extended so as also to serve this district. The Bengal Nagpur Railway was so extended and the extension was opened for traffic in 1903 At the time when the lease was granted the freight for coal from the colliery to Calcutta was Rs 3-11 annas but in 1902 this freight was reduced to Rs 3-2 annas and after some fluctuation both the East Indian Railway and the Bengal Nagpur Railway maintained the freight at Rs 3-2 annas from 1904 for many years

The interpretation of the clause quoted above gave rise to litigation in 1910 between the then lessor and lessee This litigation ended in an appeal to His Majesty in Council and the judgment of their Lordships was delivered on 8th March, 1917, by Lord Parmoor The question at issue was whether the lessor was entitled to the enhanced rate of royalty provided in that clause and after quoting the clause the judgment proceeded :

"The royalty clause fixes a royalty of 3 annas per ton of steam coal, steam rubble, hard and soft coke, and of 1 anna 6 pies per ton of brick burning rubble and dust, raised and despatched or sold by the lessee These latter words are important in construing the clause A contrast is drawn between coal or rubble despatched and coal or rubble sold at the pit's mouth, and the claim or an enhanced royalty on coal is made in respect of coal despatched by rail It does not appear, and is not material, whether at the date of the lease any coal was despatched in any other way than by rail. The only railway which served the coal field at the date of the lease was that of the East Indian Company The clause provides that royalties at the present fixed rate should be paid on all coal despatched by the East Indian Company, subject, however, to a future contingency —

But if, in future, the Bengal Nagpur Railway being constructed, the freight on coal is reduced by 2 annas or more per ton then on all coals despatched in the aforesaid manner (ukta rupey) at reduced (Kom) rates royalty would be paid at 5 annas per ton of steam coal, steam rubble, hard and soft coke, and 2 annas 6 pies per ton of brick burning rubble and dust

The Bengal Nagpur Railway has been constructed, and it has been correctly held in both Courts that, as a consequence of this construction, a re-adjustment was made in the freight on coal It was further assumed throughout the hearing, both before the Subordinate Judge and in the High Court, that, in the re-adjustment the freight on coal had been reduced by more than 2 annas per ton as compared with the freight in operation on the East Indian Company's line at the date of the lease On this finding and assumption the contingency on which an enhanced royalty would become payable has become operative, but it is said that this enhanced royalty is only payable in respect of coals sent over the Bengal Nagpur line and only so far as the Bengal Nagpur Railway Company charge a differential rate less than the rate charged by the East Indian Railway Company

Their Lordships cannot find any reference to such a differential rate in the terms of the clause or any support for the argument of the appellant under this head The decision of the Subordinate Judge is rested on evidence of the intention of the parties to the deed, but this evidence is clearly inadmissible In construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words which they used.

Apart from any question of differential rate, it is clear from the context that the words 'coals despatched in the aforesaid manner at reduced rates' cannot be restricted as applicable only to coals sent over the Bengal Nagpur system At the date when the lease was executed, no coals had been despatched over the Bengal Nagpur system and the deed speaks from the date of its execution. It might be argued that, grammatically, the words in question referred only to coals despatched by the East Indian Company but this construction would be adverse to the contention of the appellant If the words in question are not limited in their application to coal despatched by the East Indian Company, they must refer back to the earlier context in the clause and include all coals despatched by rail at a reduced rate, either by the East Indian Company or the Bengal Nagpur Company. Their Lordships are of opinion that this is what the words naturally mean, and agree in the judgment of the High Court"

After this judgment royalty was regularly paid at the enhanced rates of 5 annas and 2 annas 6 pies per ton until 1923 . At this period Messrs H. V Low & Co, Ltd., were managing the colliery for the lessees and they had been in the habit of paying the royalty During 1923 payment of royalties fell into arrear and on 28th January, 1924, the lessee the Raja of Kasimbazar himself paid Rs. 57,069-3-0 to the lessor "in full payment of Ekra royalty from 1st January to 30th September, 1923" This payment was calculated at the enhanced rates of 5 annas and 2 annas 6 pies per ton Messrs Low's agency was terminated in February, 1924 ,and before this date Mr. F. F Lyall, C I E, I C S, had been appointed manager of the Kasimbazar Estate. On 8th March, 1924, Mr Lyall wrote to the Rajah of Jharia,

the lessor, stating that the rate of freight for coal had been raised on 1st April, 1921, to Rs. 3-13-0 ; that the highest rate of royalty of 5 annas and 2 annas 6 pies per ton was

> " only payable on coal which may be despatched at a freight of 2 annas less than the freight which was in force at the time of the execution of the lease ",

and that the lessor had been very much overpaid He added :

> " Please note that we shall make no further payments on account of royalty until this excess is wiped out "

The lessor's manager wrote in reply :

> " I am sorry you have put a wrong construction upon the lease and the Raja is not prepared to accept the same , the contingencies mentioned in the lease having happened, the Raja is entitled to claim the enhanced royalty for all time to come "

After some further correspondence the lessor's manager wrote to the lessees on 18th August, 1924 :

> " It is useless carrying on further correspondence as there is no chance of the matter being settled out of Court If you think you are entitled to any refund you may sue for the same "

The contentions of the parties had been clearly stated. The lessor contended that once the higher rate of royalty had come into operation it was permanent and not affected by a subsequent rise in the rate of freight. On this view there had been no overpayment and royalties were still payable at the higher rate The lessee on the other hand maintained that on a true construction of the lease the higher rate of royalty was only payable on coal despatched by rail at a freight more than 2 annas below the freight at the date when the lease was entered into. On this view the higher rate of freight ceased to operate on 1st April, 1921. By continuing to pay at the higher rate from that date until 30th September, 1923, he had paid Rs 63,680 more than was due, and he was entitled to retain future royalties up to this amount and thereafter to pay at the lower rates The lessee acted on this view of his rights He made no further payment of royalties until 20th August, 1925, and from that date onwards he continued to pay royalty at the lower rates.

The lessor protested and did not acquiesce but he took no steps to enforce what he asserted to be his rights until he raised the present action on 5th February, 1936 In view of the provision for hypothecation contained in clause 10 of the lease the lessor, the present appellant, was able to bring his action in the form of a mortgage suit in which he claimed an account for the previous twelve years on the footing that royalty had been due throughout that period at the higher rates, and that he was entitled to interest on arrears unpaid.

On 29th June, 1937, the Subordinate Judge at Dhanbad held that during the period in question royalty had only been payable at the lower rates but that the lessee, the present respondent, was not entitled to set off against such royalty the amount of his earlier over-payments, and that no interest was due. On this footing he held the plaintiff the present appellant entitled to a decree for Rs. 52,197-5-6 in addition to a small sum in respect of a matter not now in dispute. After certain further procedure the High Court at Patna on 4th December, 1942, decided the case on appeal, affirming the decision of the Subordinate Judge on the main issues but allowing in addition certain interest Against that decision an appeal and cross-appeal have been taken to His Majesty in Council.

The main contention for the appellant before their Lordships was that once the higher rate of royalty had come into operation, as it did in or about 1903, it was permanent and not affected by any future rise in railway freights. It was not and could not be argued that this question was determined in the Appeal of 1917 Their Lordships then held the contingency on which an enhanced royalty would become payable, a fall in railway freight in consequence of the construction of the Bengal Nagpur Railway, had become operative and that the enhanced royalty was payable on coal despatched both by the East Indian Railway and by the Bengal Nagpur Railway But this decision does not touch the question

whether that enhanced royalty would continue to be payable if the rate of freight rose again to or beyond what it was when the lease was executed. This question must now be decided.

The obligation of the lessee set out in clause 1 of the Kabuliyat is that on the occurrence of two events, both of which have happened,

"I shall pay royalty for those coals which will be despatched in the aforesaid manner at the said reduced freight at 5 annas per ton . . . . . "

It has been decided that "in the aforesaid manner" means by either of the Railways mentioned. "At the said reduced freight" must refer back to

"if . . . the freight of coal becomes less by 2 annas at least or more than what is fixed at present per ton"

and must, therefore, mean at a freight 2 annas or more below that in force at the date of the lease The crucial question of construction can be stated thus: Do the words "at the said reduced freight" qualify the words "those coals which will be despatched in the aforesaid manner" so as to limit the obligation to pay at 5 annas, etc, to coals which will be despatched "at the said reduced freights"? or on the other hand do the words "at the said reduced freight" have some different purpose and effect so that the obligation to pay at 5 annas continues to attach to all coals despatched no matter what the freights may become in future?

The argument for the appellant was that the leading words of the Kabuliyat "mourushi mukarrari" require that the payment under the lease shall be at a rate permanently fixed But the decision of their Lordships in 1917 established that, as regards all coal despatched by rail, the rates of royalty which were originally due under the lease—3 annas and 1 anna 6 pies—had ceased to operate and rates of 5 annas and 2 annas 6 pies had come into operation Therefore the words "mourushi mukarrari" must be read in a sense consistent with at least one variation of the rates of royalty at a date which could not be predicted when the lease was entered into If that is so there can in their Lordships' view be no insuperable obstacle to those words being read in a sense consistent with more than one such variation

The plain and obvious meaning of the provisions of clause 1 is that the higher rates of royalty shall be payable on coals despatched "at the said reduced freight" and on no other coal, so that if and when the freight rises to or beyond the original figure the higher royalty is not payable, but if and when the freight is 2 annas or more below the original figure the higher royalty is payable. This is a simple and reasonable construction of the words which the parties have used and their Lordships have found nothing in the contract which is inconsistent with it

To appreciate the argument for the appellant it is necessary to examine the last sentence in clause 1. It was possible that a reduction of freight following on the construction of the new railway might occur but be less than 2 annas and the last sentence provides for this contingency. It is badly expressed and must be read as meaning:

"But if the said railway freight becomes less by less than 2 annas per ton . . . . ."

In that event the rates of royalty are to be enhanced but by less than the full enhancement provided for in the preceding sentence This is a reasonable provision which follows naturally on the preceding sentence and in no way conflicts with it. The argument for the appellant was that the sole purpose of the words "at the said reduced freight" in the preceding sentence is to differentiate that sentence from the last sentence in the clause Their Lordships are unable to accept this argument There is no need for any words for that purpose and if that were their purpose these words would be ill-chosen Their Lordships have no doubt that that is not their purpose and that on this matter the decision of the High Court is right

As the freight for coal despatched by rail after 1st April, 1921, exceeded the freight charged when the lease was made, it follows that after that date the lessee

was only bound to pay royalties at the lower rates of 3 annas and 1 anna 6 pies per ton But the lessee continued to pay royalties at the higher rates of 5 annas and 2 annas 6 pies per ton on coal despatched by rail during the period from 1st April, 1921, to 30th September, 1923, and so overpaid the lessor The High Court have held that the lessee was not entitled to set off the amount of this over-payment against the royalties which subsequently became due by him, and the Cross-Appeal has been taken against this decision The ground of the decision of the High Court was that the over-payment had been made because the lessee, the respondent and his agents were unaware of their right under the lease ; that this was not a mistake of fact but was a mistake of law , that the law of India in this matter is the same as the law of England , and that under the law of England money overpaid in such circumstances could neither be recovered nor set off against other payments due Harries, C J , said

" There can be no doubt that under English Law money paid under a mistake of fact is recoverable but generally speaking money paid under a mistake of law is not recoverable This has been clearly laid down in a large number of English authorities The Indian Contract Act though it deals with the effect of mistakes of fact and law upon a contract has no express provision relating to the effect of payments made under such mistakes and it appears to me that the law relating to the matter is the same in this country as it is in England "

The learned Chief Justice appears to have overlooked the provisions of section 72 of the Indian Contract Act This section was only mentioned in passing by the Subordinate Judge and it would seem that it was not argued or only faintly argued before the Subordinate Judge or in the High Court that section 72 applied to this case The appellant, the respondent in the Cross-Appeal, submitted to their Lordships that in these circumstances their Lordships should not now receive an argument based on section 72 but their Lordships are unable to exclude from their consideration the provisions of a public statute It is regrettable that their Lordships do not have the assistance of the views of the High Court on this matter Their Lordships impute no blame to the learned Judges of the High Court, but they feel bound to consider the argument which has now been adduced

Section 72 enacts

" A person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it "

This section makes no distinction between mistakes of fact and mistakes of law, but it must of course be read together with the rest of the Act and in particular with sections 21 and 22 which also deal with mistake Section 21 enacts

" A contract is not voidable because it was caused by a mistake as to any law in force in British India, but a mistake as to a law not in force in British India has the same effect as a mistake of fact "

Section 22 enacts .

" A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact "

The construction of section 72 has given rise to differences of opinion in India There is a considerable body of authority dealing with the meaning of " coercion " in this section but their Lordships have not found in those authorities anything which is of material assistance in deciding the present case The authorities which deal with the meaning of " mistake " in the section are surprisingly few and it cannot be said that there is any settled trend of authority Their Lordships are therefore, bound to consider this matter as an open question

Those learned Judges who have held that mistake in this context must be given a limited meaning appear to have been largely influenced by the view expressed in Pollock and Mulla's commentary on section 72 of the Indian Contract Act where it is stated (Indian Contract and Specific Relief Acts, 1931 Edn , p 402) .

" Mistake of law is not expressly excluded by the words of this section , but section 21 shows that it is not included "

For example in *Wolf & Sons* v. *Dadyba, Khimji & Co* [1], Macleod, J., said, referring to section 72

> " on the face of it mistake includes mistake of law But it is said that under section 21 a contract is not voidable on the ground that the parties contracted under a mistaken belief of the law existing in British India, and the effect of that section would be neutralised if a party to such a contract could recover what he had paid by means of section 72 though under section 21 the contract remained legally enforceable This seems to be the argument of Messrs Pollock and Mulla and as far as I can see it is sound "

In *Appavoo Chettiar* v *South Indian Railway Co.* [2], Ramesam and Jackson, JJ., say

> " Though the word ' mistake ' in section 72 is not limited it must refer to the kind of mistake that can afford a ground for relief as laid down in sections 20 and 21 of the Act Indian Law seems to be clear, namely, that a mistake in the sense that it is a pure mistake as to the law in India resulting in the payment by one person to another and making it equitable that the payee should return the money is no ground for relief "

Their Lordships have found no case in which an opinion that "mistake " in section 72 must be given a limited meaning has been based on any other ground In their Lordships' opinion this reasoning is fallacious If a mistake of law has led to the formation of a contract, section 21 enacts that that contract is not for that reason voidable. If money is paid under that contract, it cannot be said that that money was paid under mistake of law it was paid because it was due under a valid contract, and if it had not been paid payment could have been enforced. Payment " by mistake " in section 72 must refer to a payment which was not legally due and which could not have been enforced the " mistake " is thinking that the money paid was due when in fact it was not due There is nothing inconsistent in enacting on the one hand that if parties enter into a contract under mistake in law that contract must stand and is enforceable, but on the other hand that if one party acting under mistake of law pays to another party money which is not due by contract or otherwise, that money must be repaid Moreover if the argument based on inconsistency with section 21 were valid, a similar argument based on inconsistency with section 22 would be valid and would lead to the conclusion that section 72 does not even apply to mistake of fact The argument submitted to their Lordships was that section 72 only applies if there is no subsisting contract between the person making the payment and the payee, and that the Indian Contract Act does not deal with the case where there is a subsisting contract but the payment was not due under it But there appears to their Lordships to be no good reason for so limiting the scope of the Act Once it is established that the payment in question was not due, it appears to their Lordships to be irrelevant to consider whether or not there was a contract between the parties under which some other sum was due Their Lordships do not find it necessary to examine in detail the Indian authorities for the wider interpretation of "mistake " in section 72 They would only refer to the latest of these authorities *Pannalal* v *Produce Exchange Corporation, Ltd* [3] in which a carefully reasoned judgment was given by Sen, J. Their Lordships agree with this judgment It may be well to add that their Lordships' judgment does not imply that every sum paid under mistake is recoverable no matter what the circumstances may be There may in a particular case be circumstances which disentitle a plaintiff by estoppel or otherwise

In this case there was not sufficient evidence to show why the lessee and his agents made the overpayments They may have acted on inadequate information, they may have taken a wrong view of their legal rights or they may have continued paying at the old rates without giving any thought to the matter But it is clear that there was no intention to make a present to the lessor of money which was not due The money was paid under the belief that it was legally due This belief was mistaken In their Lordships' view that is sufficient to bring the case within section 72 and therefore the Cross-Appeal must succeed. That being so the question of interest involved in the appeal does not now arise

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1 (1919) I L R 44 Bom 631 (648).

2 (1928) 56 M L J 269.

3 A.I.R 1946 Cal 245

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed and the Cross-Appeal allowed and the plaintiff's suit dismissed with costs in the Courts in India to the defendant The appellant will pay the costs of the Appeal and Cross-Appeal.

Solicitors for Appellant . *Douglas Grant & Co*

Solicitors for Respondents *Barrow Rogers and Nevill*

V.S. *Appeal dismissed and Cross Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR JUSTICE BASHEER AHMED SAYEED.

Kalyanam Veerabhadrayya . *Petitioner* *

Madras Maintenance of Public Order Act (I of 1947), section 1 (4)—Power of Provincial Government to extend life of Act—Validity—Notification of 27th February, 1948, extending life of Act for one year—Effect—Madras Ordinance (I of 1949)—Validity and effect

In view of section 5 of the Madras General Clauses Act, the Madras Maintenance of Public Order Act, 1947, came into force upon the first publication made on 12th March, 1947, by the Governor in the *Fort St George Gazette* of the assent to the Act given by the Governor-General of India on 11th March, 1947 Accordingly the notification extending the Act for one year from 12th March, 1948, leaves no interval when the Act was not in force

The Madras Maintenance of Public Order Act, 1947, ceased to have operation and died a natural death on the 11th March, 1948 The bare power of extension of the life of an act is a legislative power and not a matter of mere administrative discretion and such power to extend cannot be delegated by the Legislature to the Executive Government

Accordingly the power conferred by section 1 (4) of the Act on the Provincial Government to extend the continuance of the Act by notification is invalid

Distinction between delegation of power to make the law and conditional legislation discussed and authorities reviewed

Jatindranath Gupta v *Province of Bihar,* (1949) 2 M L J 356 1949 F L J 225 (F C) and *K K B Canadia* v *B J H Warden,* (1949) 53 C W N 728 relied on

Gauri Nandan Upadhya v *Rex,* A I R 1948 All 414 and *Hariharanand* v *Superintendent, Central Jail,* A I R 1948 All 435, dissented from

There is nothing wrong in the Governor proroguing the Assembly and the Council (which he can do at any time he pleases) with a view to enable himself to issue an Ordinance under section 88 of the Constitution Act It cannot be said to be a fraud on his power to issue an Ordinance

Madras Ordinance I of 1949, promulgated by the Governor on 11th August, 1949, cannot have the effect of amending Madras Act I of 1947, which had ceased to exist Section 2, section 3 (*a*) and section 4 (which purports to insert a new section 4-A) of the Ordinance are of no effect, as they do not purport to enact or revive a new law but only seek to amend or clear doubts in the old Act Section 3 (*b*) of the Ordinance however is an enacting provision and it retrospectively validates actions, proceedings, notifications and orders made under the Act at any time on or after 12th March, 1948 Such a power of validation is recognised by Courts in India and the Privy Council Accordingly section 3 (*b*) of the Ordinance is valid and operative

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of Habeas Corpus for production of the petitioner herein before the High Court for being set at liberty.

N S Mani for *Row and Reddy* for Petitioner.

The Advocate-General (*K Rajah Aiyar*) instructed by *N T Raghunathan* for the Public Prosecutor (*V L Ethiraj*) on behalf of the Crown

The Court made the following

ORDER —These are applications under section 491, Criminal Procedure Code, to issue directions in the nature of Habeas Corpus directing the release of the petitioners who were detained under the Madras Maintenance of Public Order Act, 1947 (Act I of 1947). As these petitions raised some common questions of law, we thought it convenient to hear and dispose of these questions before considering

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*Crl. M. P. No 1529 of 1949. 10th October, 1949

the merits of each application. The orders of detention under the Act in all the petitions except four, Cr M Ps Nos 1645 and 1651 of 1949, 1527 and 1611 of 1949 were passed after 12th March, 1948, and according to the petitioners on the date on which the orders of detention in these cases were passed, the Madras Maintenance of Public Order Act, 1947, ceased to be in force and that therefore the orders of detention were without authority and were illegal

The Maintenance of Public Order Act, 1947 (Madras Act I of 1947), hereinafter called "the Act" in the course of this judgment, received the assent of the Governor-General on the 11th March, 1947, and was first published in the *Fort St George Gazette* on the 12th March, 1947 Under section 1, sub-clause (3) of the Act, it came into force at once Under sub-clause (4) it remains in force for a period of one year, but under that sub-clause the Provincial Government is empowered from time to time by notification in the *Fort St George Gazette* to extend the continuance of this Act for a further period or periods not exceeding one year in the aggregate if in their opinion it is expedient so to do On the expiry of the Act the provisions of section 8 of the Madras General Clauses Act are made applicable, as if the Act had then been repealed Before the expiry of the period of one year from the commencement of the Act the Provincial Government by a notification in the *Fort St George Gazette* extended the duration of the Act for a further period of one year commencing from 12th March, 1948 [*Vide* G O No 446 (General), dated 27th February, 1948, published in the *Fort St George Gazette* of 2nd March, 1948] This notification, it would be noticed, was issued before the expiry of the period of one year from the commencement of the Act Sub-clause (4) of section 1 of the Act was amended by the Madras Maintenance of Public Order (Amendment) Act, 1948 (Act XVII of 1948) by substituting for the words "for a further period or periods not exceeding one year in the aggregate" the words "for a further period or periods not exceeding three years in the aggregate" This Amending Act received the assent of the Governor-General on the 17th August, 1948, which was first published in the *Fort St George Gazette*, Extraordinary on the 20th August, 1948 The life of the Act was further extended by another notification for a period of one more year from 12th March, 1949 [*Vide* G O Ms No 594 (Public General), dated 4th March, 1949] by reason of this further extension the Act continues in force, if the notifications are valid, till 12th March, 1950 The orders of detention now in question were made during the period commencing from 12th March, 1948 In *Jatindranath Gupta* v *Province of Bihar*[1], the Federal Court held that the power delegated to the Provincial Government to extend the duration of the Bihar Maintenance of Public Order Act, 1947, on a resolution passed by the Legislative Assembly and agreed to by the Bihar Legislative Council, with or without modifications, was invalid, and that the said Act ceased to have operation on the termination of the period of one year from the commencement of that Act This decision was pronounced on the 28th May, 1949 Following the decision of the Federal Court the Calcutta High Court declared in *K K B Canadia* v *B J H. Warden*[2], that a similar power of extending the life of an Act by a resolution of the Provincial Legislature contained in the West Bengal Security Act, 1948, was invalid This decision was pronounced on the 27th June, 1949 After these two decisions the Government of Madras promulgated the Ordinance of the 11th day of August, 1949, Madras Ordinance No I of 1949, with a view to remove doubts regarding the validity of the continuance of the Madras Maintenance of Public Order Act, 1947, and also to amend the Act The Legislature in the Province was in session until it was prorogued by the Governor on the 2nd August, 1949 The Ordinance was promulgated on the 11th August, 1949, as the Legislature in the Province was not in session, and as the Governor of Madras was satisfied that immediate action was necessary for the purpose of removing doubts regarding the validity of the continuance of the Madras Maintenance of Public Order Act, 1947, and for amending it The Ordinance was promulgated after the instructions of the Governor-General were obtained in pursuance of the proviso to section 88 (1) of the

1 (1949) 2 M L J 356 1949 F L J 225 (F C) 2. (1949) 53 C W N 728.

Government of India Act, 1935 It was issued by the Governor in exercise of the powers conferred upon him by section 88 (1) of the Constitution Act The Ordinance consists of four sections Section 1 contains the short title, and section 2 declares that the Madras Maintenance of Public Order Act, 1947, remained in force on and from 12th March, 1948, and shall continue to remain in force so long as the Ordinance remains in operation It also amends section 1 of the Act by omitting sub-section (4) Section 3 validates the Madras Maintenance of Public Order (Amendment) Ordinance, 1948 and the Madras Maintenance of Public Order (Amendment) Act, 1948 (Act XVII of 1948) and provides that they shall not be questioned on the ground that the Acts amended thereby were not in force at the time when the amending Ordinance was promulgated or the amending Act was enacted Section 3, sub-clause (*b*) is intended to validate the action taken by the Provincial Government on and after 12th March, 1948, in accordance with the provisions of the Act It states

"No action or proceeding taken, no notification issued, no order made, and nothing done, by any authority in accordance with the provisions of the said Act at any time on or after the 12th day of March, 1948, shall be questioned on the ground that the said Act was not in force at that time"

Section 4 of the Ordinance introduces a new section, section 4-A in the Act It is presumably intended to nullify the effect of certain decisions of this Court which have taken the view that if the grounds of detention are vague and indefinite, or if there was inordinate delay in communicating the grounds to the detenu as required by section 3 (1) of the Act, the order of detention could not be justified. The new section 4-A inserted by the Ordinance is as follows —

"No order of detention made in respect of any person in pursuance of any of the foregoing provisions at any time, whether before, on, or after the 12th day of March, 1948, shall be deemed to be invalid or unlawful or improper on the ground of any defect, vagueness or insufficiency, or any delay, in any communication made to such person under this Act"

This short summary of the provisions of law which have to be considered in this judgment will enable one to appreciate the contentions urged on either side On behalf of the petitioners the main contention urged was that in view of the decision of the Federal Court which construed the provisions of the Bihar Act and held that the delegation was improper, it followed on the same reasoning that the delegation contained in section 1 (4) of the Madras Act was equally invalid, and that at the time when the detention orders in these cases were passed, there was no law in force authorising the authority concerned to make the orders of detention, which are now in question The petitioners' learned counsel urged that Ordinance No 1 of 1949 was promulgated by the Governor by fraudulent exercise of the power vested in him under the Constitution Act, as the Governor intentionally prorogued the Legislature of the Province while in session with a view to clothe himself with a power of issuing an Ordinance under section 88 (1) of the Constitution Act It is also invalid as no circumstances existed which justified immediate action and the issue of an Ordinance As the Act itself ceased to be in force on 12th March, 1948, the amendment sought to be effected by the Ordinance are of no legal effect, as there can be no amendment of an Act which did not exist Nor is it possible to remove doubts in an Act which ceased to be in force For this contention also reliance was placed on the decision of the Federal Court on behalf of the petitioners

The learned Advocate-General who appeared for the Government argued that the decision of the Federal Court was distinguishable as the provisions of the two Acts were entirely different, that a bare power to extend the duration or life of an Act was not a legislative power and could validly be delegated, and that this question was not considered fully by the Federal Court, and even if there were observations in the judgment of the Federal Court, these observations were *obiter* According to the learned Adovcate-General, in any event the power under sub-section (4) of section 1 of the Act of extending the life of the Act is in the nature of conditional legislation which could validly be enacted by the Legislature of the Province. As a last resort he relied on the Ordinance as validating the detentions In a very illuminating and able argument the learned Advocate-General canvassed

at length the limits of delegated legislation under written constitutions and also the sovereign power of the English Parliament to delegate legislative authority

The primary question that requires careful consideration is therefore whether the Legislature of the Province is competent to authorise the Provincial Executive Government to extend the duration of the Act and to continue the Act by notification Before dealing with this question, it would be appropriate at this stage to dispose of a question of secondary importance raised on behalf of the petitioners The notification of 27th February, 1948, published in the *Fort St George Gazette* of 2nd March, 1948, extended the life of the Act from 12th March, 1948 It was argued that the extension should have been from 11th March, 1948, as the Act had expired by that time The Maintenance of Public Order Act, 1947, received the assent of the Governor-General on the 11th March, 1947, and the assent was published in the *Fort St George Gazette* on 12th March, 1947 The Act must, according to the petitioners, be deemed to have come into effect on 11th March, 1947, when it received the assent of the Governor-General (from which date the one year should be reckoned) and not on the 12th March, 1947, when the assent was published in the *Fort St George Gazette* In support of this argument reference was made to a passage in Maxwell on Interpretation of Statutes, 9th Edition at page 409, where the learned author states —

"A statute takes effect from the first moment of the day on which it is passed, unless another day be expressly named, in which case it comes into operation immediately on the expiration of the previous day By a fiction of law, the whole session was formerly supposed to be held on its first day and to last only that one day, and every Act, if no other day was expressly fixed for the beginning of its operation, took effect, by relation, from the first day of the session "

To the same effect is the opinion of Crawford on *Statutory Construction* at page 152, paragraph 106, where the learned author states

"In the absence of a constitutional or a general statutory provision, or a provision in the statute itself relating to the effective date, the statute will take effect from the day of its passage or enactment, that is, from the date the last act necessary to complete the legislative process is performed "

In *Tomlinson* v *Bullock*[1], it was held that where no time is specified in the Act from which it is to come into operation the date on which the Act receives the royal assent is the date on which it comes into operation and takes effect from the very commencement of the day on which the royal assent is given Of course the law does not recognise fractions of a day, and when once an assent is received, it comes into effect from the very commencement of the day See *Chenchiah* v *Commissioner of Police, Madras*[2]

The short answer to this argument is that the Act is governed by the Madras General Clauses Act 1891 (Act I of 1891) which lays down in section 5 the principles for determining the commencement of an Act According to this section, if no time is mentioned or no provision is made for the commencement of an Act, the Act comes into force upon the first publication made by the Governor in *Fort St George Gazette* of the assent to the Act by the Governor-General of India That is, the date of the first publication is taken as the date of the commencement of the Act, if no date is fixed for the commencement The date of the passing of the Act therefore is different from the date when the Act comes into force If the date is mentioned in the Act itself, the Act begins to operate or comes into effect from such date, but if no day is mentioned, the date of commencement of the Act is the date on which the assent of the Governor-General is published in the Official Gazette for the first time. The present Act (No I of 1947) has not fixed any date or time for its commencement Under sub-clause (3) of section 1 it comes into force at once The assent of the Governor-General was received on the 11th March, 1947, but the assent was published in the *Fort St George Gazette* only on the 12th March, 1947 In view of section 5 of the Madras General Clauses Act the latter date, *i e*, 12th March, 1947, should be taken as the date of the commencement of the Act In this view, therefore, the notification of 27th February, 1948, extending the Act for one year from 12th March, 1948, leaves no interval when the Act was not in force

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1. (1879) 4 Q B D 230 2 (1947) 1 M L J 190

We shall now deal with the main question whether it was competent to the Provincial Legislature to delegate to the Provincial Government the power to extend the life of the Act by notification. It may not be out of place at this stage to recapitulate and set out the gist of the decisions of the Judicial Committee which have considered the position of the Legislatures created under a written Constitution, particularly the Indian Legislature and the Colonial Legislatures Such Legislatures are created by Statutes, Orders in Council, or Letters Patent The power to legislate, its limits are defined by the Constitution They are in no sense agents of the British Parliament which created them, and the principle of *delegata potestas non potest delegare* is inapplicable to them Within the limits prescribed by the statute they have sovereign and plenary powers of legislation of the same nature as the British Parliament. The authority creating them also fixes the limits of the field of legislation within which they possess plenary powers The area is no doubt restricted but within the area their powers are unrestricted In *Empress* v *Burah*[1], which is the leading case on the subject, Lord Selborne L C, described the position at page 180 as follows

" their Lordships are of opinion that the doctrine of the majority of the Court is erroneous and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed of the nature and principles of legislation The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question, and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created and, by which, negatively, they are restricted If what has been done is legislation within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions "

In *Hodge* v *The Queen*[2], Lord Fitzgerald dealing with the British North America Act said as follows —

" It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures They are in no sense delegates of or acting under any mandate from the Imperial Parliament When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion would have had under like circumstances to confide to a municipal institution or body of its own creation, authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect "

These two cases said Sir Robert P Collier in *Powell* v *Apollo Candle Company*[3] :

" have put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature It is a legislature restricted in the area of its powers, but within that area unrestricted, and not acting as an agent "

The British Parliament stands in a superior position as its powers are not circumscribed or limited by any written constitution Its sovereignty is absolute and it may enact any legislation of its choice.

The British Parliament has unrestricted power of delegation It may enact conditional legislation or may entrust to subordinate bodies the power to make by-laws or regulations in pursuance of an Act of Parliament which lays down the limits of such subordinate legislation It can itself create Legislatures and endow them with capacity or the power to legislate, define the area and also prescribe the limits of that area. The position, however, of the Indian Legislatures and of

1 (1878) L R 5 I A 178 I L R 4 Cal 172 (180). 3 A C 889 (P C)

2 (1883) 9 A C 117 at 132.

3 (1885) 10 A C. 282

Colonial Legislatures is entirely different In the United States of America that power of delegation is further complicated by two principles, one the tripartite division of the powers of the Government to executive, legislative and judicial, and the implied restriction of the power of one department of the Government to delegate its functions to the other It is a principle inherent in the American Constitutional system that unless expressly provided the Legislature cannot exercise either executive or judicial powers and an executive in its turn cannot exercise either legislative or judicial powers, and the judiciary is equally prohibited from exercising either executive or legislative powers This strict division of the powers under the American Constitution has resulted in the view that no delegation is possible , but the modern tendency seems to be not to adhere to the strict view, as it is not possible for a legislature to enact laws providing for all contingencies and laying down rules so as to cover all details regarding the enforcement of particular Acts. Crawford on Statutory Construction referring to this division of powers under the American Constitution observes at page 13 :

" It is therefore, apparent that the division of governmental powers into the legislative, the executive, and the judicial is an abstract and general division and probably was never intended to be strictly adhered to in actual operation Nor does it mean, from a practical standpoint, that they must remain completely separate and distinct with no connecting link All three departments derive their authority from the same source and, although their powers differ, they represent the sovereignty in equal degree They are co-ordinated departments of the Government, and as such are politically connected They are mutually dependent and could not exist without the assistance of each other, for one makes the laws, another executes them, and the other expounds them Yet, the functions and the powers are not blended, although sometimes the powers theoretically belonging to one department are exercised by another either at the express direction of law or incidentally as a means of exercising the power properly within its own domain Each department must perform the duties assigned to it, and should not exercise those powers properly belonging to either of the other departments And the powers properly belonging to each department are to be determined by a consideration of the language and intent of the constitution together with history, the nature of powers, limitations, and purposes of governments ".

The other principle underlying the American Constitution is that the powers of the Government are considered to have their source in the authority of the people of the United States, and that the Legislature was the agent of the people and therefore under a disability to delegate power confided to it to another authority on the principle of *delegata potestas non potest delegare.* These two principles however have no application to either the Indian Legislatures or the Colonial Legislatures, as it has now been authoritatively settled by the Privy Council in the decisions already referred to that such Legislatures are not delegates of the Parliament and have plenary powers of legislation within the appointed limits.

The power of delegation however is recognised, but the question is, what are the limits of such delegation ? As the legislative power of a Government is vested in the Legislature under the Constitution Act it is not open to the Legislature to surrender or abdicate that power or delegate it to another authority whether it is the executive Government or some other body. But a Legislature is authorised to delegate a power which is non-legislative in character. Sometimes the delegated power may be in the nature of conditional legislation authorising an authority such as the executive to determine the time of the commencement of an act and the area of its application after determining, if necessary, certain facts. It may also entrust the power of extending the Act to other matters not enumerated in the Act itself. In other cases, the Legislature entrusts to the subordinate bodies the power of making by-laws and regulations so as to carry out into execution the Act in which the principles and the policy of the Legislature have been laid down with precision. In other words, the Legislature by the Act passed by it lays down general principles and the policy, leaving out details to be filled in by regulations or rules by the Executive Government or some other authority. This form of Legislation is described by some text-writers as subordinate legislation and is very often resorted to by Legislatures. The reason is that the Legislatures have no time or the aptitude to consider and enact rules relating to the various details having regard to the complex nature of the administration and social life. The difficulty however is to draw the line between a Legislative power and a non-legislative

power. So far as we are aware, no authority has attempted to draw the line of demarcation, and all that is done is to state a number of principles by which the legality of delegation by a Legislature is to be determined. The application of these principles, it must be admitted, is not very easy All that can be said is as stated by Crawford on Statutory Construction at page 25,

"As a general rule, it would seem to be *the nature of the power* rather than the *manner* in which it is exercised by the administrative officer, which determines whether the delegation is lawful".

Another principle which is very often quoted from an American decision is :

"The true distinction therefore is between the delegation of power to make the law which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made".

Conditional legislation of the kind dealt with by the Privy Council in *Empress* v *Burah*[1], is considered to fall within the latter category, and it has been uniformly held that such a kind of delegation is valid The attempt on the part of the learned Advocate-General is to bring the present case within the principle of the above decision, and the other cases which have applied that principle In *Empress* v. *Burah*[1], the Privy Council had to deal with Act XXII of 1867 passed by the Indian Legislature. The Act purported to remove Gare Hills from the jurisdiction of the ordinary civil and criminal Courts and to vest the civil and criminal administration of justice in the said territory in officers to be appointed by the Lieutenant-Governor of Bengal. The Lieutenant-Governor of Bengal was authorised by notification in the Calcutta Gazette to determine the time when the Act should come into operation in respect of the Gare Hills The 9th section of the Act empowered the Lieutenant-Governor from time to time by notification in the Galcutta Gazette to extend the provisions of the Act to the Jaintia Hills, the Naga Hills and portions of the Khasia Hills. This delegation of the power to the Lieutenant-Governor to determine the time of the commencement of the Act and also to extend its operation to other areas was questioned in the case. The High Court was of opinion that the delegation was bad, as it was delegation of a legislative power which offended also against the principle that an agent could not delegate his powers. It was pointed out by the Privy Council that it was not open to the Governor-General in Council to create a new Legislature and arm it with legislative authority not authorised by the Councils Act Lord Selborne, L C, overruled the objection and upset the view of the High Court as it was not a legislative power that was delegated to the Lieutenant-Governor The Lord Chancellor observed at page 182 :

"Their Lordships think that it is a fallacy to speak of the powers thus conferred upon the Lieutenant-Governor (large as they undoubtedly are) as if, when they were exercised, the efficacy of the acts done under them would be due to any other legislative authority than that of the Governor-General in Council Their whole operation is, directly and immediately, under and by virtue of this Act (No XXII of 1869) itself. The proper Legislature has exercised its judgment as to place, person, laws, powers, and the result of that judgment has been to legislate conditionally as to all these things The conditions having been fulfilled, the legislation is now absolute. Where plenary powers of legislation exist as to particular subjects, whether in an Imperial or in a Provincial Legislature, they may (in their Lordships' judgment) be well exercised, either absolutely or conditionally. Legislation, conditional on the use of particular powers or on the exercise of a limited discretion, entrusted by the Legislature to persons in whom it places confidence, is no uncommon thing, and, in many circumstances it may be highly convenient. The British Statute Book abounds with examples of it; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the Legislative powers which it from time to time conferred It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal, and of the other two learned Judges who agreed with him in this case Among them are the great Codes of Civil and of Criminal Procedure. . . ."

From this it follows that when a legislation is complete in the sense that the Legislature had exercised its will and its judgment regarding all matters such as the place, the person or the laws and the powers but merely entrusted to some other authority the power of determining the time of the commencement of the Act and

1. (1878) L R. 5 I A. 178 : I L.R 4 Cal 172 at 182 · 3 A C. 889 (P.C).

the place or places to which it should be applied, it is not delegation of a legislative power at all and really falls within the category of non-legislative powers, and therefore such delegation is permissible

There are other instances of conditional legislation which have been upheld by the Privy Council and which have been brought to our notice by the learned Advocate-General, In *Russel* v. *The Queen*[1], the validity of the Canada Temperance Act, 1878, was questioned The Parliament of Canada passed the Canada Temperance Act, 1878 with the object of promoting temperance in the Dominion and introducing uniform legislation in all the Provinces respecting the traffic in intoxicating liquors. The Act was divided into three parts, and the second part contained the prohibitory enactments A machinery was provided under the Act by which the second part of the Act could be brought into force in any county or city by the Governor-General in Council by a proclamation published in the Gazette declaring that the second part of the Act shall be in force and take effect in such county or city This method of bringing into force the Act was questioned on the ground that it was delegation of a legislative power and therefore invalid The answer to this objection given by the Privy Council is at page 835

"The short answer to this objection is that the Act does not delegate any legislative powers whatever It contains within itself the whole legislation on the matters with which it deals The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer on these persons power to legislaate Parliament itself enacts the condition and everything which is to follow upon the condition being fulfilled Conditional legislation of this kind is in many cases convenient, and is certainly not unusual, and the power so to legislate cnnot be denied to the Parliament of Canada, when the subject of legislation is within its competency Their Lordships entirely agree with the opinion of Chief Justice Ritchie on this objection If authority on the point were necessary, it will be found in the case of the *Queen* v *Burah*[2], lately before this Board"

In *Hodge* v *The Queen*[3], the power of a local Legislature to entrust to a Board of Commissioners under the Liquor License Act of 1877 authority to enact regulations was upheld, as they were intended to carry out the object of the Act into operation. In *Powell* v *Apollo Candle Company*[4], under section 133 of the New South Wales Customs Regulation Act of 1879, the Governor was authorised to levy a duty on certain articles This delegation was questioned as being illegal Applying the principle of the earlier decisions already referred to, the section was held valid.

Recently the question came up for examination before the Federal Court and the Privy Council in Benoari Lall Sarma's case which related to the Special Criminal Courts Ordinance 1942 (II of 1942) The decision of the High Court and the Federal Court is to be found in *Emperor* v *Benoari Lall Sarma*[5], and of the Privy Council in *King-Emperor* v *Benoari Lall Sarma*[6] Under the Ordinance three kinds of criminal courts were constituted, Special Judges, Special Magistrates and Summary Courts A Special Judge could be authorised to try such offences or class of offences or or such cases or class of cases as the Provincial Government or a servant of the Crown empowered by the Provincial Government in this behalf may, by a general or special order in writing, direct A similar power was conferred upon the Provincial Government or the servant of the Crown empowered by the Provincial Government to decide and direct what offences should be tried by a Special Magistrate Under section 26 of the Ordinance, appeals from orders, from sentences of Courts constituted under the Ordinance were taken away from the jurisdiction of the ordinary Courts constituted under the Criminal Procedure Code, and the jurisdiction even of the High Court was barred to entertain either an appeal or revision Apart from other questions which were raised regarding the validity of this Ordinance the one question which is relevant for the purpose of this discussion is whether the delegation of the power to determine the nature of the offences or classes of offences and cases or classes of cases by the Special Judge or Special Magistrate, to the Provincial Government or the servant of the

1 (1882) 7 A C 829
2 (1878) L R. 5 I A. 178 · I L R. 4 Cal. 172 · 3 A C 889 (P C)
3. (1883) 9 A.C. 117
4 (1885) 10 A C 282
5 I L R (1943) 2 Cal 1.
6 (1945) 1 M L J 76 L R 72 I A 57 · (1945) F L J. 1 (1945) F C R 161 (P C.).

Crown was valid The High Court as well as the Federal Court took the view that as the delegation was too general, it was invalid The Officiating Chief Justice, Varadachariar, in an exhaustive judgment examined the limits of the doctrine of delegation of powers by a Legislature and considered the relevant decisions on the point The argument on behalf of the Crown was that it was a conditional legislation and not a delegation of Legislative power which might be justified by the decisions of the Judicial Committee in *Empress* v *Burah*[1], *Hodge* v. *The Queen*[2], and *Powell* v *Apollo Candle Co* [3] The test laid down in an American case that .

> " the distinction is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be and conferring authority or discretion as to its execution to be exercised under or in pursuance of the law "

was accepted as correctly laying down the distinction The Legislature in conferring however authority or discretion upon a body regarding the execution of the law into effect, it was pointed out, should not make it too general almost amounting to issue of a blank cheque to the authority ; but the Legislature must lay down the main principles and the policy leaving details to be filled in by the subordinate agency Applying this test, it was held by the Federal Court that the delegation by the Ordinance amounted to an abdication or surrender of the power of the Legislature—the Ordinance-making power of the Governor-General being co-extensive with the power of the Legislature to enact laws This view of the provisions of the Ordinance was not accepted by the Privy Council The difference between the Privy Council and the Federal Court was not due to any difference regarding the principles applicable, but the application of the principles themselves This case illustrates the difficulty in applying accepted principles for determination of the validity of a delegation of a power by a Legislature in a given case The Federal Court thought that the delegation was bad, as the language of the provisions of the Ordinance and the authority conferred were very wide, while the Judicial Committee was of opinion that it was in the nature of a conditional legislation. Viscount Simon, L C , who delivered the judgment of the Board in that case dealing with this question observed at page 66, *King Emperor* v *Benoari Lall Sarma*[4]

> " The second objection has attracted more support, but is, in their Lordships' opinion, equally unfounded It is undoubtedly true that the Governor-General acting under paragraph 72 of schedule IX must himself discharge the duty of legislation there cast upon him, and cannot transfer it to other authorities But the Governor-General has not delegated his *legislative powers at all* His powers in this respect, in cases of emergency, are as wide as the powers of the Indian legislature which, as already pointed out, in view of the proclamation under section 102, had power to make laws for a Province even in respect of matters which would otherwise be reserved to the Provincial Legislature. Their Lordships are unable to see that there was any valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of a special Court under the terms of the ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned *This is not delegated legislation at all* It is merely an example of the not uncommon legislative arrangement by which the local application of the provisions of a Statute is determined by the judgment of a local administrative body as to its necessity. Their Lordships are in entire agreement with the views of the Chief Justice of Bengal and of Khundkar, J , on this part of the case The latter Judge appositely quotes a passage from the judgment of the Privy Council in the well known decision in *Russell* v *The Queen*[5] (the italics are ours)

These decisions are sufficient in our opinion to illustrate the essence of conditional legislation, which is not delegated legislation nor delegation of a legislative power. It may not however be out of place to refer to one other decision of the High Court of Australia *Baxter* v *Ahway*[6], on which strong reliance was placed by the learned Advocate-General Under the Customs Act of 1901 of Australia certain imports were prohibited by the Act and such prohibited imports were enumerated in section 62 of the Act and by clause (*g*) of that section the Governor-General was empowered to prohibit the importation of other goods In exercise of this power the Governor-General in Council of Australia issued a proclamation on the 29th December, 1905 prohibiting the

1 (1878) L R. 5 I A 178 I L R 4 Cal. 172 3 A C 889 (P C)
2 (1883) 9 A C 117
3 (1885) 10 A.C 282.
4 (1945) 1 M L J 76 (1945) F L.J 1 : L R 72 I A 57 (1945) F C R 161 (P.C.).
5 (1882) 7 A C 829
6. 8 Commonwealth L R 626

importation of opium suitable for smoking The objection taken was that the power to prohibit the importation of opium was a power that should be exercised by the Legislature and could not be delegated to the Governor-General in Council. The delegation was upheld on the ground that it was not delegation of a legislative power but conditional legislation, and was within the powers conferred on the Parliament by the Constitution In arriving at this conclusion the High Court relied upon the decision in *Empress* v *Burah*[1] and the cases that followed it The remarks of O'Connor, J , at pages 636, 637 and 638 of the Report are of considerable assistance in distinguishing between delegation of a legislative power and conditional legislation. In the case of conditional legislation the whole of the law which operates is to be found in the statute itself except as in that particular case the naming of the article to which the provisions ought to be applied

" It is a fundamental principle of the Constitution," says the learned Judge at page 637 " that everything necessary to the exercise of a power is included in the grant of a power Everything necessary to the effective exercise of a power of legislation must, therefore, be taken to be conferred by the Constitution with that power Now the Legislature would be an ineffective instrument for making laws if it only dealt with the circumstances existing at the date of the measure The aim of all legislatures is to project their minds as far as possible into the future, and to provide in terms as general as possible for all contingencies likely to arise in the *application of the law* But it is not possible to provide specifically for all cases, and, therefore, legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied, or to what its operation shall be extended, or the paricular class of persons or goods to which it shall be applied In the case of *Field* v *Clark*[2], which was cited to us by Mr Lamb in the course of his argument, there is a passage which has a direct bearing upon this aspect of the power of the legislature In delivering the judgment of the Court, Mr Justice Harlan said, quoting from another case, *Moure* v *City of Reading*[3] Half the Statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them But it cannot be said that, the exercise of such discretion is the making of the law.' So in *Locke's appeal*[4] ' to assert that a law is less than a law, because it is made to depend upon a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know ' The proper distinction the Court said was this ' The legislature cannot delegate its power to make a law , but it can make a law to delegate a power to determine some fact or state of things, upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of Government There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore, be a subject of inquiry and determination outside the halls of legislation' "

This decision in our opinion brings out clearly the distinction between delegation of a power to make a law and the delegation of a power to apply a law if certain circumstances exist The question is whether the power conferred upon the Provincial Government to extend the duration of the Act by section 1 (4) of the Madras Maintenance of Public Order Act, 1947 falls under the former category or the latter.

Acts may be classified with reference to their *duration* into *permanent* or *perpetual* Acts and *temporary Acts* A perpetual Act is of unlimited duration and continues in force for ever unless repealed or altered while a temporary Act continues in force during a fixed period or until repealed or altered earlier · It is for the Legislature to determine whether an Act should be perpetual or only of temporary duration The period of the life of an Act is therefore determined by the exercise of the legislative will and is a legislative power It is not analogous to the power of applying a legislation which is already complete to particular areas or particular class of persons or goods or even of determining the time of its commencement or the amount of its operation Conditional legislation, as the decisions already referred to show, is of the latter description After the expiration of the period fixed for the operation of a temporary Act, the Act automatically comes to an end. There is no analogy between conditional legislation which authorises an outside authority to determine the commencement or termination of an Act and the power to determine the life of an Act itself No doubt in the case of conditional legislation, until the condition is determined or is fulfilled, the law may be in a state

1 (1878) L R 5 I A 178 I L R 4 Cal 172 · 3 A C 889 (P C)
2 (1892) 143 U S 694.
3 21 Pa S R 188.
4 72 Pa S R 491

of suspended animation but still it is law but needs its application to be determined by an extraneous authority. The power of extending the life of an Act is really a power to bring the Act itself into existence for a further period and if not so brought would cease to be law It is therefore difficult to accept the contention of the learned Advocate-General that a bare power to extend an Act is in the nature of conditional legislation and is valid Of course the word "extend" is capable of more than one meaning. If it is merely a question of extending the operation of the Act already complete and alive, to other persons or goods or even to other areas not already specified in the Act itself the argument of the learned Advocate-General on the authorities is perfectly sound. But if by "extend" is meant to extend the life of the Act itself and to prolong its duration it is a different matter and cannot be treated on the same footing as conditional legislation. The legislature it is that is charged with the duty of taking into consideration the circumstances existing at the time of enacting a law, whether the law should continue in operation only for a short duration or should be perpetual. At each time that the Legislature thinks it fit to continue the life of an Act it must exercise its mind taking into consideration the circumstances and the situation at the time in order to decide whether there is or is not justification for extending the provisions of the Act particularly so in a case where the liberty of a subject is concerned and the effect of the Act is to curtail that liberty without recourse to a judicial determination by ordinary tribunals of the question whether a proper case for depriving a subject of his liberty is made out or not Such a power cannot be delegated The power, of extending the life of an Act in our opinion, is clearly legislative power, and its delegation in the present case to the Provincial Government, namely, the executive, is not warranted by any of the principles known to Constitutional law.

The question in our opinion is really concluded by the decision of the Federal Court We thought it fit to consider the question in the light of the authorities placed before us by the learned Advocate-General, as he contended that the decision of the Federal Court was not directly in point and that in any event the observations in some of the judgments were mere obiter We do not however read the judgment of the Federal Court in the manner contended by the learned Advocate-General We think it is a direct decision on the point, and the majority of the Judges are clearly of opinion that even a bare power to extend the life of an Act with or without modification, is a legislative power which could not be delegated. The Judgment of the Federal Court is *Jatindranath Gupta* v *Province of Bihar*[1] It relates to the Bihar Maintenance of Public Order Act, 1947 The detention orders in question were made in January and February 1949, and the detenus were residents of Chhota Nagpur Division of the Province of Bihar, which is a partially excluded area governed by the provisions of section 92 of the Constitution Act. Under that section the Governor has a two-fold power of legislation Under clause (1) of the section an Act of the Dominion Legislature or of the Provincial Legislature will not apply to an excluded area or a partially excluded area, unless the Governor by public notification extends the application of the Act with such exceptions or modifications as he may think fit to make. This power of extending Acts already passed by the Dominion Legislature or the Provincial Legislature is admittedly a legislative power It was so decided also in *Chotturam and others* v *Commissioner of Income-tax, Bihar*[2] Under sub-clause (2) the Governor himself is empowered to make regulations for the peace and good government of any excluded area or of partially excluded area in a Province, and by such regulations he is authorised even to repeal or amend any Act of the Dominion Legislature or of the Provincial Legislature of any existing law applicable for the time being to the area in question but subject to the condition that such regulations are forthwith submitted to the Governor-General and assented to by him before they become operative. This is undoubtedly a plenary power of legislation vested in the Governor of the Provinces. The Bihar Legislature passed the Bihar Maintenance of Public

1 (1949) 2 M.L.J. 356 (1949) F.L J 225 F C).

2 (1947) 2 M L J 432 (1947) F.L.J. 92: 1947 F C R 116 (F C ().

Order Act, 1947, which came into force on 16th March, 1947, and its operation was limited to one year from the date of its commencement, by section 1 (3) of the Act There is a proviso to that section, *viz*,

"the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification"

As the Act could not by its own force have operation in Chhota-Nagpur Division the Governor of Bihar issued a notification on 16th March, 1947, in exercise of the power vested in him under section 92 (1) of the Constitution Act directing that the Act should apply to Chhota-Nagpur Division The life of the Act was extended on the 11th March, 1948, for a further period of one year from 16th March, 1948, by the Provincial Government acting under the power conferred upon it under the proviso, after obtaining the sanction of the Bihar Legislative Assembly by a resolution passed by it The Governor did not issue a fresh notication after the life of the Act was extended directing the application of the extended Act to Chhota-Nagpur On the 7th March, 1949, however the Governor of Bihar issued a notification under section 92 (1) of the Constitution Act directing that the said Bihar Maintenance of Public Order Act shall apply and shall always be deemed to have applied to the Chhota-Nagpur Division The Bihar Legislature passed an amending Act, Act V of 1949, on 15th March, 1949, by which for the words "for the period of one year from the date of its commencement" occurring in sub-section (3) of section 1 of the Bihar Maintenance of Public Order Act, 1947, the words and figures "till the 31st March, 1950" were substituted On 12th March, 1949, a notification was published by the Governor acting under section 92 (1) of the Government of India Act directing that the Bihar Act V of 1949, shall apply to the Chhota-Nagpur Division The appellants were arrested at a time when there was no notification applying the extended Act to Chhota-Nagpur Division the previous notification having already expired The detentions were questioned on the ground that the Provincial Government had no power to extend the life of the Act, and the delegation contained in the proviso to section 1 (3) of the Act was unauthorised There was an alternative contention that in any event as there was no notification applying the extended Act to the Chhota-Nagpur division, the detentions were illegal even on that ground Fazl Ali, J, dissented from the opinion of the majority and upheld the orders of detention Patanjali Sastri, J, based his decision on the narrower ground that in the absence of a further notification by the Governor there was no Act in force justifying the orders of detention. The Governor in the exercise of his legislative power under section 92 (1) according to the learned Judge had no power to delegate legislative power of extending the duration of the Act to the Provincial Government The Amending Act V of 1949, was of no avail to sustain the detentions, as the original Act ceased to have any opearation in Chhota-Nagpur at the time it was applied by notification of the Governor to that Division The other learned Judges, the Chief Justice of India, Mahajan and Mukherjea, JJ, considered the larger question and were unanimous in holding that the orders of detention were not justified

It will be observed that under the proviso there in question, the power of continuing the Act was vested in the Provincial Government, and required a resolution of the Bihar Legislative Assembly and the Bihar Legislative Council It also vested in the Provincial Government a power to modify the Act if necessary, besides extending the period for one more year. The argument of the learned Advocate-General is that the three learned Judges were not considering the bare power of extending the duration of the Act but were considering that power coupled with a power to modify, and that therefore the decision is not authority on the question with which we are now concerned We do not agree with this contention. No doubt in that case there was also a power to modify, but the judgments of the three learned Judges contain a clear expression of opinion that even a bare power to extend the life of an Act is also a legislative power, the delegation of which is not permissible, and that it is not in the nature of conditional legislation The

learned Chief Justice at page 230 of the Report deals with this contention He observes,

"In my opinion, the contention of the appellants on this point is correct The proviso contains the power to extend the Act for a period of one year, with modifications if any It is one power and not two severable powers The fact that no modifications were made in the Act when the power was exercised cannot help in determining the true nature of the power *The power to extend the operation of the Act beyond the period mentioned in the Act* prima facie *is a legislative power, It is for the Legislature to state how long a particular legislation will be in operation* That cannot be left to the discretion of some other body" (The italics are ours)

The sentence in italics contains clear expression of opinion that the power to extend the duration of an Act beyond one year is a legislative power The learned Judge continues :

"The power to modify an Act of a Legislature, without any limitation on the extent of the power of modification, is undoubtedly a legislative power It is not a power confined subject to any restriction, limitation or proviso (which is the same as an exception) only It seems to me therefore that the power contained in the proviso is legislative Even keeping apart the power to modify the Act, I am unable to construe the proviso, worded as it is, *as conditional legislation* by the Provincial Government Section 1 (3) and the proviso read together cannot be properly interpreted to mean that the Government of Bihar in the performance of its legislative functions had prescribed the life of the Act beyond one year For its continued existence beyond the period of one year it had not exercised its volition or judgment but left the same to another authority, which was not the legislative authority of the Province The proviso is framed in the affirmative form, stating that it shall be extended for a period of one year by the Provincial Government on a resolution passed by the two Chambers I also think that on a true construction of the proviso this power of legislation to extend the life of the Act beyond the first year *is not left in the legislative body established by the Government of India Act for the Province, but in a different body* For the extension of the Act beyond the first year, the consent of the Governor of the Province is not required under the proviso While section 69 of the Constitution Act makes the Governor an essential part of the Government of the Province in performing its legislative functions, the procedure laid down for the extension of the Act beyond the first year is also different from the procedure prescribed under section 78, etc , of the Constitution Act Applying the principles laid down by the Judicial Committee of the Privy Council in *The Queen* v *Burah*[1] and *Russell* v *The Queen*[2], I do not think the extension of the Act beyond the first year by the notifications can escape being classed as a delegated legislation It is not and cannot be disputed that delegated legislation will be *ultra vires*"

To our mind in the passages italicised the learned Chief Justice in unequivocal terms lays down that a bare power of extension of the life of an Act is a legislative power and that it should not be entrusted to an outside body.

Patanjali Sastri, J , also considers that in his opinion the discretion vested by the proviso in the Provincial Government and the two Chambers of the Provincial Legislature to prolong the duration of the Act, for a further period of one year with such modification as they may have thought fit, is a legislative power, and not a matter of mere administrative discretion No doubt the learned Judge considers the power of extending along with the power of modification, and therefore this may not be treated as authority for the view that a power of extending the duration without more is a legislative power But in considering the power of the Governor to delegate in advance the power of extending the duration of the Act to the partially excluded areas he expresses the opinion at page 235 as

"abdication of his function in that regard Such a shifting of the burden of his responsibility could not have been contemplated by section 92 (1) of the Government of India Act It follows that the application of the first proviso to section 1, sub-section (3) of the Act to Chhota Nagpur by the notification No 900, dated the 16th March, 1947, was unconstitutional and, assuming, without deciding, that the enactment of the proviso by the Provincial Legislature was *intra vires*, and the notification issued by the Provincial Government on the 11th March, 1948, under that proviso was effective to extend the duration of the Act for one more year, a fresh notification by the Governor was necessary to bring the extended Act into force in Chhota Nagpur, and in the absence of such notification the arrest and detention of the appellants must be held to be unauthorised and illegal"

Of course this passage is not direct authority on the point now under consideration, but however it throws light on the question in so far as the learned Judge holds that the delegation even by the Governor of such a power, who had the right to exercise legislative power under section 92 (1) of the Act is unconstitutional

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1 (1878) L.R. I A 178 3 A C 889 I L R 4 Cal 172 (P C). 2 (1882) 7 A C 829

Mahajan, J, at page 239 pointed out the distinction between delegation of power to make the law and conditional legislation in the following passage

"Distinction between delegation of power to make the law which necessarily involves a discretion as to what it shall be, and conferring discretion or authority as to its execution to be exercised under and in pursuance of the law is a true one and has to be made in all cases where such a question is raised In cases of conditional legislation, on fulfilment of the condition the legislation becomes absolute But in cases of delegated legislation, the delegate has to take a decision whether that legislation is to continue or has to be modified, amended or varied

The proviso which has been assailed in this case, judged on the above test, comes within the ambit of delegated legislation and is thus an improper piece of legislation and void To my mind, it not only amounts to abdication of legislative authority by the Provincial Legislature, it goes further and amounts to setting up a parallel Legislature for enacting a modified Bihar Maintenance of Public Order Act and for enacting a provision in it that that Act has to be enacted for a further period of one year"

Later on, he observes

"Nothing is here being done in pursuance of any law What is being delegated is the power to determine whether a law shall be in force after its normal life has ended and if so, what that law will be, whether that what was originally enacted or something different The body appointed as a delegate for declaring whether a penal Act of this character shall have longer life than originally contemplated by the Legislature and if so, with what modification, is a new kind of Legislature than entrusted with the duty under the Government of India Act, 1935 I am further of the opinion that the power given to extend the life of the Act for another year in the context of the language of section 1 (3) also amounts to an Act of legislation and does not fall under the rule laid down in *The Queen* v *Burah*[1] The Act in a mandatory form stated that it shall be in force for one year only. That being so, the power given in the proviso to re-enact it for another year is legislative power and does not amount to conditional legislation In letter and in spirit this proviso gives the impression that the Bihar Legislature for reasons best known to itself wanted to retain the power of saying that the law shall continue for another year with such modifications as it thinks fit, but that it did not want to meet as a Legislature with its necessary safeguards but wanted to do so by a resolution The Legislature in doing so acted beyond the powers conferred on it by the Act of Parliament"

Mukherjea, J, after considering the decisions in *The Queen* v *Burah*[1], *Russell* v. *Queen*[2] and *King-Emperor* v *Benoarilal*[3], expressed his opinion at page 250 as follows .—

"In my opinion, the validity of the proviso to section 1 (3) of the Bihar Maintenance of Public Order Act cannot be upheld on the ground of its being a piece of contingent legislation It cannot also be supported on the ground that what it delegates is a mere non-legislative function *The duration of a statute is a matter for determination by the Legislature itself* From the language of sub-section (3) of section 1 and that of the proviso, it is difficult to say that the Legislature fixed the duration of the Act at two years from the date of the commencement and left it to the Provincial Government to determine at the end of one year in consultation with the two Houses of the Bihar Legislature whether the Act should be in operation for one year more If that was the real intention of the Legislature, it might have been argued that it was a piece of conditional legislation only That this was not the intention of the Legislature is, however, clear from the fact that the Provincial Government is authorised to decide at the end of the year not merely whether the Act should be continued for another year but whether the Act itself should be modified in any way or not"

In view of these clear expressions of opinion by the highest judicial tribunal of the land it is impossible to hold that the question raised in these applications regarding the validity of the power of extension conferred upon the executive of this Province by section 1 (4) of the Act is not covered by the majority decision of the Federal Court, and that the provision in section 1 (4) of the Act is valid.

After the decision of the Federal Court the same question was considered by the Calcutta High Court in *Badal Bose* v *Chief Secretary to Government, West Bengal*[4], a case under the West Bengal Security Act, 1948. Section 1 (4) of that Act which provided for the duration of the Bengal Act was in these terms :

"It shall, in the first instance, remain in force for a period of one year provided that if a resolution in that behalf is, before the date on which under this sub-section it would otherwise have ceased to operate, passed by the Provincial Legislature, it shall continue in force for a further period of one year *from such date*"

Under this proviso there is no power of modification but only a power to extend the duration Applying the decision of the Federal Court, Harris, C J. and

1 (1878) L R 5 I A 178 3 A C. 889 I L R. 4 Cal 172 (P C)
2 (1882) 7 A C 829
3 (1945) 1 M L J 76. L R 72 I A 57: 1945 F L J 1 (P C)
4 (1949) 53 C W N 728.

Mitter, J, held that Provincial Legislature had no authority to continue the Act by a resolution This case is concerned with a bare power of extension and is on all fours with the case now before us The decision of the learned Judges is based mostly on an interpretation of the judgment of the Federal Court, and for the reasons already stated we are also of opinion that the decision of the Federal Court covers the point and that it is binding on us In the two cases there is at least a requirement that a resolution of the Provincial Legislature was necessary before extending the life of the Act Under the Madras Act, there is not even this safeguard The Provincial Government had no duty at all to ascertain the opinion of the Legislature, and not even such safeguard is provided under the Madras Act We do not by this mean that the delegation would have been valid if such provision were made All that we intend to point out is that the delegation in the present case is more absolute than in the two cases, in the sense that there is no obligation on the part of the Provincial Government to obtain the wishes of the Legislature on the advisability of extending the duration of the Act. From this it follows that the Madras Maintenance of Public Order Act, 1947, ceased to have operation and died a natural death on the 11th March, 1948.

Relying upon the hypothetical case suggested by Mukherjea, J, in the passage already cited from the judgment of the Federal Court, the learned Advocate-General contended that upon a true interpretation of section 1 (4) of the Act, the Legislature fixed the duration of the Act at two years from its commencement, and gave discretion to the Provincial Government to determine at the end of one year whether the Act should continue in operation of one more year or not If that was the intention of the Legislature, it is argued that it is a piece of conditional legislation as stated by Mukherjea, J, at page 251 The language in our opinion of section 1 (4) of the Act does not admit of any doubt that it was not originally intended to be in force for a period of two years The sub-section expressly says that the Act shall remain in force for a period of one year and that the Provincial Government may extend the Act from time to time by notification for a further period or periods not exceeding one year The discretion given to the Provincial Government is clearly to extend the operation of the Act by another year, after the first year had elapsed, and the intention is not to fix the period of duration as two years in the first instance The expression "upon the expiry of this Act" occurring in the last part of the sub-section is emphasised as having reference to the period of two years; but this in our opinion is a far-fetched construction of the sub-section The Act expires at the end of the one year, if it is not continued for a further period. If it is continued, of course, it expires at the end of two years. Therefore there were two possible periods contemplated by the Legislature when the Act might expire either at the end of the first year or if extended, at the end of the second year The expression "expiry" therefore does not indicate expiry only at the end of a period of two years The illustration suggested in the judgment of Mukherjea, J, has therefore no application, and we cannot accept the argument of the learned Advocate-General on this point

We may also refer to two decisions of the Allahabad High Court both of single Judges, which have taken the contrary view One of the decisions, *Gaurinandan* v *Rex*[1], was referred to in the judgment of the Federal Court, but as no definite opinion was expressed by the learned Judges on the correctness of that decision it was urged on behalf of the Government by the learned Advocate-General that that decision must be treated as laying down the law correctly Another decision is *Hariharanand* v *Superintendent, Central Jail*[2], which follows the earlier decision at page 414 We have given sufficient reasons in the course of this judgment to show that the view contained in these two judgments cannot be accepted

It remains for us now to consider the validity of the Ordinance which was promulgated by the Governor on the 11th August, 1949, Madras Ordinance I of 1949 The power of the Governor to promulgate an Ordinance during the recess

1. A I R. 1948 All 414. 2 A I R 1948 All 435

of a Legislature is contained in section 88 of the Government of India Act as adapted by the India (Provisional Constitution) Order, 1947, the relevant portions of which are as follows .

"If at any time when the Legislature of a Province is not in session the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require

Provided that the Governor shall not, without instructions from the Governor-General, promulgate any such Ordinance if an Act of the Provincial Legislature containing the same provisions would under this Act have been invalid unless, having been reserved for the consideration of the Governor-General, it had received assent of the Governor-General

(2) An Ordinance promulgated under this section shall have the same force and effect as an Act of the Provincial Legislature assented to by the Governor, but every such Ordinance—

(*a*) shall be laid before the Provincial Legislature and shall cease to operate at the expiration of six weeks from the re-assembly of the Legislature, or, if a resolution disapproving it is passed by the Legislative Assembly and agreed to by the Legislative Council if any, upon the passing of the resolution or, as the case may be, on the resolution being agreed to by the Council "

The rest of the section is not relevant The assent of the Governor-General has been obtained in pursuance of the proviso to section 88 (1) of the Government of India Act, as the preamble of the Ordinance shows There is a declaration by the Governor in the preamble that the Legislature of the Province was not in session and that he was also satisfied that immediate action was necessary for the purpose of removing doubts and amending the Act The Legislature is deemed to be in session till it is prorogued or dissolved The Governor has the undoubted right to prorogue the Legislature, and in this case it is common ground that it was prorogued on the 2nd August, 1949 It must be admitted that at the time the Ordinance was promulgated by the Governor the Legislature was not in session, and that condition is therefore satisfied

On behalf of the petitioners an affidavit of one C V Rajagopalachari was filed in which reference is made to a report in the *Hindu*, dated 4th August, 1949, that His Excellency the Governor of Madras contemplates to issue an Ordinance with a view to remove certain defects in the Madras Maintenance of Public Order Act, and that as no Ordinance can be issued while the Legislature is in session the Madras Assembly and Council were prorogued with effect from 2nd August by a notification , and the deponent of the affidavit expressed surprise that the Government should have considered proroguing the Legislature only for the purpose of passing an Ordinance. Mr Mani, the learned advocate for the petitioners in the course of his arguments, urged that the promulgation of the Ordinance by the Governor in exercise of the power under section 88 of the Government of India Act is really a fraud on the power, as the Legislature which was in session was purposely prorogued by the Governor with a view to confer upon himself the power of issuing an Ordinance We think this is an unfounded suggestion for which there is no basis, assuming that fraudulent exercise of the power would vitiate the Ordinance It is open to His Excellency the Governor to prorogue the Legislature at any time he pleases We do not see anything wrong in the Governor proroguing the Assembly and the Council with a view to enable himself to issue an Ordinance under section 88 It is a well-known fact that the Legislature, which is democratically constituted, is very slow to move in the matter of legislation, having regard to the rules of procedure laid down in that behalf, and if urgent action is necessary, at any rate when His Excellency the Governor has reasons to believe that immediate action is necessary, it will be more expedient to have resort to the power of issuing an Ordinance under section 88 rather than approach the Legislature for the necessary legislation The section itself requires that the Governor should be satisfied that circumstances exist which render it necessary for him to take immediate action Of this necessity, the Governor is the sole judge The satisfaction is that of the Governor It is not open to a Court to canvass and find out whether in fact there could or could not have been the satisfaction The power of the Governor under this section is analogous to the power of the Governor-General to promulgate Ordinances in case of emergency It has been repeatedly held both by the Privy Council and High Courts that the Governor-General is the sole Judge for deciding the existence of emergency which justified the issue of an

Ordinance See *Benoari Lal Sarma's case*[1] and *Jnan Prosanna* v *Province of West Bengal*[2]. It cannot but be admitted that the situation created at or about the time the Ordinance was promulgated was that in view of the two decisions, one of the Federal Court and the other of the Calcutta High Court, the Government must have felt that the validity of the continuance of the Ordinance by notifications was seriously in doubt, and it was possible that the orders of detention against several persons made under the Act were imperilled The Governor must have thought that these persons, if set at liberty, might endanger public safety and might make it difficult for Government to maintain public order, as they were all persons who were found to be either acting or about to act in a manner prejudicial to the public safety or the maintenance of public order In order to avoid such a situation, it must have been felt that it was imperative that some step should be taken, and the result was the Ordinance, which was issued on the 11th August, 1949 It cannot be said that in such circumstances His Excellency the Governor was not justified in exercising his power under section 88 (1) by issuing the Ordinance

Mr Mani, the learned advocate for the petitioners, laid emphasis on the preamble and urged that the word "expedient" did not occur in the section and the Governor could not seek justification to amend the Act by relying upon expediency In the subsequent paragraph in the preamble the Ordinance expressly states that the Governor of Madras was satisfied that immediate action was necessary for the purpose of removing doubts and amending the Act If the condition as to necessity is satisfied, the power to issue the Ordinance follows The amendment sought to be effected was not introduced, merely because it was expedient though it was given as an additional reason in the preamble , but the basis of the Ordinance is existence of necessity for immediate action in the manner indicated in the Ordinance

The Ordinance introduced three important sections, sections 2 to 4. It may be now taken as settled law that the Governor's power of making law by Ordinance is analogous and is co-extensive with the power of the Legislature to enact laws subject to two qualifications One is that the power springs into existence when the Legislature is not in session, and when there is necessity to take immediate action Secondly the Ordinance ceases to operate at the expiration of six weeks from the re-assembly of the Legislature, if a resolution disapproving it is not passed by the Legislative Assembly and agreed to by the Legislative Council earlier. Subject to this, the Governor, under the power to issue Ordinance conferred upon him, is entitled to enact, alter or repeal laws and can even pass retrospective legislation To what extent under the Ordinance-making power the Governor can pass retroactive legislation is a point on which there is some doubt or difficulty The Ordinance purports to *declare* and *amend* The declaration is of course with a view to remove doubts By section 2 it is declared that the Madras Maintenance of Public Order Act, 1947, hereinafter referred to as the said Act remained in force on and from the 12th day of March, 1948, and shall continue to remain in force so long as this Ordinance remains in operation and with a view to achieve this object the last part of the section purports to omit section 1, sub-section (4) If it merely declared that the Act continued in force the result would have been, the Act as originally stood, which is to remain in force for a period of one year from its commencement, would have continued in force for a period of one year from 12th March, 1947 The mere declaration therefore would not have been sufficient to achieve the object of converting a temporary Act into an Act of unlimited duration It was therefore necessary to amend the Act by omitting sub-section (4) of section 1 altogether

A declaratory Act as pointed out by Craies on Statute Law at page 60 is defined as

"an Act passed to remove doubts existing as to the common law, or the meaning or effect of any statute Such Acts were usually held to be retrospective "

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1 (1945) 1 M.L J 76 L R 72 I.A 57 1945 F L. J 1 (P C)

2. A.I R. 1949 Cal. 1 (F.B.).

An amending Act is not an independent Act but an Act passed with a view to effect an improvement or to more effectively carry out the purpose for which the original law was passed To remove doubts by a declaratory Act, there should be in existence an Act, the doubts in which have to be removed If the Act had already ceased to be in force, a declaratory Act would have no operation An amending Act also presumes the existence of an original Act If the original Act, which was a temporary Act, terminated after the lapse of time, the amending Act would be inoperative. It has been decided by the Federal Court in the same judgment dealing with the Bihar Maintenance of Public Order Act that the Amending Act V of 1949 of the Bihar Legislature was of no effect, as the main Act was not in operation in the Province at the time the amending Act was passed. The Chief Justice of India at page 231 of the Report considered a similar argument and observed :

"Bihar Act V of 1949 is an amending Act It is not a new Act. It purports only to amend the Bihar Maintenance of Public Order Act, 1947 That Act, which was a temporary Act, as its duration was fixed for one year by the Act itself, came to an end when the first year expired. The result is that when the Bihar Amending Act V of 1949 was passed, there was no Bihar Maintenance of Public Order Act, 1947, in operation in the Province which could be amended and the notification of the 18th March, 1949, issued in the name of the Governor, could not improve the position."

With this opinion the majority of the learned Judges concurred The amending provisions therefore of the present Ordinance are of no effect in view of our conclusion that the main Act came to an end when the first year expired From this point of view, it must be held that unless there is a re-enacting provision in the Ordinance which amounts to a new Act, the declaratory and amending provisions of the Act are not valid As pointed out in the judgments of the Federal Court particularly of Mahajan, J , at page 243,

"Unless that Act was revived, no amendment made in it could be of any effect. The only apt manner of reviving the expired Act was by *enacting a fresh statute* or by enacting a statute expressly saying that that Act is herewith revived"

The same opinion was expressed by Mukerjea, J , at page 252 where he states that,

"It is certainly competent to the Legislature in exercise of its plenary powers to *revive* or *re-enact* a legislation which has already expired by lapse of time The Legislature is also competent to legislate with retrospective effect , but neither of these things seems to have been done in the present case. The Legislature proceeds on the footing that the old Act was alive at the date when the new Act was passed, the new Act merely purports to amend one of the provisions of the old Act There could be no amendment of an enactment which is not in existence and from the fact that the Legislature purports to amend an Act, it could not be held as a matter of construction that the intention of the Legislature was to renew a dead Act or make a new enactment on the same terms as the old with retrospective effect"

In the light of these principles it follows that section 2, section 3 (*a*) and section 4 which purports to insert a new section 4-A of the Ordinance are of no effect, as they do not purport to enact or revive a new law but only seek to amend or clear doubts in the old Act

We felt considerable doubt whether the same reasoning would apply to section 3 (*b*) which states

"No action or proceeding taken, no notification issued, no order made, and nothing done, by any authority in accordance with the provisions of the said Act at any time on or after the 12th day of March, 1948, shall be questioned on the ground that the said Act was not in force at that time."

This, in our opinion, is an enacting provision though the opening words of the section state, "For the removal of doubts it is hereby declared", and it retrospectively validates action, proceedings, notifications and orders made under the Act.

On a *prima facie* reading of the clause we at one stage thought that this might apply only to validate the further steps that were taken after 12th March, 1948, in respect of orders of detention passed under the original Act before that date. Under the provisions of the Act it will be noticed that there are various steps which have to be taken by the Government before a final order under section 3 (5)

of the Act is passed The grounds have to be communicated to the detenu The matter thereafter should be referred to the Advisory Council which has to send its report to the Provincial Government, and the Provincial Government have to consider the report and pass appropriate orders under section 3 (5) We have come across cases where orders of detention passed even within the period of one year from the date of the commencement of the Act were not confirmed even though more than one year had elapsed from the date of the order If the original order of detention was validly made, but the confirmation was delayed for reasons beyond the control of the Government, we thought that such proceedings taken after the expiry of the Act were intended to be validated by this provision On a further consideration, however, we are of opinion that there is no reason for putting such a restricted construction upon this clause No doubt the words " the said Act " would refer only to the original Act, and the expression " purporting to act under the provisions of the said Act " is not used, which are words generally employed in provisions intended to validate irregular or illegal proceedings But apparently it was assumed that as there was extension of the Act by notification, orders passed even after the lapse of one year from the date of the Act are orders passed in accordance with the provisions of the said Act, because there is no other Act except the original Act of 1947 Further, it clearly refers to Acts, proceedings, notifications, Orders initiated, issued or made at any time on or after 12th March, 1948, which is the date on which the Act came to an end, from which it is clear that it is the intention of His Excellency the Governor by this provision to validate all the proceedings Such power of validation is recognised by Courts in India and the Privy Council

Immediately after the Special Criminal Courts Ordinance No II of 1942 was declared *ultra vires* by the Federal Court the Governor-General issued Special Criminal Courts (Repeal) Ordinance No. XIX of 1943 which by section 3 provided that :

> " Any sentence passed by a Special Judge, a Special Magistrate or a summary Court in exercise of jurisdiction conferred or purporting to have been conferred by or under the said Ordinance shall have effect, and subject to the succeeding provisions of this section, shall continue to have effect, as if the trial at which it was passed had been held in accordance with the Code of Criminal Procedure, 1898 (V of 1898), by a Sessions Judge, an Assistant Sessions Judge, or a Magistrate of the First Class respectively, exercising competent jurisdiction under the said Code "

The validity of this provision was again questioned, and the Calcutta High Court held that it was invalid ; but that decision was reversed by the Privy Council in *Kumar Singh Chhajor* v *King-Emperor*[1]. One of the objections raised was that the Ordinance was intended to set at naught the decision of the Federal Court. The Judicial Committee adverting to the contention observed :

> " It would require clear language to establish that any legislative authority intended to provide that convictions held to have been illegal by the highest judicial tribunal in the country should, nevertheless, be treated as legal legislative enactment Their Lordships can find nothing in the language of section 3, sub-section (1) of the Ordinance of 1943 to suggest that the Governor-General intended to do more than to render valid the punishment imposed by the special courts, leaving the validity of the convictions to rest on judicial decisions "

and the provisions in the Ordinance was upheld In view of this decision of the highest tribunal it is not necessary to refer to other decisions. The decision in *Jnan Prosanna* v *Province of West Bengal*[2], recognised that it was competent to pass retrospective legislation by an Ordinance We accordingly hold that section 3 (*b*) of the Ordinance is valid and operative.

The petitions have now to be heard and disposed of in the light of the observations contained in this judgment, and they will be posted accordingly.

K S *Questions of law decided.*

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1. (1946) 2 M L J. 299 : L R 73 I A 199 (P.C.).
2. A I R. 1949 Cal. 1 (F.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. P V RAJAMANNAR, *Chief Justice* AND MR JUSTICE KRISHNASWAMI NAYUDU

Muhammad Amin Sahib (died) *Appellant**

v

Tiruvannamalai Co-operative Society by its Secretary Sri M S Seshachala Aiyar and others *Respondents*

Madras Co-operative Societies Act (VI of 1932), *section* 57-*A—Application to Registrar to recover money payable to society under a decree—Transfer of decree to the Registrar by the Court which passed it under section* 39, *Civil Procedure Code—If essential*

A Registrar of Co-operative Societies acting under section 57-A of the Madras Co-operative Societies Act, 1932, cannot be treated as a Court within the meaning of section 39 of the Civil Procedure Code and a decree-holder applying to the Registrar to recover money payable under a decree of a Civil Court need not get a transfer of the decree to the Registrar The proceedings taken by the Registrar under section 57-A of the Act may be of the same nature and may have the same result as but they are not execution proceedings in a Civil Court governed by the Civil Procedure Code

Karuppasamy v *Krishnasamy*, (1949) 1 M L J 199, approved

Appeal against the decree of the Court of the Subordinate Judge, Vellore, in A S. No 162 of 1944, preferred against the decree of the Court of the District Munsif, Tiruvannamalai, in O S No 487 of 1941 and appeal against the order of the District Court, North Arcot at Vellore, dated 8th August, 1945, in A S. No. 496 of 1944 (R E A No 1369 of 1943 in O S. No. 458 of 1932, District Munsif Court of Tiruvannamalai)

T R Arunachalam for Appellant in S A No. 1345 of 1945 and Respondent in A A A O. No 28 of 1946

The Advocate-General (*K. Rajah Aiyar*) and *P K Janakiram* for Respondent in S A No 1345 of 1945 and Appellant in A A A O No 28 of 1946

The Judgment of the Court was delivered by

The Chief Justice—*S A No* 1345 *of* 1945 —In this second appeal Mr Arunachalam raised a very interesting point of law on which the only reported case is that of *Karuppasami* v *Krishnasami*[1], a decision of Satyanarayana Rao, J.

There was a mortgage decree passed by the District Munsif of Tiruvannamalai in favour of the Co-operative Society The Society, instead of proceeding with the execution of the decree in the District Munsif's Court, applied to the Registrar to recover the money payable under that decree under section 57-A of the Madras Co-operative Societies Act, VI of 1932 Under that section, the Registrar or any person subordinate to him empowered by the Registrar in this behalf may, subject to such rules as may be prescribed by the local Government, recover the amount due under a decree or order of a Civil Court by the attachment and sale or by the sale without attachment of property of the person against whom such decree or order has been obtained or passed Under section 57-B, the Registrar or any person empowered by him in that behalf is deemed to be Civil Court for the purposes of Article 182 of the First Schedule to the Indian Limitation Act, IX of 1908 Rule 22 of the rules framed under the Act sets forth the procedure to be followed by the Registrar when an application is made under section 57-A Form No 1 of Schedule III is the form prescribed for such application On receipt of the application, the Registrar shall verify the correctness and genuineness of the particulars set forth in the application with the records, if any, in his office and prepare a demand notice in writing in duplicate in the form prescribed by the Registrar, setting forth the name of the defaulter, the amount due and forward it to a sale officer

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* S A. No 1345 of 1945 and A A A O No 28 of 1946 — 9th September, 1949

1. (1949) 1 M L J 199

The contention of Mr Arunachalam is that the Registrar cannot take proceedings under section 57-A of the Act without a formal transfer of the decree from the Court which passed the decree to the Registrar Under section 38 of the Civil Procedure Code, a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution So he argues that if the decree has not been sent for execution to the Registrar, the Registrar is not competent to execute it The short answer to this argument is that the execution to which section 38 refers is an execution under the Code of Civil Procedure. The proceedings taken by the Registrar under section 57-A of the Act may be of the same nature and may have the same result as but they are not execution proceedings in a Civil Court governed by the Code of Civil Procedure Section 39 says that the Court which passed the decree may on the application of the decree-holder send it for execution to another Court for any of the reasons mentioned in clauses (*a*) to (*d*). Clearly, clauses (*a*), (*b*) and (*c*) do not apply Clause (*d*) is in the following terms:—

> " If the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court "

We think that such Court must be a Court governed by the Code of Civil Procedure and not a body which might have functions almost exactly similar to those of the Civil Court but is not governed by the Code of Civil Procedure It may be that the Registrar acting under section 57-A can be deemed to be a Civil Court for some purposes. Section 57-B expressly says that the Registrar will be a Civil Court for purposes of Article 182 of the Limitation Act For purposes of court-fee, a learned Judge of this Court has held that the Registrar may be deemed to be a Civil Court (*Subramania* v *Official Liquidator*[1]) But there is no authority for the position that the Registrar can be treated as a Court within the meaning of section 39 of the Code of Civil Procedure

We have therefore two things One is that there is nothing in the Co-operative Societies Act which compels the decree-holder to get a transfer of the decree to the Registrar, and the other, that there is nothing in the Code of Civil Procedure which empowers the Court which passed the decree to transfer it on application to the Registrar We therefore hold that the contention of the appellant cannot prevail. We find that this is the view taken by Satyanarayana Rao, J, in *Karuppasami* v. *Krishnasami*[2]

Mr. Arunachalam drew our attention to several anomalies which might arise if there is no provision for a formal transfer of the decree from the file of the Court which passed the decree to the file of the Registrar with all connected records, particularly relating to execution, if any, which had taken place in the Civil Court. There is nothing in the Act or in the rules which prevents the Civil Court from proceeding to execute the decree passed by it, because an application has been made by the decree-holder to the Registrar under section 57-A of the Act This will lead to concurrent execution both by the Civil Court and by the Registrar which could not have been intended. Likewise, there is nothing in the Act or in the rules to enable the Registrar to obtain the records relating to the decree and to the execution proceedings, if any, in the Civil Court In the absence of a provision enabling the Registrar to obtain such records, there is scope for grave injustice sometimes happening either due to mistake or due to inadvertence If the application to the Registrar under section 57-A is considered to be virtually an execution application, it is but proper that the decree and all relevant records should be available to the Registrar It is most desirable that provision should be made in the Rules or in the Act to avoid the anomalies pointed out above. These anomalies however cannot compel us to hold that under the Act or under the Code of Civil Procedure there is anything which compels a decree-holder to apply for and obtain a transfer of the decree from the Court which passed it to the Registrar before further proceedings are taken under section 57-A of the Act.

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1 (1949) 1 M L.J. 107 2 (1949) 1 M L J 199.

In the result the second appeal is dismissed. There will be no order as to costs.

A. A A O No 28 *of* 1946 —We agree with the lower Court that the application for delivery of possession was barred by limitation having been filed more than three years after the date of confirmation of sale. It is admitted that the article applicable is Article 180 of Schedule I to the Limitation Act This result is sought to be got over by the contention that E A No 893 of 1942, a prior application for delivery of possession was not judicially disposed of on 30th October, 1943, but it was struck off for statistical purposes and therefore it could be revived by the present application Now that E A No 893 of 1942 was dismissed because the petitioners were not present, that is to say, it was dismissed on account of the default of the auction purchaser We agree with the lower Court that E. A. No 893 of 1942 was not closed for statistical purposes or for other reasons as was done in *Appavoo Nainar* v. *Lakshmana Reddi*[1] on which the counsel for the appellant relied, and therefore no question of reviving that application would arise

The learned counsel for the appellant also relied upon the fact that appeals were pending in which the validity of the sale was being challenged. But it is not pretended that the application for delivery of possession could not proceed because of a stay by any competent Court and that therefore it was struck off on 30th October, 1943.

The Civil Miscellaneous Second Appeal is dismissed with costs.

K. S ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—MR. JUSTICE SATYANARAYANA RAO AND MR JUSTICE BASHEER AHMED SAYEED.

Sayyaparaju Surayya .. *Appellant**

v.

Koduri Kondamma .. *Respondent*

Registration Act (XVI of 1908), sections 35 and 77—" Admission of execution "—Essentials

The admission required under section 35 of the Registration Act is admission of execution of the document It may be a sale deed, it may be a mortgage deed It is not enough for the person, who is the ostensible executant, to admit his signature on a paper on which, it may be, the document is ultimately engrossed The identity of the paper on which the signature occurs is not sufficient. If a man says that he signed a blank paper on the representation that it was required for presenting a petition, or if he signed a completed document on the representation that his signature or thumb impression is required as an attesting witness, that admission of the signature or thumb impression in those circumstances cannot be construed to be an admission of the execution of the document. Far from its being an admission, it is a clear and unambiguous denial of the execution of the document. He must admit in order to attract the provisions of section 35 (1) of the Registration Act that he signed the document, *viz* , a sale deed or a mortgage deed or a lease deed as the case may be

Bapanayya v *Bangarraju*, (1949) 1 M L J 479, dissented from

Case-law discussed

The same considerations should guide the Court in directing registration under section 77 which guide also the Registrar

Appeal against the decree of the Court of the Subordinate Judge, Amalapuram, dated 31st December, 1945, in O S No. 65 of 1944

V. Parthasarathi for Appellant

P. Satyanarayana Raju for Respondent

The Judgment of the Court was delivered by

Satyanarayana Rao, J—This is an appeal by the plaintiff against the decree dismissing her suit under section 77 of the Indian Registration Act Plaintiff's

1 (1933) 65 M L J 305

* Appeal No 343 of 1946. 7th September, 1949.

husband presented to the Sub-Registrar of Kothapeta on the 8th January, 1944, a document purporting to be a sale deed executed by the defendants in favour of the plaintiff on the 29th September, 1943 The Sub-Registrar refused to register the document as the defendant denied its execution. There was an appeal against that decision of the Sub-Registrar to the District Registrar who agreed with the Sub-Registrar and confirmed his decision His order is dated 15th November, 1944 A suit was thereafter instituted by the plaintiff on the 13th December, 1944, under section 77 of the Indian Registration Act for enforcing registration of the document The document is Exhibit P-2 in the case. The document consists of six sheets of paper of which five sheets are stamp papers of the aggregate value of Rs 82-8-0 The sixth and the last sheet is a brown paper and there is the thumb impression of the defendant only on the last sheet There is the "nishani" (mark) put by the scribe on the first five sheets On the stamp papers, it is significant, there is no thumb impression It purports to be a sale for a sum of Rs 5,500 of lands of the extent of about 24 acres belonging to the defendant and in which are included about 10 acres of wet land. The document was attested by two witnesses, Vageswara Venkataraju and Nadimpilli Chandraraju The document, it is in evidence, is in the handwriting of one Appalaraju. The defendant's case was that the plaintiff's husband who was the village munsiff of Vedireswaram represented to her that in order to get the contribution demanded from her to the War Fund reduced it was necessary to present a petition to the Tahsildar and on that representation her thumb impression was obtained by the plaintiff's husband on a blank paper She also pleaded that she could not have sold the property for such a low consideration of Rs 5,500 especially as the property comprised also wet lands of considerable value

To substantiate the case of the plaintiff, plaintiff examined herself on commission and examined her husband as P W 4 and one of the attestors as P W 3. During the course of the trial she got Exhibit P-17 produced through P W 5, which purports to be an application intended to be sent to the Sub-Registrar for procuring his attendance at the house of the defendant for registering the document. The importance of this document is that it purports to bear the thumb impression of the defendant and contains an admission that the property was sold to the plaintiff for a sum of Rs 5,500, though the date of the document is left blank in the petition The learned Subordinate Judge who tried the case was of opinion that the document was not executed by the defendant and that the evidence to establish its execution was interested and no reliance could be placed upon it He also found that the consideration for the sale was wholly inadequate, having regard to the evidence regarding the value of the property at or about the time and relied on this as a circumstance improbabilising the case of the plaintiff that the defendant sold the property to the plaintiff He accepted the version of the defendant that the thumb impression was obtained by the plaintiff's husband on a blank paper on the representation that it was necessary to file a petition to get the contribution to the War Fund reduced and that sheet was utilised as the sixth sheet in the document for bringing into existence a sale deed He also noticed that in the recitals in the document the description of the properties was repeated more than once in order to bring over the matter to the last sheet, the brown paper For these reasons the learned Judge in a very exhaustive and careful judgment came to the conclusion that the document could not be directed to be registered under section 77 of the Registration Act and the suit was dismissed

In this appeal we have been taken through the evidence bearing on the question and we have perused the document We have no doubt that the conclusion of the learned Subordinate Judge is perfectly justified on the evidence on record. The most striking circumstance which tells against the case of the plaintiff is the absence of the thumb impression on the stamp papers The importance of this is admitted even by the plaintiff's husband in the witness box, and yet, though he is a village munsiff, who must have been acquainted with the formalities required for the execution of documents, he has no explanation to offer for this significant omission The plaintiff did not examine the scribe and the other attesting witness.

There is no satisfactory explanation for the non-examination of these two persons. What is more, the evidence of P W 3, the only attesting witness who has been examined in the case, is wholly interested and is not worthy of credence Exhibit P-17 no doubt purports to bear the thumb impression of the defendant ; but on a comparison of the thumb impression on Exhibit P-17 with the thumb impression on the last page of the sale deed, we are satisfied that the two are not identical. The scribe of the document Exhibit P-17 is not known, though the names of two persons are disclosed in the evidence, and the document itself does not bear the signature of the scribe The date of the sale deed is left blank, and the document is not proved by any witnesses No reliance can therefore be placed upon the recital in the document that the defendant executed a sale deed for a sum of Rs 5,500 in respect of her lands in favour of the plaintiff For these reasons we are of opinion that the decision of the learned Judge on the question of fact is correct

On behalf of the appellant a question of law was raised, *viz*, that in a suit under section 77 of the Registration Act, or for the matter of that, when a document was presented for registration and the Registrar had to consider the registration of the document under section 35 of the Act, if it purports to bear the signature or thumb impression of the executant the document must be registered, if the signature or thumb impression is admitted by the executant, as such an admission amounts to admission of execution within the meaning of section 35 of the Registration Act In support of this position reliance was placed by the learned advocate for the appellant on a recent decision of a single Judge of this Court in *Bapanayya* v *Bangarraju*[1] In that case which also arose out of a suit under section 77 of the Registration Act the defendant denied the execution of the document and stated that his finger impression was taken by representing that his attestation on a document, *i e*, a sale deed executed by his brother in favour of the plaintiff was needed. Registration was refused and so the plaintiff instituted a suit under section 77 of the Act for compelling the registration The suit was dismissed by the lower appellate Court ; but on second appeal his decision was reversed by Viswanatha Sastri, J According to the learned Judge, under section 35 of the Registration Act it is the duty of the Registrar to register a document if the ostensible executant admits his signature to the document This amounts to an admission of execution referred to in section 35 of the Act We are unable to read section 35 in the manner in which the learned Judge did. What section 35 requires is that there should be an admission of execution of the document Section 35 (1) (*a*) says,

> " If all the persons executing the document appear personally before the registering officer and are personally known to him, or if he be otherwise satisfied that they are the persons they represent themselves to be, and if they all admit the execution of the document,
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> * * * * *
>
> (2) The registering officer shall register the document as directed in sections 58 to 61, inclusive."

Under sub-section (3),

> " If any person by whom the document purports to be executed denies its execution, the registering officer shall refuse to register the document as to the person so denying "

The admission required therefore is admission of the execution *of the document*. It may be a sale deed, it may be a mortgage deed It is not enough for the person, who is the ostensible executant, to admit his signature on a paper on which, it may be, the document is ultimately engrossed. The identity of the papers on which the signature occurs is not sufficient If a man says that he signed a blank paper on the representation that it was required for presenting a petition, as in the present case or if a man signs a completed document on the representation that his signature or thumb impression is required as an attesting witness, that admission of the signature or thumb impression in those circumstances cannot be construed to be an admission of the execution of the document Far from its being an admission, it is a clear and unambiguous denial of the execution of the document He must admit, in order to attract the provisions of section 35 (1) that he *signed the document*, *viz*, a sale deed or a mortgage deed or a lease deed, as the case may be Some

1. (1949) 1 M L J 479

light is thrown on this question by the observations of the Privy Council in *Puranchand Nahatta* v *Monmothonath Mukherji*[1] No doubt the question which their Lordships of the Judicial Committee were considering was different from the question now before us But their Lordships were defining the expression " person executing " in the Act, and it is pointed out that the expression is not identical with the " person signing " " They mean " to quote the words of their Lordships at page 537 " something more, namely, the person who by a valid execution enters into obligation under the instrument " The admission of execution therefore must amount to an admission that the person admitting entered into an obligation under the *instrument*, in other words, that he had executed the document, signed it as a sale deed, mortgage deed or a lease deed, as the case may be There are a number of decisions to which our attention was drawn which have considered the scope of section 77 of the Act *Guruvayya* v *Venkataratnam*[2] is a very extraordinary case in which the person in whose favour two documents were executed, one a sale deed and another a mortgage, with the help of certain acids removed the writing in the body of the documents leaving the signature intact and converted the two documents into a sale deed in respect of a larger extent of property and presented it for registration The executant denied execution of the document and the question was whether, in view of the admission of the signature in the document, which was left untouched by the acid, under section 77 of the Act it was open to the Registrar to refuse registration The power of a Court under section 77 of the Act is the same as that of the Registrar whose duty it is to register the document The same considerations should guide the Court in directing registration under section 77 which guide also the Registrar It was contended in that case that the document as presented to the Registrar for registration represented in substance the agreement between the parties and therefore it should be registered In dealing with this contention Coutts-Trotter, C J , observed at page 835 as follows

" Is this Court to enter on a roving enquiry into the probabilities and the surrounding circumstances and put itself the question, Does this document, whatever its history, represent the substance of the agreement between the parties ? In my opinion, that is a wholly otiose and irrelevant enquiry. The Registrar has to ask himself merely this Is this document now tendered to me to be registered actually in the state in which it was executed by the parties to it ? In my opinion, he would be exceeding his functions if he went into a roving enquiry as to whether the substance of the document truly represented the agreement actually concluded He is concerned alone with the form, and not with the substance of the document It appears that, in a suit under section 77, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration Indeed, were it otherwise, the Court would be called upon to say, in effect, that the Registrar was perfectly justified in refusing registration, but that the Court will nevertheless order it to be registered , and the result might be that the Court would order registration of the document which had been altered behind the back of the person who executed it and after its execution and signature on the ground not that he had ever executed it in its present state, but that it represented what had actually been agreed between the parties In my opinion, such a conclusion is so absurd as to refute itself "

The registration of the document was ultimately refused In that case the Registrar had before him a document which contained admittedly the signature of the executant, but was on the face of it in an altered condition It was held by the Full Bench that the proper course for the Registrar and for the Court was to refuse to register the document in such circumstances The mere fact that the signature on the document was admitted is not treated as *execution of the document* so as to make it the imperative duty of the Registrar to register the document The admission of signature therein cannot be taken to be conclusive and as constituting admission of execution of the document There is the earlier case in *Balambal Ammal* v *Arunachala Chetti*[3], which also lays that the function of the Court acting under section 77 of the Registration Act is to confine itself to the factum of execution and it should not go into a validity of the document In a later decision of this Court in *Ramaswami Chettiar* v *Srinivasa Pillai*[4], a Bench consisting of Sundaram Chetty and Pakenham Walsh, JJ , had to consider the question whether in a suti

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1 (1927) 54 M L J 473 L R 55 I A 81 I L R 55 Cal 532 (P C)
2. (1924) 47 M L J 271 I L R 47 Mad 833 (F B).
3 (1894) I L R 18 Mad 255
4 (1933) 66 M L J 424

under section 77, questions as regards the validity or enforceability of the document could be gone into It was a case in which the execution of the document was admitted and no difficulty arose regarding its registration. The learned Judges pointed out that the jurisdiction of the Court under section 77 being analogous to that of the Registrar functioning under the Registration Act, it was not open to the Court to go into those questions and it should confine its attention only to the question of the execution of the document. No exception can be taken to this judgment and we do not think that that decision throws any light or supports the contention of the appellant. There are also other decisions on the same line, which it is unnecessary to refer to in this judgment Another important circumstance in the present case is there is only one thumb impression on the last page and not on the other pages The net result of the discussion of the cases is that in a case like the present where the ostensible executant states that she had affixed her thumb impression to a blank paper in order to enable the plaintiff's husband to file a petition before the Tahsildar to get the contribution to the War Fund reduced, it is a clear denial of execution of the document and not an admission of execution The refusal, therefore, by the Registering authorities to register the document is perfectly justified

The result is that the appeal fails and is dismissed with costs.

K S —— *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras)

PRESENT —LORD OAKSEY, LORD REID AND SIR JOHN BEAUMONT.

A. Veerayya Vandayar and others .. *Appellants**

v.

Sivagami Achi and another .. *Respondents*

Madras Agriculturists Relief Act (IV of 1938), section 3 (2) (a) and Proviso (C)—Agriculturist—Burden of proof—Assessments mentioned in proviso (C) to be treated cumulatively—Proof of entry of holding in the name of a person—If enough to bring the matter within proviso (C)

Though the burden of proving that he is an agriculturist is on the debtor in the first instance, where he shows that he fell within the general definition of the word he would be entitled to relief unless he is deprived of the privilege by one of the provisos, and the burden would lie upon any one so asserting to prove his case

It is wrong to say that the assessments under the Acts mentioned in proviso (*C*) to section 3 (2) of the Act should not be treated as cumulative

Where a person is not the owner of any building, the mere fact that the assessment registers show that it stands in his name is not enough to bring the matter within proviso (*C*).

S P. Khambatta and *J M R Jayakar* for Appellants.

P. V. Subba Rao and *A Rahman* for Respondents.

Their Lordships' Judgment was delivered by

SIR JOHN BEAUMONT —This is an appeal from a judgment and decree of the High Court at Madras, dated 13th November, 1944, modifying a decree of the Court of the Subordinate Judge of Tanjore, dated 18th July, 1941

The suit out of which this appeal arises was brought by Receivers appointed by the Court to collect the dues upon a mortgage bond, dated 19th April, 1926. The mortgage was executed by appellant 1, who was defendant 1 in the suit, on behalf of himself and his minor sons appellants 3 and 4, who were defendants 3 and 4, and by defendant 2 and members of his joint family who were defendants 5, 6 and 7 The suit, which was to enforce the mortgage, was commenced on 6th April, 1937, and the plaintiffs who are respondents in this appeal, were the persons interested in the mortgage money The defences originally raised are no longer relevant. On 22nd March, 1938, the Madras Agriculturists Relief Act, 1938 (Madras Act IV of 1938) (hereinafter referred to as " the Act ") was passed with the object of giving certain relief to agriculturists as defined in the Act The

*18th July, 1949

defendants filed supplementary written statements claiming relief under the Act. It was conceded that defendants 2, 5, 6 and 7 were agriculturists entitled to relief under the Act, and the principal matter in issue in the suit was, and the only question for determination in this appeal is, whether the appellants representing the other branch of the mortgagor family are also entitled to relief as agriculturists

Section 3, sub-section (2) of the Act defines agriculturist as meaning a person who

> " (*a*) has a saleable interest in any agricultural or horticultural land in the Province of Madras, not being land situated within a municipality or cantonment, which is assessed by the Provincial Government to land revenue (which shall be deemed to include peshkush and quit rent), or which is held free of tax under a grant made, confirmed or recognised by Government , "

The other clauses of the definition are not relevant, but there are four provisos to this section which restrict the class of agriculturists. Provisos " C " and "D" are relevant and are in the following terms :—

> " Provided that a person shall not be deemed to be an agriculturist if he ' (*c*) has within the two years immediately preceding 1st October, 1937, been assessed to property or house tax in respect of buildings or lands other than agricultural lands, under the Madras District Municipalities Act, 1920, the Madras City Municipal Act, 1919, the Cantonments Act, 1924, or any law governing municipal or local bodies in any other province in British India or any Indian State, or under the Madras Local Boards Act, 1920, in a panchayat which was a union before 26th August, 1930, provided that the aggregate annual rental value of such buildings and lands, whether let out or in the occupation of the owner, is not less than Rs 600 ; or
>
> (*D*) is a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion any sum exceeding Rs 500 is paid as peshkash or any sum exceeding Rs 100 is paid as quit-rent, jodi, kattubadi, poruppu or the like or is a janmi under the Malabar Tenancy Act, 1929, who pays any sum exceeding Rs 500 as land revenue to the Provincial Government "

It is not disputed that the appellants came within the definition of " agriculturist " contained in section 3 (2) (*a*), but it is claimed by the respondents that they were taken out of the class of agriculturists because appellant 1 fell within provisos C and D. Some discussion took place before the Board as to the burden of proof and the Judges of the High Court seem to have considered that the burden of proving that they were agriculturists entitled to relief under the Act lay upon the appellants In the first instance no doubt the burden was upon the appellants to show that they were agriculturists But having shown that they fell within the general definition of that word they would be entitled to relief unless they were deprived of the privilege by one of the provisos and the burden would lie upon anyone so asserting to prove his case *See* section 102, Evidence Act and Illustration (*b*) This is a point to be borne in mind, though it is not of paramount importance since the whole of the evidence is on record

Both Courts in India held that appellant 1 did not fall within proviso D, since he held the estate which was alleged to bring him within that proviso as a trustee, and not as an owner, and this concurrent finding their Lordships accept ; indeed it has not been challenged Under proviso C the contention of the respondents is that appellant 1 was assessed within the two years immediately preceding 1st October, 1937, to property tax on properties in Tanjore under the Madras District Municipalities Act, 1920, and to house tax on house properties in the Panchayat of Ammapet which was a Union before 1930 under the Madras Local Boards Act, 1920, and that the aggregate annual rental value of the said properties exceeded Rs 600.

It was contended in the first place by the appellants that the High Court put a wrong construction upon proviso C The argument presented to the Board was that the assessments under the Acts mentioned in that proviso should not be treated as cumulative, and that the appellants did not fall within the proviso unless it was shown that the assessment on the Tanjore property and the assessment on the Ammapet property, in each case, was on land or buildings of the aggregate annual rental value of not less than Rs 600. This construction seems to be not only inconsistent with the words of the proviso which speak of the " aggregate annual

rental value of such buildings and lands," words which mean, their Lordships think, buildings and land assessed to tax under any of the Acts mentioned in the proviso, but also to ignore the plain intendment of the Act which is to distinguish between agricultural and non-agricultural properties, and not to differentiate between different classes of non-agricultural income

"There are concurrent findings of the Courts in India that appellant 1 was assessed to property tax in Tanjore on property, the annual rental value of which was Rs 490. These concurrent findings their Lordships accept The Courts in India differed on the question of the assessment of house tax on properties in Ammapet The trial Court held that the appellants during the relevant period were the owners of the sites only of the property in Ammapet, and were not the owners of the superstructures on those sites, the ownership of which was in the tenants of the respective sites, and such tenants were assessed to the house tax. The High Court held that the appellants, during the relevant period, were assessed to house tax on the Ammapet properties and were the owners of at least three houses in Ammapet, the annual rental value of which was Rs 216 The High Court therefore held that the assessment to house tax in Ammapet, taken together with the assessment to property tax in Tanjore, excluded the appellants from the benefits of the Act under proviso C

Rule 7 of the rules made by the Provincial Government under section 28 of the Act, provides that if a person is not the owner of any building, the mere fact that the assessment registers show that it stands in his name is not enough to bring the matter within proviso C. Their Lordships reach this conclusion on the construction of the Act without reference to rule 7, the validity of which need not be considered The main question for determination on this appeal is therefore whether appellant 1 was during the relevant period the owner of property in the Panchayat of Ammapet, in which he was assessed to house tax, of the annual rental value of not less than Rs 110

The learned Subordinate Judge dealt with the question of ownership in paragraph 53 of his judgment in the following terms

"53 Defendant 1 admits that he owns 46 house sites or manaikats in this village (i e) Ammapet but denies that he owns any buildings Exhibit V (a) dated 4th August, 1938, is a certificate granted by the President of the Ammapet Panchayat Board, under section 27 of the Act, to the effect that defendant 1 had not been assessed to property or house tax in respect of any buildings other than agricultural lands in his panchayat during the two years preceding 1st October, 1937. In respect of these house sites which he owns in this village, his father and grandfather had taken the lease deeds Exs VI to VI (d) as early as 1891 from some of the tenants and Exs VII to VII (e) in 1896 In 1918, his father Appaswami Vandayar had taken registered lease deeds Exs. VIII to VIII (y) from some of the tenants who have all agreed to pay manai pagudi or site rent for the manaikats and had put up thatched structures with his consent During his management, defendant 1 has taken lease-deeds Exs XV series from several of the tenants containing the same provisions as those contained in Exs VIII series Defendant 1's case is that his tenants had put up petty superstructures upon his manikats with his permission, that they are the owners of such superstructures and that he is entitled only to the site Several of the tenants have been examined as witnesses and all of them speak to the execution of rent deeds by them and to the fact that they are the owners of the superstructures and not defendant 1 There have been instances spoken to by the witnesses of sales, othis and mortgages by the tenants of these superstructures The village kurippus maintained by defendant 1, which have been filed as Exs XV to XV (e) and the estate ledgers Exs XIV series show only receipt of rent for the sites and there is not a single instance in those account books of any receipt of rent for the superstructures which are admittedly in the possession of tenants There has not been also during all these years a single item of expenditure either for repair or reconstruction of any of these 40 and odd superstructures, in the account books maintained by defendant 1 Likewise, there is not a single entry in those account books to show payment of the union tax by defendant 1 in respect of these superstructures All the tenants who have been examined say that they paid the union taxes though in some cases through defendant 1's kariasthans .There are one or two instances in which the kariasthans collected the taxes from the tenants and after entering the collection in the village kurippu paid them over the next day or the day after the next to the union office The fact remains that for all these years, there has not been a single instance in which defendant 1 paid the tax for any of these superstructures Almost all the tenants, excepting a few who were not available either on account of sickness or on account of their absence from the village, have been examined by defendant 1 and all of them say that they are owners of the superstructures and that they have paid the union tax Not a single tenant residing in any of these superstructures and not a single resident of this village has been examined on the other side to show that defendant 1 is the owner of any of these

superstructure These circumstances and the evidence of the tenants which stands uncontradicted and is extremely probabilised by the registered documents Exs VIII series which came into existence in 1918, point to the fact that defendant 1 is not the owner of these superstructures '

After a detailed discussion of the evidence and the arguments presented before him the learned Judge concluded by saying,

" I have no hesitation in coming to the conclusion that defendant 1 was not the owner of any superstructures in the village of Ammapet "

The learned Judge then expressed the view that this finding, combined with R 7, involved that appellant 1 was not hit by Proviso C, and that it was not necessary for him to decide whether the name of appellant 1 was entered in the assessment register on house property in Ammapet during the relevant period though he noticed the contentions of the parties upon the question

In appeal the High Court dealt first with the question of assessment The evidence with regard to the assessment register stood in this way It is common ground that up to the end of 1935 appellant 1 was shown in the register as assessed to house tax in respect of property in Ammapet, but that the register had been altered by striking out his name and substituting the names of the tenants of the houses This alteration according to the evidence for the appellant, was made on 12th April, 1935, to take effect as from 1st April, 1935, that is before the commencement of the relevant period At the trial, as noted by the Judge, the defendants produced a certificate (Ex 5 A) given under section 27 of the Act, signed by the President of the Panchayat of Ammapet stating that appellant 1 had not been assessed to house tax during the relevant period A similar certificate had been issued to another creditor of the appellants in May, 1938 , that creditor challenged the correctness of the certificate, and an inquiry was ordered by the District Panchayat Officer, West Tanjore The Assistant Panchayat Officer made an inquiry and on 8th July, 1938, reported to the District Officer that certain numbers originally stood in the name of appellant 1, but that his name had been scored out and the names of eleven named persons (who were tenants of the appellants' sites) had been substituted, and that the alterations had been made because appellant 1 was only entitled to house sites at Ammapet This report the District Officer did not consider sufficient and he directed the Assistant Panchayat Officer to make a full inquiry and ascertain at whose instance the changes in the assessment register had been made, and whether they were genuine The Assistant Panchayat Officer then took statements from the President of the Panchayat Board, the Bill Collectors and various of the ryots into whose names the properties had been transferred, and on 12th October, 1938, he made a full report to the District Officer, in which he stated

" In view of my local enquiry and the statements obtained from the President, Panchayat Board, Ammapet, from the parties and from the Bill Collectors, I am of opinion that the changes made in the assessment registers were genuine and there is nothing to be doubted "

This report seems to have been accepted by the District Officer, and must carry some weight

The learned Judges of the High Court, however, held that there had been a conspiracy between appellant 1, the President of the Panchayat Board and numerous tenants to make it appear that there was a transfer early in 1935, whereas the transfer must have been made sometime after the provisions of the Act were known The basis for this opinion of the learned Judges depended upon the electoral roll prepared for the purpose of election to the Legislative Assembly at Madras Under the Government of India Act, 1935, Schedule VI, part 2 (*d*), a person was entitled to be included in the electoral roll if in the previous financial year he had paid house tax The first electoral roll was prepared on 17th January, 1938, and this did not contain the names of most of the tenants of the Ammapet property ; nor did it include the name of appellant 1, who may have been entered on the roll of some other district, though there is no evidence of this This roll was revised on 1st November, 1938, and in the revised roll the names of most of the tenants of the Ammapet property of appellant 1 were included From these

facts the High Court inferred that the names of the tenants were first entered in the register during the year 1938, but this inference is really no more than suspicion. The officer who prepared the first electoral roll was not called as a witness nor was his absence from the witness box, explained. There is no evidence as to whether the person who prepared the electoral roll inspected the house tax register. No question was put upon this subject to the President of the Panchayat Board, Ammapet, who might have had an explanation for the omission of the tenants' names, for example, that the officer who prepared the electoral roll had been provided by mistake with an out of date register of those assessed to house tax There is no direct evidence whatever as to the existence of any such conspiracy Its date and the circumstances in which it was entered into are not shown, nor are the names of the conspirators who must certainly have been numerous Nor is there any evidence that anybody received any advantage from having entered into the conspiracy In these circumstances their Lordships are not prepared to hold that the conspiracy found by the High Court is proved, whatever grounds for suspicion there may be.

The learned Subordinate Judge in the passage quoted from his judgment makes a formidable case in support of his view that the appellants did not own anything but house sites in Ammapet The learned Judges of the High Court, in view of their finding that there was a conspiracy between the appellant and most of his witnesses, were not prepared to take so favourable a view of the oral evidence given on behalf of the appellants as the Subordinate Judge had done. In relation to the documentary evidence they did not differ altogether from the conclusions of the learned Judge, but they made some criticisms of a negative character upon the evidence discussed by him They pointed out in particular, that not a single receipt for payment of house tax had been produceed by any tenant. This is a legitimate criticism, but as against this it is open to observation that if appellant 1 was concocting a false case, it would have been easy for him, in conjunction with the President of the Panchayat Board, and the Bill Collector, who must have been parties to the alleged conspiracy, to have provided the tenants with receipts for the payment of house tax which were antedated.

The learned Judges also considered that no tax receipt books of the Panchayat had been put into evidence But this seems to be an error The Bill Collector witness D W. 5 stated in his evidence in chief that house sites in the Panchayat were not taxed, and that he had carried out the changes in the register from the name of appellant 1 to the names of the tenants on the instructions of the President given on 15th April, 1935 In cross-examination he said that he had collected taxes from the tenants after the change, and put in his collection register as Ex W Exhibit W has not been incorporated in the Record before the Board but it is described in the list of omitted documents in Ex. L from which it appears that it was a collection of books kept by the Bill Collector from 18th September, 1932, down to 31st July, 1937 As no suggestion to the contrary was made to the witness, it must be assumed that these books bore out his evidence, and showed that the tax had been collected from the tenants.

The learned Judges of the High Court did not suggest that entry on the assessment register would render the appellants liable to tax without proof of ownership of the properties assessed and, as already observed, they did not reject the whole of the finding of the learned Subordinate Judge on the question of ownership, but they considered that it was proved that the appellant owned three houses in Ammapet during the relevant period of the rental value of Rs 216 which brought him within schedule C The first two of these houses are the last two items in schedule B to Ex E which is a partition deed made in August, 1920, between the appellant and his brother The properties in schedule B were those allotted to appellant 1 and comprised a considerable number of properties described as including some sort of a house. The learned Subordinate Judge in para 68 of his judgment pointed out that in the case of almost all the houses mentioned in this sechedule, it was proved by Ex VIII series and by the evidence of the per-

sons living in the houses that the sites alone belonged to appellant 1 and accordingly he considered that the reference to houses in the schedule was made merely by way of description of the property and did not establish ownership by appellant 1. The last two items in the schedule, however, which are assessment Nos. 428 and 407 were not included in Ex VIII series and their history is unknown until they appear in the schedule to the partition deed Assessment No 428 is situate in the western row of Bazaar Street within the boundaries stated and the description ends with the words "within these one shop No 41" Assessment No 407 is situate in the eastern row of the said street within the boundaries stated, and the description concludes "within these one terraced shop" Assessment No 407 was comprised in the counterpart lease Ex GG, dated 2nd September, 1918, by which one Swaminatha Chetti stated that he had taken from appellant 1, "Your shop with terraced superstructure" in the eastern row of Big Bazaar Street for a period of three years at a rent of Rs. 3 per month, and that on the expiration of the lease he would vacate the shop and deliver possession thereof to the appellant. This document no doubts suggests that in 1918 the appellant owned the shop on this piece of land.

The next relevant document is Ex IX-C which is an annual tenancy agreement relating to the assessment Nos 407 and 428 By this document one Hussain Badsha deposed that he had accepted from appellant 1 for one year from 14th June, 1928, land situate in Ammapet Village belonging to appellant 1 measuring kulis 9 and "mentioned hereunder" for him (the tenant) to build a house thereon and enjoy the same, paying rent at Rs 3-8-0 per month The tenant agreed that on the expiry of the lease period, *i e*, on 13th June, 1929, he would remove the superstructure of the said house and deliver possession to the landlord of the ground site Then in a schedule to the document the property was described as one upstair shop situate on the eastern row of Big Bazaar Street and one upstair shop situate on the western row of the said street, in each case the boundaries being given. These houses are those included in assessment Nos 407 and 428

The tenant of the property Hussain Badsha gave evidence as D W 31. His evidence was that he owned the superstructures of the two shops in question which are Nos 43 and 22 He said that on the site of No 22 there had been a thatched hut which had fallen down and that Swaminatha Chetti then ceased to do business there The witness further said that he himself had built the existing superstructure No. 22 ; that he had executed Ex IX-C ; that there was no superstructure on the site when he executed the first chit, and he could not say whether Ex IX-C was the first or the second chit The learned trial Judge accepted the evidence of this witness and their Lordships can see no good reason why the High Court should have rejected it. If accepted, it shows that the house on assessment No 407 in 1918 had fallen down before 1928, and that at that date the tenant owned the superstructure Counsel for the respondents have argued that Ex IX-C must be regarded as a lease of the houses and not of a vacant site The document is certainly not happily expressed The parties seem to have used a printed form not suitable to the case. The lease purports to be of a vacant site for the purpose of the tenant erecting a house thereon, but the schedule described the existing houses The explanation must be, their Lordships think, that the parties have used a printed form applicable to the first grant of a yearly tenancy of a vacant site, but not applicable to a renewal of the tenancy after a house had been erected on the site. Regarding the document as a whole their Lordships have no doubt that the schedule contains merely a description of the physical condition of the property at the time of the lease, and does not contradict the operative part of the document which is a lease of land on which the tenant may build a house and which imposes on the tenant the obligation to remove the superstructure at the end of the term It may be noticed that Ex XV series contains instances of many similar yearly tenancies of a vacant site for the purpose of erecting a house but with a house described in the schedule.

The other shop assessment No 428 is not included in Ex GG and there is no evidence that in 1918 or at any other time the shop on that piece of land belonged

to the appellant The case for the respondents in regard to the shop on assessment No 428 is less strong than their case in relation to the shop on assessment No. 407.

In view of the documents and the evidence of the tenant, Hussain Badsha, their Lordships are of opinion that it is not proved that the appellants owned houses on those two sites during the relevant period from 1935 to 1937

The other piece of property upon which the High Court considered that it was shown that the appellant possessed a building was assessment No. 1163 relating to No 1 Railway Road This property is not to be traced in the partition deed, Ex E, but it is admitted that it is part of the Ammapet property of the appellants No special claim in respect of this house appears to have been made before the trial Judge, but the matter was discussed in some detail in the judgment of the High Court The property is occupied by one Moidinsa Rowther who gave evidence as D W 47 His evidence was that the appellant 1 owned the site and that the superstructure belonged to him He said that he had purchased it from his uncle Ibramsa Rowther eight years before giving evidence for Rs 30 and that after the purchase he repaired it at a cost of between Rs 50 and Rs 60 He said that he paid manai paguthi of Rs 13-4-0 every month to appellant 1, that he had not been making this payment for the last two years as the building had fallen down In the House Tax Demand Register the capital annual value of this house is given as Rs 108 and the Judges of the High Court rejected the evidence of this witness because he did not produce any registered sale-deed of the house and because they considered that the sum which he said he had paid for it, *viz*, Rs 30 was incredible in view of the annual value of the house But no question was put to the witness about this It is possible that his uncle only charged him a nominal sum for the house The learned trial Judge accepted the evidence of this witness, pointing out that he belonged to an entirely different community from the appellant, and their Lordships see no reason for rejecting the evidence

In the circumstances their Lordships think that the plaintiffs failed to prove that defendant 1 was the owner of any houses in Ammapet Panchayat or that he was assessed to house tax in respect of any such houses during the relevant period, and that the judgment of the learned Subordinate Judge was right.

For these reasons, their Lordships will humbly advise His Majesty that this appeal be allowed, that the judgment and decree of the High Court at Madras dated 13th November, 1944, be set aside and the decree of the Subordinate Judge at Tanjore dated 18th July, 1941, be restored

The respondents must pay the costs of the appeal to the High Court and of the Appeal to His Majesty in Council

Solicitors for Appellants *Chapman-Walkers*

Solicitors for Respondents *Barrow Rogers & Nevill*

V.S *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR P V RAJAMANNAR, *Chief Justice* AND MR JUSTICE KRISHNASWAMI NAYUDU

S. Raja Chetty and another ... *Petitioners**

v

Jagannathadas Govindas and others ... *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), section 7 (2) (i)—Registered lease after commencement of Act—Provisions as to default and eviction—Lease if governed by the Act

A lease of a Cinema Theatre with furniture, fittings, talkie equipment, machinery, etc , was entered into by a registered agreement after the commencement of Madras Act XV of 1946 and the lease contained *inter alia* provisions as to the due date for payment of rent, hire, etc , and for re-entry in case of default in their payment

In an application for eviction under section 7 (2) (i) of the Act for default in payment of a month's rent on the due date,

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*C M P. No 5615 of 1949 16th September, 1946

Held. The provisions of Madras Act XV of 1946 would not apply to the lease in question. The parties must be presumed to have known of the provisions of the Act and contracted out of the terms of the Act The landlord must by the agreement be deemed to have waived the right to evict conferred by the Act No ground of public policy compelled the Court to hold that it was not open to the lessor to abridge his right to evict his lessees Further the Act is not applicable as the lease is not one of a mere building and furniture only Accordingly an eviction cannot be ordered under the Act.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H R A No 1077 of 1949 on the file of the Second Judge, Small Cause Court, Madras and quash the order therein

V. Radhakrishnayya for *V S. Rangachari* for Petitioners

K V. Ramachandra Aiyar and *A. Arunachalam* for Respondents.

The Order of the Court was pronounced by

The Chief Justice—This is an application for the issue of a writ of *certiorari* to quash the order of the Second Judge, Small Causes Court, Madras, sitting as the appellate authority, made by him on the 16th August, 1949, in H R A No. 1077 of 1949 setting aside the order of the Rent Controller, dated the 2nd August, 1949, and directing eviction of the petitioner from the premises described as " Maharani Talkies ".

By a registered deed, dated the 15th November, 1948, executed by and between the petitioners and the respondents 1 to 3, the respondents as lessors demised to the petitioners as lessees the cinema theatre known as " Maharani Theatre or Maharani Talkies ", Madras, situated in Washermanpet. What was demised is thus described in the indenture :

" All the piece of ground with the new cinema theatre including the buildings and stall erected thereon known as ' Maharani Theatre ' or ' Maharani Talkies ' together with all easements and appurtenances whatsoever thereunto belonging and also all the fixtures, fittings, cinematographic talkie equipments, machinery, furniture, scenery and things in, upon and about the said theatre specified in the inventory hereunder."

The lease was for a term of five years commencing from the 1st October, 1948. The monthly rent and hire was fixed at Rs 3,200 and this sum is expressed to be made up as follows

(1) Rs 1,600 being rent for the ground and superstructure,

(2) Rs 800 being hire of furniture, and

(3) Rs 800 being hire of talkie equipment, machinery, fittings and lessors' fixtures

The provisions of the lease deed which are material for the purpose of this application are contained in clause I, sub-clauses (2) and (3), clause 25 and clause II, sub-clause (4) proviso

" Clause I (2) — to pay the monthly reserved rent and hire regularly each English calendar month's rent and hire being payable on or before the 10th of the respective succeeding month (whether demanded or not) irrespective of the question whether the necessary permission or licence from the municipal, police or other authority has or has not been applied for or obtained by the lessees and irrespective of the suspension or revocation temporarily or otherwise of the licence or permission and irrespective of the question whether the cinema or theatre is run or not

(3) to pay to the lessors an advance of Rs 21,000 of which sum the lessees have already paid Rs 10,000 and the balance of Rs 11,000 being payable at or before the execution of these presents T e said advance shall not carry any interest and shall be returnable to the lessees on the termination of the lease hereby created but subject to the lessees having complied with their covenants hereinafter contained The lessors shall be at liberty to adjust the said advance towards the arrears of rent and hire if any remaining unpaid and towards damages, losses, charges, costs and expenses recoverable both under this deed and in law

Clause 25 To yield up subject to the exceptions and provisos hereunder mentioned, the demised premises together with the said fixtures, fittings, talkie equipment, machinery, furniture, scenery, articles and things and additions, alterations thereto and to the said buildings whether severable or otherwise and whether they are lessors' or lessees' fixtures or additions and also all effects which shall be brought upon the said premises in addition thereto or substitution thereof at the expiration or sooner determination of the said term in good and substantial repair and condition and with a full and working stock for the requirements of the cinema, and the theatre, belonging to the lessors,

and otherwise in a fit, proper and working condition to be used for cinema and theatrical representations

Clause II, sub-clause (4), proviso (1) —If the rent hereby reserved (or any part thereof) shall remain unpaid for two tenancy months after the same becomes payable (whether legally or formally demanded or not) or if the lessees shall fail or neglect to perform or observe any of the covenants herein contained and on their part to be performed or observed other than clauses 1 (9) and (10) *supra* or if the lessees or either of them shall be adjudged insolvent, then and in any of the said cases, it shall be lawful for the lessors at any time thereafter to re-enter upon the demised premises or any part thereof in the name of the whole and thereupon the demise shall absolutely determine but without prejudice to the right of action of the lessors in respect of any breach of the lessees' covenants herein contained, and it shall be lawful for the lessors to make and effect such re-entry even without the consent of the lessees and without subjecting themselves to any action for trespass or otherwise and without recourse to legal proceedings "

On the 30th April, 1949, the petitioners, lessees, addressed a letter to the lessors enclosing a cheque for Rs 3,200 being the rent for the month of March, 1949. The cheque however was post-dated 5th May, 1949 On 4th May, 1949, the respondents returned the cheque and intimated that as the petitioners had defaulted in the payment of the rent due for the month of March, 1949, they were applying for their eviction from the theatre On the same day they filed an application before the Rent Controller, Madras, under section 7 (2) (i) of the Madras Buildings (Lease and Rent Control) Act, 1946, praying for vacant possession of the said talkies (land and buildings) The allegations in the petition were that under the lease the monthly rent of Rs 1,600 for the ground and superstructures was payable on or before the 10th of the respective succeeding month and that the lessees did not tender or pay to them the rent due for March, 1949, till 30th April, 1949, when they sent a post-dated cheque and by reason of the default made by the lessees they had become entitled to evict them from the land and buildings. The lessees pleaded that the application was unreasonable and contrary to the specific purport of the Act, that they were not statutory tenants but tenants governed by the express provisions of a registered lease and hence the application for eviction under section 7 of the Act was not maintainable They also pleaded that forfeiture of the lease for non-payment of the rent could be availed of only when the rent for a particular month remained unpaid for a period of two tenancy months after the same became payable and the rent for March had been tendered within the period fixed in the indenture of lease and therefore the provisions of the Act were not attracted. They also contended that a sum of Rs 21,000 was in the hands of the lessors and it was obligatory on their part to adjust from the said advance the arrears of rent if any and they were therefore precluded from filing this application We are not concerned with the other pleas raised in their counter statement.

The Additional Rent Controller dismissed the application on the ground that there was no default It is not clear how and why she came to that conclusion. The main argument addressed on behalf of the lessees was that parties were aware of Madras Act XV of 1946 and by this lease they had contracted out of the statute and therefore the application was not maintainable The Rent Controller was evidently not inclined to uphold this contention There was an appeal by the lessors. The appellate authority approached the case from the stand-point that as eviction was claimed under the said Act, Madras Act XV of 1946, and not under the general law in accordance with the agreement between the parties, the only question to be considered was whether there was a default within the meaning of section 7 (2) (i) of the Act As there was clearly such a default he found that the lessees were liable to be evicted He overruled their plea that the arrears of rent should be adjusted from the advance of Rs 21,000 He therefore allowed the appeal and set aside the order of the Rent Controller, and passed an order for eviction The petitioners are the lessees

We may at the outset briefly dispose of one of the contentions pressed upon us by Mr V Radhakrishnayya for the petitioners, namely, that because a sum of Rs 21,000 had been paid to the respondents and because under clause I (3) the lessors were at liberty to adjust the said advance towards arrears of rent and hire if any remaining unpaid, it cannot be said that there has been a default in payment

of the rent for March, 1949 We think that this contention cannot prevail because the sum of Rs 21,000 was not only security for the due payment of rent but also security for damage and loss and expenses which the lessors may sustain and incur on account of non-compliance of any of the covenants by the lessees The advance is returnable to the lessees on the termination of the lease and presumably the adjustment either towards rent or towards damages or expenses is to be made also at the same time, namely, on the termination of the lease.

It was next contended by Mr Radhakrishnayya that though clause I, sub-clause (2) of the lease provided for the payment of the rent of each month before the 10th of the succeeding month, we should take into account the subsequent provision which provides for re-entry if the rent remains unpaid for two tenancy months after the same becomes payable The result is that the time fixed in the agreement of tenancy must be deemed to be not the 10th of the succeeding month but two months thereafter—so the argument ran We think that the contention is very far fetched The time fixed in the agreement of tenancy for payment of the rent of any month is certainly the 10th of the succeeding month The later provision deals with the right of the lessors to re-enter on the premises in a particular contingency In fact this later provision itself alludes to rent remaining unpaid after the same had become *payable* This contention cannot be accepted.

The most important contention of Mr Radhakrishnayya then remains and this has given us considerable difficulty Neither side has been able to cite any direct authority or any authority which gives any material assistance in the decision of the question The contention is this The parties knew or must be deemed to have been aware of the provisions of Madras Act XV of 1946 It was open to the parties to enter into a contract containing terms manifestly inconsistent with the provisions of the Act There is nothing illegal in such a course As regards matters expressly provided for in the contract between the parties, the terms of the contract relating thereto would prevail over the provisions of the statute in so far as they are inconsistent Incidentally the learned counsel also argued that the parties did not contemplate that the contract of lease which they were entering into was to be governed by the provisions of Madras Act XV of 1946 In fact having regard to the peculiar nature of the lease with which we are concerned, it was contended that the Act would not apply to it

After giving the question our careful consideration we have come to the conclusion that the provisions of Madras Act XV of 1946 would not apply to the lease in question In coming to this conclusion we have been impressed by the fact that the lease was entered into long after the Act had come into force and it must be presumed that the parties knew of its provisions. This Act was primarily intended to prevent unreasonable eviction of tenants and to regulate the letting of residential and non-residential buildings and to control the rents of such buildings. Though most of the provisions of the Act are obviously thus intended to safeguard the rights of tenants, there are provisions which, so far as they go, are in favour of the landlord also Now section 7 (2) (*i*) is one of such provisions which gives a right to the landlord to pray for the eviction of the tenant on default of due payment of rent Under that provision in a case where the rent is payable every month, even default in payment of the rent for one month entitled the landlord to apply for eviction of the tenant This provision certainly is made for the benefit of the landlord. It is a well-established principle of law that

> " every one has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, which may be dispensed with without infringing any public right or public policy."[1]

There is no express prohibition against contracting out of it Though we realise that the Act was passed in accordance with a general policy, we cannot say that that policy would be violated if a contract is entered into between a landlord and tenant giving the tenant larger rights and greater privileges than those conferred on him by the Act In the present case though under

1 Maxwell, 9th edition, page 389

section 7 (2) (i) of the Act the landlord may be entitled to apply for eviction even when there was default in payment of a month's rent, the lease deed expressly provides that it is only if the rent remains unpaid for two tenancy months after the same became payable that the landlord is entitled to re-enter upon the demised premises In the absence of authority that it is not permissible for the parties to contract themselves out of the provisions of this Act we hold that they can agree to be governed by terms and conditions which may be inconsistent with some of the provisions of the Act. There is no provision in the Act which has a material bearing on this aspect couched in imperative terms, as, for example, found in some enactments which declare that any action done in contravention of the enactment is void. Even assuming that a plausible argument can be raised that on the grounds of public policy the tenant should not be bound by any term inconsistent with the Act which is to his detriment, we see no offence to public policy in allowing a landlord to abridge his rights Otherwise it comes to this, that an Act intended to prevent unreasonable eviction of tenants can be used for the perpetration of the very thing sought to be prevented

Mr Ramachandra Aiyar argued that there is no reference to the Act in the lease deed and therefore it cannot be said that they contracted out of it Merely because there was no reference to it we cannot presume that the parties or their legal advisers who evidently prepared the lease were not aware of the Act Though the learned advocate attempted to contend that it would be against public policy to permit the parties to contract out of this statute, he did not make good this contention by either citation of authority or otherwise In this connection we have found the judgment of Farewell, J , in *Soho Square Syndicate, Ld* v *E Pollard and Co.*[1], very instructive, and applying the test laid down by the learned Judge in that case we cannot say that any ground of public policy compels us to hold that it was not open to the lessor to abridge his right to evict his lessees

We have come to the conclusion that the lessors' application in this case is not maintainable on other grounds as well In our opinion the lease in question is not governed by the provisions of Madras Act XV of 1946 That Act regulates only the letting of residential and non-residential buildings In section 2 building has been defined as to include the garden, grounds and out-houses appurtenant to the building and furniture supplied by the landlord for use in such building. In the case before us, there is no lease of a mere building or a building with compound and furniture of the sort covered by the definition. The lease is of land and building together with fixtures, fittings, cinematographic talkie equipments, machinery and other articles The lessors, evidently aware of the composite nature of the demise, have prayed in their petition for eviction of the lessees from the land and buildings only On behalf of the respondent, Mr. K V Ramachandra Aiyar relied strongly on the provision in the deed which splits up the monthly rent and hire of Rs 3,200 into Rs 1,600 being rent for the ground and superstructure, Rs 800 being hire of furniture and Rs 800 being hire of talkie equipments and machinery, fittings and lessors' fixtures We have no hesitation in holding that this splitting is purely notional and nominal and intended probably for purposes relating to the municipal assessment and other extraneous considerations. When we asked Mr Ramachandra Aiyar what would happen, in this case, when there is an eviction of the lessees from the land and building, to the machinery and equipments, etc , and whether there was any provision in the deed relating to them, he confessed that there was no specific provision in the deed Obviously they cannot be governed by Madras Act XV of 1946 and so he said they must be governed by the general law of contract. He also conceded that if the lessees paid Rs 1 600 but defaulted in the payment of the balance which is due as hire, the lessors have no right to ask for eviction under the Rent Control Act. We think that the attempted division of the lease and separation of rights in regard to two classes of property is in the highest degree artificial, never contemplated by the parties Here is a lease of a talkie house with every thing that is necessary

1. (1940) 1 Ch 638.

to run cinema shows To split up such a composite lease as this into separate contracts of lease and hire is to destroy it altogether Mr Ramachandra Aiyar argued that the furniture which was covered by the lease fell within the definition of section 2 of the Act We do not agree The observations of the learned Judges in App No. 590 of 1945 (Patanjali Sastri, and Bell, JJ)in dealing with the plant, machinery and other moveables which were demised along with a factory are very apposite in this connection,

" No doubt in one sense the buildings comprised in the lease did contain articles supplied by the landlord , but we cannot agree that what was so supplied can be considered in any modern sense as being furniture "

Though in that case the learned Judges were dealing with the lease of a factory called the West Coast Match Co , which consisted of land and buildings including a bungalow used for residential purposes together with plant, machinery and moveables contained therein, we think the principle of that decision would apply equally to the case before us in which there is a lease not merely of a building but of a cinema theatre with all necessary equipment for the exhibition of films

We therefore hold that the appellate authority had no jurisdiction to direct eviction of the petitioners under the provisions of Madras Act XV of 1946 His order must be and is hereby quashed There will be no order as to costs

K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE HORWILL AND MR. JUSTICE BALAKRISHNA AYYAR

K P S. Thangaswamy Chettiyar *Appellant**

v

A. Bapoo Sahib . *Respondent*

Madras Buildings (Lease and Rent Control) Act (XV of 1946), *sections* 9 *and* 12—*Civil Procedure Code (V of* 1908), *section* 144—*Application for eviction—Eviction ordered and executed—Reversal by Subordinate Court—Restitution ordered and effected—Legality of.*

In an application for eviction of a tenant on the ground of arrears of rent, the landlord got an order for eviction and actually got possession of the building in execution On appeal to the sub-judge, the appellate authority of the place, the order was reversed After five days the tenant applied to the sub-judge himself for restitution and re-delivery, which were ordered and actually effected

On appeal against this order, on the ground of want of jurisdiction of the Sub-Court to order,

Held, negativing the contention (1) That an application for restitution is an application for execution.

Somasundaram v. *Chokkalingam,* (1916) I L.R 40 Mad 780, *Unnamalai Ammal* v *Mathan,* (1917) 33 M.L J 413 and *Palaniandi Pillai* v *Rasappa Pillai,* (1937) 2 M L J 108 followed

(2) That once execution proceedings under Madras Act XV of 1946, are placed in the hands of ordinary Courts, the provisions of Civil Procedure Code relating to the subject would apply *mutatis mutandis* and so far as the machinery set up by that Act and provisions thereof permit

(3) That it is a basic rule that Courts will not permit a suitor to suffer by reason of a wrong order it has made, and that when once the error is discovered it will as far as possible put him in the position which he would have occupied if the wrong order had not been made The right to restitution is not derived from section 144, Civil Procedure Code That section only prescribes the method of enforcing the right

Birendranath Basu Thakur v *Surendrakumar Basu Thakur,* I L R 1940 (1) Cal 486, applied

(4) That no separate suit for restitution could lie in view of section 144, Civil Procedure Code.

(5) That in the circumstances, the order passed by the Subordinate Judge is the only order, that could have been made.

Appeal against the order of the Court of the Subordinate Judge, Tiruchirapalli in E P No 512 of 1948 in H R.C A. No 68 of 1948 (H R C No. 47 of 1948 Rent Controller, Tiruchirapalli)

M.S Vaidyanatha Aiyar for Appellant.

A V Narayanaswamy Aiyar for Respondent

The Judgment of the Court was delivered by

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*A A O No 545 of 1948 22nd July, 1949.

Balakrishna Ayyar, J—The property which forms the subject-matter of these proceedings is a shop in Big Bazaar Street, Tiruchirapalli town The appellant who is the owner of the property applied to the Rent Controller for eviction of the respondent who was his tenant on the grounds that he required the shop for his own use, and that the tenant was in arrears with his rent. The Rent Controller recorded no finding on the question whether the landlord required the shop for his own use ; but he found that the respondent was in arrear of rent for June 1947 and therefore passed an order evicting him from the premises The appellant put the order in execution as soon as he could and actually took possession of the property on 22nd June, 1948 The tenant appealed to the Sub-Judge who reversed the order of the Rent Controller and dismissed the petition for eviction That order was pronounced on the 25th of August, 1948 Mr. Vaidyanatha Aiyar for the appellant complained that the order made in the appeal was inequitable ; but into that matter we cannot go for the reason that under section 12(4) of Madras Act XV of 1946 the decision of the appellate authority is final. On 30th August, 1945, *i e*, five days after the Sub-Judge had pronounced the order in the appeal the tenant applied for restitution, and without notice to the appellant the learned Subordinate Judge ordered re-delivery of the property by 30th September, 1948 and re-delivery was actually effected It is against this order that the present appeal has been filed

Before examining the contentions of Mr. Vaidyanatha Aiyar for the appellant it may be stated that so far as execution is concerned, the scheme of Madras Act XV of 1946 is that in the mofussil all orders passed under section 7,8 or 12 of the Act, i e, the orders of the Rent Controller and the Appellate Authority—are executable in the Court of the appropriate Subordinate Judge or where there is no Subordinate Judge, in the Court of the District Judge

For the appellant, Mr Vaidyanatha Aiyar contended that the lower court had no jurisdiction to order restitution His reasoning was that it could derive the necessary power only from section 144, Civil Ppocedure Code but that section has not yet been made applicable to proceedings under Madras Act XV of 1946. Besides, even assuming that section 144 does apply to a matter of this kind the procedure laid down by the decisions in respect of section 144 has not been followed. Before restitution can be made, there must be a separate and specific order directing restitution and particularising the nature and extent of the restitution that should be made There must be an order, said Mr Vaidyanatha Aiyar, "crystallising" and formulating the rights of the party seeking restitution Such an order can be made only by the court of first instance, *i e*, in the present case, the Rent Controller The Rent Controller has made no such order, and therefore there was no order on the basis of which any restitution could be made Further the order which the Rent Controller passed in the first instance was sent to the Sub-Court for execution, and the moment the Sub-Court executed that order, it became *functus officio*

In his attempt to develop this line of reasoning, Mr Vaidyanatha Aiyar cited a number of decisions The first of these is *Banmul Soanmul* v *Harakchand Roopchand*[1]. We do not think that that decision has really any application to the facts of the present case In that case what happened was this . The Provincial Government passed an order under the Madras House Rent Control Order—this is different from the Act—in favour of a certain party. An attempt was made to execute that order through the machinery set up by Madras Act XV of 1946. It was held that the order was not one which could be or was made pursuant to any provisions of the Act Since section 9 enables execution to issue only in respect of orders made under the specified sections of the Act, the order which had been obtained from the Government was not one which could be executed under that Act In the present case the order of the Sub-Judge was not made under the House Rent Control Order but in virtue of the powers conferred by the Act itself. Section 9 of the Act specifically provides that :

1. (1948) 1 M L J 256

"every order passed on appeal under section 12 shall be executed by the Principal, Subordinate Judge having original jurisdiction over the area in which the building is situated"

This decision is not an authority for the proposition that no restitution can be ordered under the Act. In *Rohani Ramandhwaj Prasad Singh* v *Har Prasad Singh*[1], which is the second case cited by Mr Vaidhyanatha Aiyar the Privy Council decided :

"When a decree is varied or reversed in circumstances giving rise to a right by way of restitution the right arises automatically and is claimable under section 144, Civil Procedure Code, before the trial Court"

Mr Vaidhyanatha Aiyar next referred to *Palaniyandi Pillai* v. *Rasappa Pillai*[2] where this passage occurs :

"It will be seen that under section 144 before an order for restitution can be made the form and the manner of restitution and the relief which the Court would grant for giving the benefit of the decree to the person who seeks the restitution of the property which he has been deprived of, have to be determined by the Court . After determination as aforesaid it will be then open to the Court to give the appropriate relief which the nature of the case may require and which may accord with such determination"

He also cited *Birendranath Basu Thakur* v. *Surendrakumar Basu Thakur*[3] where the learned Judges say

"The final judgment or decree furnishes only the foundation to a claim for restitution,—gives authority for *the view* that restitution is necessary An application for restitution is not one for enforcement of that judgment or decree, but in the words of Rankin, C J, it is an application for relief which is consequential upon the appellate Court's decree of reversal . . The order for restitution is in effect a new decree, which has to be enforced by another execution"

Finally he referred in this connection to *Kishori Mohan* v *Brahma Niranjan*[4], in which it was decided that a Court to which a decree is transmitted for execution becomes *functus officio* the moment it has executed the decree. He also referred to a passage at page 556 which runs thus :

"Therefore the judgment-debtors had the right to go to the Court of first instance for such restitution as was just and proper . . . ."

In view of these decisions he repeated that the tenant should in the first instance have gone to the Rent Controller and obtained an order from him, "crystallising and formulating" his rights in regard to restitution and thereafter put that order in execution He also suggested that if it was necessary a separate suit for the purpose should or could be filed

To this Mr Narayanaswami Aiyar replied (i) that in this Province at least it is well established that restitution proceedings are in the nature of execution proceedings, (ii) that section 8 of Madras Act XV of 1946 provides a machinery for executing orders passed in appeal, that the Court set up for that purpose in the mofussil is the Court of the Subordinate Judge or District Judge where there is no Sub-Judge and (iii) that the general rule is that once the ordinary tribunals are seized of a matter, the forms, procedure and reliefs usually observed by and obtainable in such Courts become applicable and available in respect of that matter. In *Somasundaram* v. *Chokkalingam*[5], it was decided,

"An application for restitution is an application in execution under the new Code of Civil Procedure"

The same view appears in *Unnamalai Ammal* v. *Mathan*[6]. The decision there wa that,

"An application for restitution is an application for execution of a decree and is governed by Article 182 and not by Article 181, Limitation Act"

In one of the cases cited by Mr Vaidhyanatha Aiyar and already referred to namely, *Palaniyandi Pillai* v *Rasappa Pillai*[2], it is stated at page 112,

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1 (1943) 2 M.L J 460 (P C)
2 (1937) 2 M L J 108 at 112
3. (1940) 1 Cal 486 at 494
4 A I R 1938 Cal 554
5 (1916) I L R 40 Mad 780
6. (1917) 33 M L J. 413.

"It is no doubt true that our High Court has taken the view that an application for restitution is an application for execution of the decree whatever may be the view of the other High Courts."

There are several other decisions of this Court to the same effect and it is clear that the first of the three propositions on which Mr Narayana Aiyar founded his reply is well-established in this Province.

In *Maruthamuthu* v *H R E. Board, Madras*[1] Varadachariar, J, as he then was, took it as a proposition which required no authority, namely, that

"once a matter comes before a regular Civil Court its further course will be governed by the provisions of the Code"

The same view is expressed in *Kandaswami* v *Neelamegam Pillai*[2], where Chandrasekhra Aiyar, J, refers to a number of decisions which have laid down that rule. It is sufficient to refer to one of the decisions he cited, *viz*, the case of *National Telephone Co, Ltd*, v *Postmaster General*[3], where Viscount Haldane, L C, says at page 552

"When a question is stated to be referred to an established Court without more, it, in my opinion, imports that the ordinary incidents of the Procedure of that Court are to attach, and also that any general right of appeal from its decision likewise attaches"

On the basis of this rule it must be held that once execution proceedings under this Act are placed in the hands of the ordinary Courts, the provisions of the Civil Procedure Code relating to that subject would apply *mutatis mutandis* and so far as the nature of the machinary set up by Madras Act XV of 1946 and the provisions thereof permit

There is another aspect of the matter The contention for the appellant ignores the true nature of restitution proceedings. It is a basic rule that the Courts will not permit a suitor to suffer by reason of a wrong order it has made, and that when once the error is discovered it will so far as possible put him in the position which he would have occupied if the wrong order had not been made The right to restitution is not derived from section 144, Civil Procedure Code. That section only prescribes a method by which that right can be enforced In *Birendranath Basu Thakur* v. *Surendrakumar Basu Thakur*[4], which Mr. Vaidhyanatha Aiyar himself cited, the following passage occurs at page 493 .

"The power a Court to direct restitution is inherent in the Court itself It rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act *Rodger* v. *The Comptoir D'Escompte de Paris*[5], and *Jai Berhma* v *Kedarnath Marwari*[6]. The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of section 144 of the Civil Procedure Code, which defines the procedure only *in one class of cases* requiring restitution by enacting that the application for restitution is to be made in the Court of first instance"

The portion underlined implies that section 144 is not exhaustive of the forms of procedure.

If as we think we have regard to the substance of the matter and not merely to its technical forms it must be clear that the order passed by the learned Subordinate Judge is the only one which could have been made in the circumstances of the case Except by ordering that the tenant be put back into possession of the property the appellate authority could not have given effect to its order at all

It has been already mentioned that the contention of Mr. Vaidhyanatha Aiyar was that after he had succeeded in the appeal the tenant should have gone back to the Rent Controller and obtained a separate order from him granting him restitution and thereafter put this order in execution in the Sub-Court or if necessary filed a separate suit It is difficult to see how in view of the provisions of section 144 (2), Civil Procedure Code, any suit would lie The suggestion that the tenant should have gone to the Rent Controller and obtained a specific order from him is not as simple as it looks because if the tenant had made such an application

1 (1937) 2 M L J 175 I L R 1938 Mad. 216 at 218
2 (1946) 2 M L J 368
3 (1913) A C 546
4 I L R (1940) 1 Cal. 486
5 (1871) L R 3 P.C 465
6 (1922) 44 M L J 735 L.R 49 I A 351 I L R 2 Pat 10 (P C)

he might well have been met with the plea that the Rent Controller had no jurisdiction at all

A decisive objection to the argument of Mr Vaidhyanatha Aiyar is that if his contentions were to prevail there would be really no effective means of putting in execution a large category of orders that may be passed in appeal The clear purpose of Madras Act XV of 1946 was to simplify proceedings and to set up a machinery for the speedier disposal of certain matters , but if the contentions of Mr Vaidhyanatha Aiyar are sound we must be prepared to assume that the legislature deliberately conferred a right of appeal and simultaneously nullified its intentions by depriving the successful party of any means of realising the benefit of his success It is not to be supposed that the Legislature would have stultified itself in this manner

Mr Vaidhyanatha Aiyar next complained that the order of restitution was passed without notice to his client. To this Mr Narayanaswami Aiyar attempted the answer that no notice was necessary under Order 21, rule 22, since the execution petition was being filed within two years of what may be called the date of the decree To this it was replied that Order 21, rule 22, has no application to the matter on hand ; whether that be so or not, we are clear in our mind that the appellant has not been prejudiced in any manner Before the learned Subordinate Judge he could not have raised any points that have not been raised here, and the result could hardly have been different

In the result, therefore, the appeal fails and is dismissed with costs.

K C *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE PANCHAPAKESA AYYAR

M. Abraham *Petitioner* *

Penal Code (XLV of 1860), *sections* 339 *and* 341—*Wrongful restraint—' Proceeding in any direction '—Meaning of*

The accused, who was the driver of a bus purposely made his bus stand across a road in such a manner as to prevent another bus which was coming behind to proceed further

Held, ' proceeding in any direction ' within the meaning of section 339, Indian Penal Code, must mean only proceeding in that direction and not in any other direction, much less in the reverse direction It cannot be said that because the driver and the passengers in the second bus could have got down from that bus and walked away in different direction, or gone in that bus to a different destination, in the reverse direction, there was therefore no wrongful restraint. Hence the conviction of the accused under section 341 was justified.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Additional First Class Magistrate, Chingleput in C. C No 686 of 1947, dated 31st July, 1948

S Krishnamurthi and *Vepa P. Sarathy* for Petitioner

The Assistant Public Prosecutor (*A. S. Sivakaminathan*) for the Crown

The Court made the following

ORDER —This is a petition against the conviction of the petitioner under section 341, Indian Penal Code, by the Additional First Class Magistrate, Chingleput, and a fine of Rs. 50 imposed on him therefor

The facts are briefly these The petitioner was the first accused in C C. No. 686 of 1947, on the file of the Additional First Class Magistrate, Chingleput, He was the driver of bus No. MDH 787. The prosecution case is that, on 27th September, 1947, he purposely made his bus stand across the Thirukkalikundram

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* Crl R C No 1035 of 1948 (Crl R P No 975 of 1948) 19th October, 1949.

Road, at Chingleput, near the Chowki post in such a manner as to prevent another bus MDH 1167, which was coming from behind, to proceed further When P W. 1, the driver of MDH 1167, turned his bus to the right, to avoid and pass the petitioner's bus, the petitioner deliberately and intentionally drove his bus MDH 787 in a rash and negligent manner and dashed against bus No. 1167, causing damage, and thereby committing an act endangering the life of the passengers who were travelling in that bus The learned Magistrate found this petitioner guilty only under section 341, Indian Penal Code, for wrongfully restraining the driver and passengers of Bus No 1167, and sentenced him as stated above.

The learned Counsel for the petitioner has contended before me that the petitioner would not be guilty of " wrongful restraint " by preventing the progress of the other bus MDH 1167, by putting his bus across the road, because of the observations of the Bench ruling in *Maharani of Nabha* v. *Province of Madras*[1]. I have looked into that ruling It will not help the petitioner It was mainly concerned with the question of " wrongful confinement," and not with " wrongful restraint," as here, though that question was also incidentally referred to by way of *obiter*. The learned Magistrate relied on the ruling in *Gopala Reddi* v. *Lakshmi Reddi*[2] a later judgment by Happell, J , and more or less a direct ruling on the point, on similar facts, and convicted and sentenced the petitioner.

I have perused the entire records, and heard the learned counsel for the petitioner and the learned Public Prosecutor *contra*. The first contention of the learned counsel for the petitioner was that the ruling of Happell, J , in *Gopala Reddi* v. *Lakshmi Reddi*[2] was not correct, and that, since the driver of bus No. MDH 1167 and the passengers therein could have either got down from the bus and walked away in various directions, or got into the petitioner's bus and proceeded in the direction they wanted, or even proceeded in their bus in another direction, no offence was committed under section 341. The argument is quite unsustainable. Section 339, Indian Penal Code says .

" Whoever voluntarily obstructs any person so as to prevent that person from proceeding *in any direction in which that person has a right to proceed* "

wrongfully restrains that person. It is only regarding wrongful *confinement* that the person must be prevented from proceeding beyond certain circumscribed limits, *i e* , prevented from proceeding in any direction beyond those limits It is absurd to say that because the driver and the passengers of the other bus could have got down from that bus and walked away in different directions, or even gone in that bus to a different destination, in the reverse direction, there was, therefore, no wrongful restraint Such a contention will make " wrongful restraint " under the Indian Penal Code infructuous and meaningless Proceeding in any direction must only mean proceeding in that direction and not in any other direction mush less in the reverse direction Nor can anybody be forced to get into the obstructor's bus and travel, which will be kind of press-ganging system for the bus, not recognised by law.

The last contention was that the persons were obstructed only if they went by the bus and not if they got down from the bus and walked along in the direction they wanted It has been held by Happell, J., that this contention will not be of any avail and that any person travelling in a vehicle is entitled to travel in that vechicle, and should not be complled to get down from that vehicle and walk or proceed in any other manner the obstructor wants That is elementary commonsense , Suppose, for instance, four people are taking a corpse to the cremation ground, and they are obstructed regarding the corpse but would be free to proceed to the cremation ground after leaving the corpse behind, it is obvious that the excuse that, as they had liberty to proceed without the corpse to the cremation ground, there was no obstruction would be frivolous and unsustainable, as the very object of these persons proceeding to the cremation ground is to take the

1. (1942) 2 M L.J 14 I L R 1942 Mad 696 2 (1946) 2 M.L J. 281.

corpse with them there So, too, a man going in his car or bus to a destination intends to take the bus or car to that destination and should not be forced to convert himself into a veritable pedestrian, trudging wearily all the way, by the wrongful act of any obstructor.

This petition deserves to be and is hereby dismissed.

V P S — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE PANCHAPAKESA AYYAR.

Nari Chinnabba Chetty .. *Appellants**

v.

E Chengalroya Chetty and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 21, *Rule* 32 (5)—*Applicability—Does not apply to prohibitory injunctions*

Order 21, R 32 (5) of the Civil Procedure Code is intended to cover only mandatory injunctions It does not apply to prohibitory injunctions preventing interference by defendants with plaintiffs' right of way

Appeal against the order of the Court of the District Judge of North Arcot, dated 26th November, 1946, in A S. No 244 of 1946 (E A No. 496 in O. S. No 124 of 1942, District Munsiff, Vellore).

G. R. Jagadisa Aiyar for Appellants.

T. L Venkatarama Aiyar for Respondents

The Court delivered the following

JUDGMENT —This second appeal is against the judgment and decree of the District Judge, North Arcot, in A S No 244 of 1946. The facts were briefly these. The appellants here had obtained a decree in O S No 124 of 1942 against the respondents preventing the respondents from interfering with the appellants' right of way along the pathway marked KLM in the suit plan, so that appellants might take their cattle and ploughing materials along that pathway These appellants put in E A No 496 of 1946 in the District Munsiff's Court, Vellore, the Court which had granted the decree, alleging that the respondents had ploughed up a portion of the pathway and included it in their adjacent land, had dug a pit on the pathway, and widened the existing well making an encroachment on the pathway, and thus made it impossible for any cattle to go along the pathway with safety, and for any persons to go along the pathway without care The learned District Munsiff gave these appellants a decree directing these respondents to remove the obstructions within a week from 10th August, 1946, the date of his order, failing which he allowed these appellants to rectify all the defects and obstructions in the path put up by these respondents through Court and recover costs from these respondents, obviously acting under Order 21, rule 32 (5), Civil Procedure Code These respondents took the matter in appeal The learned District Judge, relying on the rulings in *Hemichandra Naskar* v *Narendranath Basu*[1], and *Angad* v *Madho Ram*[2], held that sub-rule (5) of Rule 32 of Order 21, Civil Procedure Code, would not apply to a *prohibitory* injunction but only to a *mandatory* injunction and overruled the contention of these appellants that they would be left remediless and that the decree would become worthless, adding that there were ways and means by which the decree could be effectively enforced, but that the way prescribed in Order 21, rule 32 (5) was not the way, and allowed the appeal and dismissed the E A. but directed all the parties to bear their own costs in his Court Hence this second appeal

I have perused the entire records and heard the learned counsel on both sides. Mr. Jagadisa Aiyar, for the appellants, raised three main contentions The first was that the lower appellate Court went wrong in relying on the rulings in *Hemi-*

*A A A O No 130 of 1947 — 26th August, 1949.

1 (1933) I L R 61 Cal 148 2 I L R 1938 All 673

chandra Naskar v. *Narendranath Basu*[1], *Anand* v. *Madho Ram*[2], instead of relying on the rulings in *Sachi Prasad Mukherjee* v *Amarnath Roy Chowdhuri*[3] and *G E Sampath Chetty* v. *M S Sankara Aiyar*[4], which two rulings allow the application of Order 21, rule 32 (5) to prohibitory injunctions also and not merely to mandatory injunctions and are preferable ones as they give the same meaning to the word " injunctions " in Order 21, rule 32 (1) as well as Order 21, rule 32 (5) and enable the decree-holder to enjoy the fruits of his decree free from mischief and obstruction from the judgment-debtors and will avoid the addition of words like " mandatory " before " injunction " and " prescribed in the decree " after the words " the act " in sub-rule (5), and will also avoid the illustration given below rule 32 (5) being allowed to alter or add to the express wording of the section, contrary to the Privy Council ruling in *Bengal Nagpur Railway Company* v *Ratanji Ramji*[5] After a careful consideration of the exhaustive arguments by Mr Jagadisa Aiyar on this point, I am clearly of the opinion that Order 21, rule 32 (5) will have no application to the case of *prohibitory* injunctions, and will apply only to the case of mandatory injunctions Sub-rule (5) has been added later on, whereas sub-rule (1) existed before

Sub-rule (5) runs as follows —

" Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree "

The passage,

" direct that the act required to be done may be done as far as practicable by the decree-holder . . . and upon the act being done the expenses incurred may be ascertained "

shows beyond all possiblity of doubt that the act intended to be done through court is *the act directed in the decree to be done*, especially where we read this with the phrase " or for an injuction has not been obeyed " Obviously, the phrase " has not been obeyed " implies disobedience of the very order of injunction prescribed in the decree and not getting round that injunction by other acts of obstructions, as here, by digging a pit, widening a well and merging the pathway etc This shows that only a *mandatory* injunction is intended to be covered by Order 21, rule 32 (5).

Mr Jagadisa Aiyar's objection that two different constructions cannot be given to the same word " injunction " in (1) and (5) though sustainable generally, will not apply to this case where the wording of sub-section (5) clearly shows that that sub-rule could only be applied to the case of mandatory injunctions As already stated, sub-rule (5) was added later on, whereas sub-rule (1) existed already and sub-rule (1) admittedly, covers both prohibitory and mandatory injunction. There is nothing peculiar in the added sub-rule (5) referring only to *mandatory* injunctions

The second objection of Mr. Jagadisa Aiyar was that, by not applying sub-rule (5) to such cases, the decree-holder holding only a decree for prohibitory injunction will be deprived of the fruits of his decree, and injustice will be done, and the judgment-debtor encouraged to harass the decree-holder, and that, therefore, as the policy of the law is to enable the decree-holders to enjoy the fruits of their decree, I must hold that sub-rule (5) will apply to prohibitory injunctions also The argument is unsustainable The decree-holder in the case of a prohibitory injunction has not only got a right of suit in such a case in order to get a mandatory injunction for the removal of the obstructions etc , but has also the easier remedy under Order 21, rule 32 (1) He can ask for the detention of the judgment-debtor in the civil prison, or the attachment of his property or both, and a Court can order either or both of these things to be done in case the judgment-debtor will not remove the obstruction on the path preventing the decree-holder

1 (1933) I L R 61 Cal 148
2 I L R 1938 All 673
3 (1918) I.L.R. 46 Cal 103
4 (1930) M W.N 809
5 I L R 1938 (2) Cal 72 at 79

from using the path, within a time prescribed by it Such an order of Court will be normally quite effective and will enable the decree-holder to enjoy the fruits of his decree Mr Jagadisa Iyer says that in some cases of prohibitory injunction the judgment-debtors may be persons who have no property to be attached and who would cheerfully go to jail also There is no need to consider such hypothetical cases. There is nothing on record to show that the judgment-debtors in this case are persons without property to be attached, or are desperadoes willing to go to the civil jail and eat the bread of idleness at the decree-holder's expense Even if that is so, and the decree-holders will suffer injustice by not being able to achieve their object by invoking the provisions of sub-rule (1), they can file a suit for a mandatory injunction If that suit too, for some reason fails, and the injustice still remains, that cannot be helped In all civilised countries, it is recognised that, despite the best of laws, a residuum of injustice will sometimes remain The best of laws can only mitigate injustice and not eradicate it altogether in all cases. Thus, if a husband, who is a gazetted officer and has no other property, resigns his job and remains unemployed in order to spite his wife who sues him for maintenance, the wife will certainly suffer injustice by getting a far lesser maintenance than she would otherwise get, and the Courts will be powerless to rectify that residuum of injustice So too, no Court, in modern times, in a civilised country, will compel a husband or wife to have actual conjugal relations with the partner, in pursuance of a decree for restitution of conjugal rights, and, often no amount of other remedies will be a sufficient or satisfactory substitute for conjugal rights But that residuum of injustice also cannot be rectified by Courts

The third objection of Mr Jagadisa Iyer is that the ruling in *Hemchandra Naskar* v *Narendranath Basu*[1], relied largely on the illustration given in sub-rule (5) overlooking the fact that only one illustration was given, and that too to cover a case of mandatory injunction, and that there is nothing said in the sub-rule about its non-applicability to prohibitory injunctions, and that the Privy Council in *Bengal Nagpur Railway Company, Limited* v. *Ratanji Ramji*[2], has clearly held that the *illustration* cannot have the effect of modifying the language of the *section* which alone forms the enactment I cannot agree with the contention The Privy Council ruling has no application to this case as the illustration had *not modified* but only exemplified the meaning of sub-rule (5), as I construe it The ruling in *G. E Sampath Chetty* v *M S Sankara Iyer*[3] does not specifically say that sub-rule (5) will apply also to cases of prohibitory injunctions though undoubtedly there is some ambiguity, the result of the facts not being clearly stated, evidently because it was not necessary for deciding that case It is obvious that if a party in a case has agreed not to erect a wall more than 30 feet, and that any wall erected by him above that height may be demolished, to bring it to that height, the Court will have an undoubted power, under sub-rule (5), to demolish the excess wall and to bring the wall to the requisite height That, I take it, is the real rationale of the decision in that case It will not, therefore, help Mr Jagadisa Iyer's contention.

No doubt Richardson, J , in *Sachi Prasad Mukherjee* v *Amarnath Roy Chowdhuri*[4], held that sub-rules (1) and (5) would clearly apply to injunctions both prohibitory and mandatory, and that the act required to be done mentioned in sub-clause (5) means "the Act which has to be done to enforce the injunctions" But even his brother on the Bench, Beachcroft, J , did not agree with that proposition, and said that he expressed no opinion as to whether sub-rule (5) would apply to prohibitory injunctions A later Bench of the Calcutta High Court, in *Hemchandra Naskar* v *Narendranath Basu*[1] has expressly dissented from the view of Richardson, J , and held that sub-rule (5) would not apply to prohibitory injunctions A Bench of the Allahabad High Court has also adopted the same view in *Angad* v *Madho Ram*[5], as the later Calcutta view The same view has been adopted by a Bench of the Patna High Court in *Toon Lal* v *Sonoo Lal*[6] The alleged decision in *G E Sampath*

1 (1933) I L R 61 Cal 148
2 (1938) 1 M L J 640 L R 65 I A 66 I L R (1938) 2 Cal 72 (P C)
3 (1930) M W N 809
4 (1918) I L R 46 Cal 103
5 I L R (1938) All 673
6 A I R 1938 Pat 522

Chetty v. *M S Sankara Iyer*[1], is, as already stated, not a decision on that point, and I have no doubt that sub-rule (5), by its wording, clearly excludes the possibility of its being applied to prohibitory injunctions I agree, therefore, with the Bench rulings of the Allahabad, Calcutta and Patna High Courts referred to above and hold that sub-rule (5) will not apply to this case which is a case of *prohibitory* injunction.

Then Mr Jagadisa Iyer requested that I should at least convert the petition into a suit, as is allowed under the ruling in *Angad* v *Madho Ram*[2] and said that he would pay the necessary court-fee In the circumstances of this case, I see no reason to grant this prayer The obstructions are still existing on the path, and will give these appellants a cause of action for a suit for a mandatory injunction to remove them even without my converting this old application into a suit. Wherever the circumstances do not require such extraordinary translations of applications into suits, those things will not be done, and the parties will be left to pursue their ordinary independent remedies

In the end, therefore, the second appeal deserves to be, and is hereby, dismissed, but, in the circumstances, without costs, since the judgment-debtors have not proved that they have not put up obstructions and effectively prevented the decree-holders from enjoying the right of pathway, and since I have disallowed the appellants' request to convert the application into a suit

K S ——— *Appeal dismissed. Leave refused.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras.)

PRESENT :—LORD SIMONDS, LORD MORTON OF HENRYTON, LORD REID, SIR JOHN BEAUMONT AND SIR MALCOLM MACNAGHTEN

V Rm Km. M Kulandaivelan Chettiar . *Appellant**

v

Official Receiver of South Arcot and others *Respondents.*

Hindu Law—Stridhanam—Women's interest in—Decision against her in regard to stridhanam—If binds people who claim it after her—Custom—Nattukottai Chetties—Custom involving alteration of the ordinary law—Definite evidence—Necessity

In the ordinary case a woman's interest in stridhanam is undoubtedly such that a decision against her with regard to it binds all who claim it after her

Where according to an alleged custom of the Nattukottai Chetti community it is said that a woman of that community has no right to her stridhanam, the whole interest being in her children, or at least that her interest is of such a limited character that her children have an independent right and are not bound by any decision against her and that the stridhanam is deposited with a family firm on trust so that that firm has a right to use the money in its business but is nevertheless bound as trustee to account for the money. together with compound interest on it as trust money, with the consequence that on the insolvency of the firm, the family can claim a charge over the whole of firm's assets to the prejudice of the other creditors,

Held, that both parts of the alleged custom involved such a radical alteration of the ordinary law that the Court would not be prepared to recognise it without definite evidence

C S. Rewcastle and *Sir Alfred Wort* for Appellant.

J M Pringle and *P. V Subba Row* for Respondents.

Their Lordships' Judgment was delivered by

LORD REID —The appellant is the son of Muthappa Chetti, defendant 2 and respondent 3 in this suit, and the deceased Deivanai Achi who were both members of the Nattukottai Chetti community On the occasion of their marriage in 1897, a hundi or bill for Rs. 3,062-8-0 was given by the bride's family to the husband's father Muthayya Chetti and an entry was made in the books of Muthayya Chetti's firm on 16th December, 1897, in the following terms

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1 (1930) M W N. 809 2 I L.R (1938) All 673

* P C Appeal No 7 of 1948. 28th July, 1949.

"Credit—In respect of sending the hundial obtained from V T M for stridhanam amount to R M AR AR of Madras as per the letter of the said person, principal Rs 3,062-8-0, interest Rs 66-3-6; in all as per the two items together with Madura current rate of interest as settled in the presence of (1) P R K M and (2) A AR S as on 17th of the current Avani (31st August, 1897) . . Rs 3,128-11-6"

V.T M was the bride's family vilasam P R K M and A AR S were members of the family. So far there is no dispute but there is no later admittedly authentic entry in any account or other writing which identifies or expressly refers to the stridhanam and there is no agreement as to what happened to it

The Nattukottai Chetties are a community whose hereditary calling is money-lending and banking The appellant's case is that it is customary in the community for a bride's parents to give money presents to her but to hand over such money in the shape of cash or hundies to the senior member of the husband's family to be invested and held in trust for the issue of the marriage, and that such investment may be made by using the money in the husband's famly business or by lending it to another business : in either case the money is to be accumulated at compound interest and is the subject of a trust. The appellant alleged and sought to prove that in accordance with this custom the abovementioned sum was held and accumulated by this grandfather's firm until 1908 when it amounted to Rs 8,643-6-3 and that it was then withdrawn from this firm at the instance of his mother's family and divided into two parts Rs 5,143-6-3, being invested with Somasundaram and Rs. 3,500 being invested with Chinnayya Chettiar Somasundaram and Chinnayya were brothers and maternal uncles of the appellant's father It is alleged that Somasundaram and Chinnayya accepted these sums in trust to accumulate at compound interest Somasundaram was adjudged insolvent in 1928 and it is alleged that the trust fund then amounted to Rs 50,000 and that the appellant is entitled to a charge over his entire estate for this amount The respondent, the Official Receiver of South Arcot, has opposed this claim in the interest of the creditors

This is not the first suit in which this matter has been litigated In Somasundaram's insolvency proceedings the appellant's mother made a claim in March, 1932, founding on the alleged deposit of Rs 5,143-6-3 with Somasundaram in trust in 1908 and claiming over Rs 40,000. Somasundaram had lived for nearly three years after being adjudicated insolvent but no claim was made during his life when his evidence about the alleged deposit would have been available · the claim was made a few weeks after his death and no good reason was given for the delay The Official Receiver after hearing evidence and examining a number of the documents which are founded on the present suit found that it was not proved that any part of the stridhanam had been deposited with Somasundaram and this finding was affirmed by the District Judge, South Arcot, and by the High Court at Madras. The appellant's mother died before the hearing of the appeal by the High Court and the present appellant was made an appellant in that suit as legal representative of his mother The appeal to the High Court in that suit was dismissed on 1st October, 1937

The present suit was brought by the appellant on 10th April, 1939 It was dismissed by the Subordinate Judge at Devakottai on 27th February, 1941, but the High Court allowed an appeal and the suit was remanded On 4th September, 1943, the Principal Subordinate Judge found in favour of the appellant and an appeal was taken against this decree by the present respondent 1, the Official Receiver, South Arcot, representing Somasundaram This appeal was allowed by the High Court on 15th August, 1945, and the suit dismissed so far as the present respondent 1 is concerned. Against that decision the present appeal is taken to His Majesty in Council. One of the grounds of judgment of the High Court was that it had not been proved that the sum of Rs 5,143-6-3 deposited with Somasundaram's firm was part of the stridhanam of the appellant's mother It will be convenient first to consider this question because unless the appellant can show that part of

his mother's stridhanam was deposited with Somasundaram this appeal must fail and the other question involved in the case do not arise for decision

There is no doubt that the sum of Rs 5,143-6-3 was paid to Somasundaram. This appears from a hundi of 25th October, 1908, granted by the appellant's grandfather's firm in favour of Somasundaram's firm and from certain letters and entries in the books of other firms But none of these entries identifies this money as coming from any particular source The books of Somasundaram's firm for this period were not available Accordingly there is no written evidence—apart from a draft hundi which will be referred to later—to show that this sum was part of the appellant's mother's stridhanam The appellant relies on evidence given by his grandfather in the earlier suit and by his great uncle and his father in this suit This evidence is not entirely consistent but its purport is that in 1908 the mother's family or the mother herself wished the stridhanam to be transferred to Somasundaram's firm the amount of the stridhanam was found to be Rs 8,643-6-3 and the first proposal was to invest the whole with the one firm. With this in view there was written out by Somasundaram or his brother a draft of a hundi to be granted by the appellant's grandfather in favour of his father. But it was then decided to split the stridhanam and invest Rs 5,143-6-3 with Somasundaram and the balance of Rs 3,500 with his brother The draft hundi is produced : It begins

"Credit to V. RM K M M and Debit to V. RM K. M in respect of the stridhanam amount paid to self by V. T M people . "

If this document is genuine it would go far to establish the appellant's case. But it is in quite a different form from the hundies admittedly granted a few days later. According to the witnesses the only reason for not completing the earlier draft was the decision to split the sum into two parts In that case there was no reason why the form of the draft should be altered and there is no adequate explanation of the omission of the vital reference to stridhanam from the two hundies in favour of Somasundaram and his brother which were granted a few days later. It is said, however, that when Somasundaram received the money he gave a cadjan voucher which identified the money It is remarkable that that voucher is said to have been lost whereas the useless draft hundi has been preserved It is equally remarkable that although Somasundaram's brother is alleged to have received the rest of the stridhanam at the same time and in the course of the same transaction, and that brother was still alive, no attempt was made to get his evidence.

Although the appellant's mother and her family are said to have urged the transfer of the stridhanam to Somasundaram and his brother for greater safety they appear to have been singularly lax in failing to obtain any proper voucher or accounts after the transfer It is said that the appellant's mother asked for accounts several times without success and indeed demanded payment of money from Somasundaram, yet for over two years after his insolvency she remained silent, only making a claim after he had died The appellant's grandfather states that he also asked for a voucher, but that he was told by Somasundaram that there was a credit entry in the account and given as a voucher an unsigned ainthogai or balance sheet which is produced This is a most improbable story. In the first place it is unlikely that a money-lender would voluntarily disclose the names of all his customers and the state of their accounts when a simple voucher for the one sum of money in question could so easily have been given ; and further this document is useless as a voucher because all it shows is an entry under "particulars of credit" of "V R M K. M. M Rs 6,074-13-8" There is nothing to indicate that this sum was stridhanam or that the wife had any interest in it. Finally, Somasundaram's books are available from about 1912 onwards and there is no entry in them of any sum due to the appellant's father or mother which could be the stridhanam. The appellant attempts to explain this by alleging a deliberate breach of trust by Somasundaram. The appellant's grandfather was heavily in debt to Somasundaram ; there is an entry in the balance sheet referred to above of a debit of Rs 17,487-0-0 It is said that Somasundaram, though well aware that the sum at the credit of the appellant's father was trust money, applied it to reduce

the debit of the grandfather. It does not seem possible that this could be done without its coming to the knowledge of both the father and the grandfather within a comparatively short time ; certainly the grandfather must have become aware that his debt had been reduced ; yet the father denies all knowledge of it and the grandfather says nothing about it. In their Lordships' judgment the actions of all parties concerned since 1908 are so difficult to reconcile with there having been any deposit of trust money with Somasundaram that the evidence given by the appellant's relations cannot be accepted That being so the appeal must fail

The appellant was also met by a plea of *res judicata* This would be a good plea if his mother had such an interest in the stridhanam as entitled her to represent the estate so that the decision against her in the earlier suit is binding on those who would take it after her In order to avoid the plea the appellant would have to show that his mother's interest fell short of such an interest In the ordinary case a woman's interest in stridhanam is undoubtedly such that a decision against her with regard to it binds all who claim it after her But it is said that by a custom of the Nattukottai Chetti community a woman of that community has no right to her stridhanam, the whole interest being in her children ; or at least that her interest is of such a limited character that her children have an independent right and are not bound by any decision against her It is further said to be a part of the custom of that community that the stridhanam is deposited with a family firm on the trust so that that firm has a right to use the money in its business but is nevertheless bound as trustee to account for the money together with compound interest on it as trust money This would mean that on the insolvency of the family firm the family can claim a charge over the whole of the firm's assets to the prejudice of the other creditors Both parts of this alleged custom involve such a radical alteration of the ordinary law that their Lordships would not be prepared to recognise it without much more definite evidence than that given in this case. Several cases were cited in which a custom of this community has been held to be established in one form or another. It is unnecessary for the decision of this case to express any opinion about these cases and therefore their Lordships do not propose to do so

Their Lordships will humbly advise His Majesty that this appeal should be dismissed As the appellant is proceeding *in forma pauperis* there will be no order as to costs

Solicitors for Appellant *Douglas Grant & Co*

Solicitors for Respondents *Lambert & White*

V S. *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT .—MR JUSTICE SATYANARAYANA RAO (on difference of opinion between MR JUSTICE HORWILL AND MR JUSTICE BALAKRISHNA AYYAR)

Devata Lakshminarayana *Petitioner**

Madras Maintenance of Public Order Act (I of 1947)*—Scope—Person in Krishna District of Madras Province transporting explosive substances to Communist camps in the Hyderabad State—If liable to detention under the Act—Dropping proceedings under Explosive Substances Act, VI of* 1908, *and detaining the person under Madras Act, I of* 1947—Bona fides *and validity*

The petitioner who was said to have transported explosive substances from Bezwada to Jeggayyapet was arrested on 1st January, 1949, for having committed an offence punishable under the Explosive Substances Act, VI of 1908, but instead of being brought to trial for that offence, he was served on 30th January, 1949, with an order of detention under Madras Act I of 1947 Grounds of detention were served on 1st March, 1949 Nine days later a charge-sheet was filed against the petitioner and two others and no final orders were passed, nor were the petitioner and his co-accused brought to trial The only ground given for the detention was that the petitioner was transporting explosive substances to the Communist camps in the Hyderabad State for the manufacture of gunpowder, country bombs and other explosives in furtherance of acts of sabotage

Held Satyanarayana Rao, J (on difference of opinion between Horwill, J and Balakrishna Ayyar, J) (1) The ground on which the order of detention was based is not within the purview of

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*Cr. M P No 1536 of 1949 19th October, 1949

Madras Act (I of 1947) and as the activity alleged was not shown in the grounds to be calculated to endanger the peace and security of this Province the order of detention cannot be justified (2) There was a lack of *bona fides* on the part of the Government in resorting to the provisions of the Act when the petitioner could have been, if the case for the Government were true, prosecuted under section 5 of the Explosive Substances Act, 1908.

Petition under section 491, Criminal Procedure Code (V of 1898), praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue directions in the nature of a *Habeas Corpus* for production before the High Court of the person of Devata Lakshminarayana, a detenu, in the Camp Jail at Cuddalore to be dealt with according to law and direct that he be set at liberty.

S. Krishnamurthy for Petitioner.

N. T Raghunathan for the Public Prosecutor for the Crown.

When the case came before the Court in the first instance, the Court made the following

ORDER *Horwill, J*—The petitioner is said to have transported explosive substances, such as potassium chlorate, potassium nitrate, and sulpher from Bezwada to Jeggayyapet He was arrested on 1st January, 1949, for having committed an offence punishable under the Explosive Substances Act, VI of 1908, but instead of being brought to trial for this offence, he was served on 30th January, 1949, with an order of detention under Madras Act I of 1947 Grounds of detention were served on 1st March, 1949, and nine days later a charge-sheet was filed against the petitioner and two others. On 17th March, 1949, the petitioner made the usual representations, denying that he had any connection with communists, saying that he had always been a staunch supporter of the Congress Party, and had contributed to their funds. These representations were sent to the District Magistrate by the Government for report, and three months elapsed before the District Magistrate sent in his report on 21st June, 1949 The matter was referred to the Advisory Council on 4th July, 1949, and no final orders have been passed ; nor, we understand, has the petitioner or his co-accused been brought to trial

In the grounds of detention only one ground is given for the detention of the petitioner, and that is the one with which he has been charged It is said in the second paragraph :

"Due to the disturbed conditions in the Hyderabad State and the subversive activities carried on by Hyderabad State Communists, the Communists have infiltrated into Indian Union villages and contacted villagers, especially those on the border and engaged them to make surreptitious purchases of explosive substances useful for manufacture of gunpowder, country bombs, and other explosives of similar nature for furtherance of their acts of sabotage."

In the following paragraph it is said :

"In particular he (the petitioner) has been clandestinely purchasing locally and importing rom outside sulphur, graphite, saltpetre, and potassium and smuggling them to Communist camps in Hyderabad State"

The following short paragraph is much to the same effect :

"There is information that he is clandestinely importing sulphur, graphite, and other explosive substances and smuggling them for Hyderabad State Communists"

Perhaps the succeeding sentence may also be quoted :

"He is a Communist sympathiser and is actively assisting the State Communists in supplying ammunition"

The gravamen of the charge is thus that the petitioner was transporting explosive substances to the Communist camps in the Hyderabad State for the manufacture of gunpowder, country bombs and other explosives in furtherance of acts of sabotage. The grounds of detention served on the detenu are intended to be of the nature of a charge, to which he can write an answer that is sent to the Government for their consideration as well as that of the statutory Advisory Committee. He cannot be expected to answer what is not in the charge ; and he is entitled to rely on any defects in that charge, such as that it does not show how the acts committed by him endanger the peace and security of this Presidency. The ground served on the petitioner do not show in what way the furtherance of Communist activities in the Communist camps of the Hyderabad State supplied by the petitioner

would endanger the peace and security of this Presidency. The learned Public Prosecutor has asked us to read into the charge-sheet something that is not there and which can only be furnished by observations found in newspapers and from gossip and rumours of which he says we can take judicial notice. Speaking for myself, I have no personal knowledge, either from newspapers or otherwise, of the inter-relations between the Communists of Hyderabad and the Communists in the neighbouring Krishna District Moreover, it would *prima facie* be very unlikely, from a reading of the grounds in the charge, even if all the allegations made therein were true, that the explosive substances were intended for use in the Krishna District. The articles, as above indicated, were transported from Bezwada; and it would have been the easiest thing in the world for the Communists in Krishna District, strong as they are said to be by the learned Public Prosecutor, to have supplied the explosives direct to the Communists in Bezwada and in other parts of the District I cannot see the purpose of supplying the Communist camps in Hyderabad with materials for use in Krishna District, and I am not at all satisfied that the Government meant to imply in their grounds of detention that the explosives were sent to Hyderabad for use in Krishna District The defect in the charge is not therefore altogether a technical one.

Moreover, I think from the circumstances and from the manner in which this order of detention was served—if what has been said from the Bar is true—that there has been lack of good faith on the part of the Government The petitioner, it is alleged, has committed an offence under the Explosive Substances Act which is punishable very severely, the maximum sentence being Transportation for life; and since it would appear from what the learned Public Prosecutor has said that the Government have no intention of prosecuting this charge against the petitioner, it means that the Government have no trustworthy evidence on which to base their allegations.

For these reasons, in particular for the first reason, I am of opinion that the petitioner should be set at liberty forthwith

Balakrishna Ayyar, J—This is a petition under section 491, Criminal Procedure Code, by one Devata Lakshminarayana, a detenu under Madras Act I of 1947. The substance of the allegations against him as set out in the grounds of detention is that

"he has been clandestinely purchasing locally and also importing from outside sulphur, graphite, saltpetre, and potassium and smuggling them to Communist camps in Hyderabad State"

There is a further allegation that he is a Communist sympathiser and "is actively assisting the State Communists in supplying ammunition" The detenu denied these allegations

The principal argument urged on behalf of the petitioner may be put in this form. Assuming for the moment that the allegations made in the grounds of detention are true, the export of these articles to Hyderabad might probably prejudice the maintenance of public order in that State; but disturbances in Hyderabad State would be of no concern to us here and would not affect or be prejudicial to the maintenance of public order within the limits of this Province. Madras Act I of 1947 is intended to deal only with the maintenance of public safety and the preservation of tranquillity in this Province. The Provincial Legislature cannot enact a law for the preservation of peace outside the limits of the Province. The Act applies only to this Province, and the preamble makes that clear. The allegations against the petitioner, therefore, fall outside the purview of the Act. This reasoning has one weak spot. It assumes that conditions in those areas of Hyderabad which border this Province and to which State these articles are said to have been intended have no effect on the public tranquillity or the public safety in this Province, and that the Communists in Hyderabad do not cross over and create disturbances here. I do not feel that such an assumption would be right. There have been so many reports of disturbances in Krishna District which are attributed to the Communists of that District and of Hyderabad that I think we may take judicial notice of the existence of disturbed conditions there. As the

Public Prosecutor pointed out, Krishna has been notified to be a disturbed area. Law breakers who use explosives are not likely to have much respect for formal political frontiers It is true that the grounds of detention do not make specific reference to these features, but that is possibly because it may have been assumed that the facts were too well known to need mention. The argument urged on behalf of the petitioner might have been accepted if the consignment had been to a destination, so far away that the disturbances there would have no effect on the tranquillity of this Province, but regard being had to the geographical proximity of Hyderabad State with this Province and that the boundary line between Krishna District and Hyderabad is one which is easily passed and re-passed, it would be impracticable to deal with questions of public safety and public order in Krishna District in complete isolation from conditions immediately beyond the border. Articles of the nature in which the petitioner is alleged to have been trafficking, might first travel across the border into Hyderabad and there be converted into more handy forms of explosives and be brought back for use here

I perfectly agree that when there is a specific charge against an individual he ought normally to be prosecuted under the ordinary law, and that it would be dangerous to encourage the practice of simultaneously keeping a charge under the ordinary law pending over his head and also proceeding against him under one of these Special Acts The scope for abuse would be large and very often such a procedure may in itself be evidence of want of good faith Here, we have the specific allegation that the petitioner was transporting explosives for delivery to the Communists in Hyderabad, and I do not think that the contention of the Public Prosecutor that the case can be brought within the scope of Madras Act I of 1947, can be rejected I do not therefore consider that the petitioner can legally claim that he should be released from his detention under this Act. I would dismiss the petition.

Horwill and Balakrishna Ayyar, JJ—As we differ in our opinion as to whether we should issue directions under section 491 (1) (*b*) that the petitioner be set at liberty it is necessary that this point should be referred to a third Judge for his opinion; and we direct that the papers be placed before the Chief Justice for that purpose

(In view of the divided opinion of the Bench, this petition having been laid before the Honourable Mr Justice Satyanarayana Rao) for his opinion, on Friday, the 14th October, 1949, and his Lordship having perused the petition and the affidavit filed in support thereof and the other papers material to the application and the divided opinion of the Bench, expressed the following

OPINION *Satyanarayana Rao, J*—As there is a difference of opinion between my learned brothers Horwill, J. and Balakrishna Ayyar, J, this matter was placed before me under clause 36 of the Letters Patent. The matter arises out of an application under section 491 of the Criminal Procedure Code by one Devata Lakshminarayana who was detained under the Madras Maintenance of Public Order Act, 1947. The relevant dates and the grounds on which the detention was sought to be justified are set out in the judgment of my learned brother Horwill, J., and therefore it is not necessary for me to repeat them in this judgment. The learned Judges differed on two questions, firstly whether the grounds on which the order of detention is based are within the purview of the Act and even if true, are calculated to endanger the peace and security of this Province; secondly whether or not there is lack of *bona fides* on the part of the Government in resorting to the provisions of the Act when the petitioner could have been, if the case for the Government were true, prosecuted under section 5 of the Explosive Substances Act, 1908 (Act VI of 1908).

After anxious consideration I am of opinion that the view of Horwill, J, on the two points is correct I had occasion to consider the object of the provisions of the Madras Maintenance of Public Order Act, 1947, requiring the Government to communicate to the detenu the grounds on which the order of detention has been made, I then said,

"Under the Act the liberty of the subject is curtailed without trial by Courts established by law and the only safeguard provided by the Act for the detenu is the right to make a representation to the Advisory Council through the Provincial Government This right is a substitute for a trial under ordinary law In order to enable the detenu to present his case properly he should know the grounds and the particulars of the grounds on the basis of which an order for detention is made under section 2 (1) The duty of providing this information was laid by the Act on the Provincial Government The power conferred upon the Provincial Government of curtailing the liberty of the subject by the Act should, in my opinion, be exercised subject to the conditions and limitations imposed by the Act, It is the function of the Court to see whether the conditions laid down by the statute are properly carried out or not If they are not duly observed and fulfilled, the very foundation of the power to continue to detain the person comes to an end and the further detention becomes illegal If the grounds furnished are no grounds at all in the sense that they convey no information to the person detained, or even if they are grounds *outside the purview of the Act*, the continuance of the detention cannot be justified It may not be necessary that the Provincial Government should furnish legal evidence or proof of the accusations against the detenu, as in cases where he is charged with a crime, (Vide *Mani* v. *District Magistrate, Mathurai*[1]) but the information furnished must be such which enables the detenu to present his case effectively'

The gravamen of the charge against the petitioner is, as pointed out by Horwill, J, that he had been clandestinely purchasing and importing from outside sulphur, graphite, saltpetre and potassium and smuggling them to Communist camps in Hyderabad State If the object of the detenu is to supply the explosives to the Communists in Hyderabad State, it is difficult to see how this activity of his is calculated to endanger the public safety and maintenance of public order, in this Presidency. It is not permissible in a case of this description, in my opinion, to enlarge the scope of the grounds by inferences or by implications as it is in the nature of a charge which the detenu is called upon to meet It should specifically and definitely be stated in the grounds the activity of the petitioner which is calculated to endanger public peace so as to justify an order of detention under the Act I cannot import into the case my knowledge of facts and events acquired by me through other channels and it is not open to me to interpret the grounds in the light of such knowledge The ground therefore is entirely outside the purview of the Act No attempt is made in the grounds to show how supply of the explosives to the Communists in Hyderabad State would endanger the tranquillity of this Province In the light of the principles laid down in the judgment of myself and Viswanatha Sastri, J, already referred to I have no hesitation in holding that the order of detention on this ground cannot be justified.

I also agree with Horwill, J., that the fact that the Government had abandoned the intention of prosecuting the case initiated against the petitioner under the Explosive Substances Act is undoubted proof that the Government did not believe in the truth of the allegation now made If the Government were really serious in the charge levelled against the detenu, they could have easily prosecuted him under the Act and his liberty would have been deprived not merely for a period as under the Madras Maintenance of Public Order Act but for a longer period, as under the Explosive Substances Act, the maximum sentence which could be awarded, if the guilt is established, is transportation for life This conduct of the Government in my opinion affords a basis for inferring lack of good faith on the part of the Government. This Madras Maintenance of Public Order Act is not intended to enable the Government to deprive the liberty of a subject by first putting forward a case which they know fully well could not be substantiated in a Court of law and then take advantage of the provisions of the Madras Act I of 1947 and detain the person in jail, as it is a settled fact that it is not open to this Court in a proceeding under section 491, Criminal Procedure Code, to go into the truth of the grounds on which the order of detention is made. I agree, therefore, in the order proposed by my learned brother Horwill, J, that the petitioner should be set at liberty forthwith

On this petition coming on for final orders this day the Court made the following

ORDER.—In accordance with the majority opinion, the immediate release of the petitioner is ordered

K S. *Petition allowed.*

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1 (1949) 2 M L J. 310.

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Madras.)

PRESENT —LORD MACDERMOTT, LORD REID, SIR MADHAVAN NAIR AND SIR JOHN BEAUMONT

Gannamaneedi Madhavayya and another ... *Appellants**

v

Gannamaneedi Achamma (since deceased) and another . *Respondents.*

Will—Genuineness—Signature disputed—Will unregistered—Attestation by family doctor—Value.

A will executed by a testator while he was seriously ill who died the day after its execution was challenged as not being genuine on the ground that the signature of the testator was unlike his usual signature and that the will was not registered

Held The fact that the letters forming the disputed signature appeared to have been written somewhat slowly and that there were small breaks between them could be explained by the fact that the testator was a dying man and his hand could not have remained steady while writing. As from the facts it was clear that the testator was not in a fit condition to be taken to the Registrar's Office on the day the will was executed and the next day happened to be a Sunday and the testator died that day, from the mere fact of non-registration it could not be said that the will was not genuine Moreover, a will did not require registration to make it valid.

Where a family doctor has attested the will, it cannot be easily discredited merely on the ground that he belonged to a rival faction in the village

C. S Rewcastle and *P V Subba Rao* for Appellants

J. P Eddy and *R Parikh* for Respondents

Their Lordships' Judgment was delivered by

SIR MADHAVAN NAIR —This is an appeal from a judgment and decree of the High Court of Judicature at Madras, dated 27th November, 1944, which reversed a judgment and decree of the Court of the Subordinate Judge of Narsapur, dated 27th October, 1942

The appeal arises out of a suit (O S. No 38 of 1941) instituted by the appellants for a declaration that a will, dated 11th March, 1939, alleged to have been executed by their step brother one Ramalingayya, the husband of the respondent Achamma (since deceased), is not genuine Ramalingayya died on 12th March, 1939

The appellants also brought another suit (O S. No 25 of 1940) against Achamma, under section 77, Registration Act, for a decree directing registration of a settlement deed dated 10th March, 1939, said to have been executed in their favour by the aforesaid Ramalingayya.

Both suits were tried and disposed of together by the trial Court. The Subordinate Judge held that both the settlement deed and the will were not genuine documents He therefore dismissed O S No. 25 of 1940 relating to the settlement deed, and decreed O. S No. 38 of 1941, relating to the will, declaring that the will is not a genuine document

The appellants appealed against the decree dismissing O. S. No. 25 of 1940, and the respondent, the widow of Ramalingayya, appealed against the decree in O S. No. 38 of 1941.

Both appeals were heard together by the High Court. The learned Judges dismissed the appeal preferred by the appellants, agreeing with the Subordinate Judge that the settlement deed was not genuine ; and allowed the appeal preferred by the widow, holding—differing from the Subordinate Judge—that the alleged will was proved to have been executed by the deceased. They stated

"we have come to the conclusion that the former (settlement deed) is not genuine, while the latter (the will) may be accepted as having been duly executed by the deceased"

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* P C Appeal No. 11 of 1947 21st February, 1949

The appellants applied for special leave to appeal to His Majesty in Council in the settlement deed suit but the petition was dismissed

The present appeal, as stated before, relates to the alleged will The widow Achamma (respondent) having died since the filing of the appeal, her adopted son, then a minor, was brought on record as her representative He has now become a major and is the respondent before the Board

The only question for determination in the appeal is whether the will referred to above is genuine or not

One Padmanabhudu died in 1935 He was twice married Ramalingayya the executant of the will was his son by his first wife, the appellants are his sons by his second wife Soon after their father's death, Ramalingayya and the appellants partitioned their joint family properties The appellants are the immediate reversioners to the estate of the deceased Ramalingayya

It is common case that Ramalingayya was in poor health and suffered from tuberculosis and diabetes In 1938 he became ill He spent some months in a sanatorium at Rajahmundry. On 5th April, 1938, before going to the sanatorium, he executed a registered will by which he gave absolutely to his wife 9 acres and 98 cents of land. He gave her also a restricted power of adoption and provided that if no adoption took place, or if the adoption did not stand, the rest of the property should go to the Andhra University. While he was in the sanatorium he executed on 26th August, 1938, a registered document cancelling the will. He gave no reasons for cancelling it but his widow says it was cancelled because of her desire that he should give her unrestricted powers of adoption In October, 1938, Ramalingayya left the sanatorium and for some time lived in a village nearby. Then he went to his father-in-law's village During this time his wife was living with him It appears that in January or February, 1939, he visited his village Rayakuduru for one day Some time after, he again went to his village where he registered a sale-deed on 7th March By this time his wife had been sent to Vizagapatam for treatment as she had not been well She returned only two or three days after his death On 8th March, Ramalingayya fell seriously ill and died on 12th March, 1939, at about 11 P M These facts are not disputed.

The main dispute between the parties relates to what actually happened after Ramalingayya fell ill on 8th March, 1939 The version given by the appellants has been totally disbelieved by the Courts in India The appellants said that in January or February Ramalingayya expressed a desire to settle property on them, that a draft—not produced in evidence—was brought into being, that nothing was done about it, that when the deceased realised that he was on the point of death he wished again to settle the property on them and that on 10th March, a settlement deed was duly executed By this deed he gave them absolutely 37 acres 11 cents out of the 60 acres of land of which he was in possession. These were the best lands Ramalingayya had. They said that the deceased moved comparatively freely about the house and spent most of his time in their "*chavadi*" and that he was attended during the last days of his illness exclusively by P. W 7, a doctor whom they had summoned from an adjoining village

After examining the evidence, the Subordinate Judge stated as follows his opinion as regards the alleged execution of the deed .

"The probabilities are that after he (Ramalingayya) had the attack on the night of the 8th, he was confined to his bed as spoken to by the defendant's witnesses and that he was attended on only by D W 1 (Dr. Narayana) and not by P W 7 I, therefore, disbelieve the evidence of P.W. 1, P W. 7 and P Ws 2, 3, 4 and 5, who said that Ramalingayya was moving about and spending the day-time from 9th to 12th in plaintiffs' '*chavadi*' and believe the evidence of D Ws 1, 2, 4 and 6 who state that D W 1 alone was attending on Ramalingayya and not P W 7 and that he was confined to his bed in his own room In this view the case of the plaintiffs that Ramalingayya was in plaintiffs' '*chavadi*' on the afternoon of 10th March, 1939, that Exhibit P-1 (settlement deed) was written there and that Ramalingayya executed it cannot possibly be true"

In appeal the learned Judges of the High Court stated that

"we agree therefore with the learned Judge that the deed was not a genuine document and in all probability was brought into existence subsequent to the death of Ramalingayya."

The case of the respondent as regards the execution of the will is as follows. The settlement deed referred to was never executed by the deceased. When Ramalingayya fell seriously ill at his house on 8th March, 1939, their doctor Narayana (D.W. 1) was sent for He saw Ramalingayya on 8th March, and also on 9th. On 10th March, Ramalingayya told his doctor in the presence of his cousin and others that he wanted to make a will On the morning of 11th March he asked Seshayya (D W 2) to prepare a draft of his will. D W. 2 is the same scribe who had drawn up the previous will The draft of the new will which he prepared was based on the draft already made by him The draft was ready by about 1 P.M This was approved by Ramalingayya and a fair copy of the will was made and was ready by about 4 P.M At about this time Dr. Narayana (D W 1) paid his professional visit Ramalingayya was lying on a cot in his room. Having decided that the will should be executed he asked the doctor to stay and attest the will. The doctor agreed The will was also attested by G Madhavarayudu, C Ramamurti (D.W 4), C Satyanarayanamurti (referred to in these proceedings as Dr Narayana, D W 1), T. Someswararao (D W 6), K Somayya (D W 3) and by D. Seshayya, the writer (D W. 2). Ramalingayya signed the will in the presence of the above persons 11th March was a Saturday The deceased collapsed and died on the Sunday following, and that was given as the reason why the will was not registered It is admitted by both sides that at all material times Ramalingayya was of sound mind

The exact terms of the will are as follows:

"Will executed on 11th March, 1939, by Ramalingayya, son of late Gannamaneedi Padmanabhudu, Kamma, inamdar, resident of Rayakuduru, Bhimavaram taluk, West Godavari District I am suffering from tuberculosis since some time past There was some improvement previously but it has again become worse of late Apprehending that I will not live long I have by means of this will set forth the provisions that should come into effect after my death in respect of my property I had executed a will on 5th April, 1938, and got it registered on 7th April, 1938 I cancelled the said will on 26th August, 1938 This will has been executed containing the provisions which I considered necessary

1 I give authority to my wife by means of this will, to adopt, till the adoption stands any boy she likes, provided I do not adopt during my lifetime

2 My wife shall after my death pay Rs 500 out of my moveable properties, to the Tuberculosis Relief Sanatorium, Rajahmundry

3 My wife shall enjoy with absolute rights of gift and sale all my moveable properties, all outstandings due from people, the postal savings bank deposit amounts, and the inam dry and wet lands *viz* . .

4 If my wife should not adopt during her lifetime, or if such, adopted son or sons should predecease her without having become majors, all my immoveable properties shall go with absolute rights to the Andhra University They should spend the income got therefrom by the grant of scholarships to medical students for research in tuberculosis I have executed this will with good understanding and consciousness, and with wholehearted consent Power has been reserved to cancel or alter it during my lifetime

(Signed) Gannamaneedi Ramalingayya

Witnesses hereof—

(Signed) Gannamaneedi Madhavarayudu,
Chengalvala Ramamurti,
Chengalvala Satyanarayanamurti,
Thullpori Someswararao,
Kodati Somayya,
Devireddi Seshayya, writer "

After the will was executed it was given to the custody of the first attestor Madhavarayudu The respondent was absent in Vizagapatam when her husband died When she returned about three days after the death of her husband, the will was given to her by her grandfather to whom Madhavarayudu had given it about 15 days after her husband's death The will was never presented for registration.

After the death of her husband the respondent entered into possession of his properties

What happened after the death of Ramalingayya may now be briefly noticed. The appellants presented the deed of settlement for registration on 4th April, 1939. In a statement made on 18th April, 1939, before the Sub-Registrar, in answer to the summons issued to her, the respondent stated that the deed of settlement was a forgery and that her husband had left a will The registration of the settlement deed was refused on 28th April, 1940 In the course of proceedings before the Registrar, the first attestor to the will, Madhavarayudu, who died before he could give evidence in the present case, stated that he (Ramalingayya)

> "wrote will on the 11th which is not registered We wanted to get the document registered on Monday He had no intention of applying for private attendance "

In the course of proceedings under section 145, Criminal Procedure Code the respondent stated before the Sub-Divisional Magistrate, conducting the inquiry, that her husband had made a will and that a copy of the will had been filed in Court, and she would produce the original when required. The original was subsequently filed on 20th July, 1939 In the course of these proceedings Dr Narayana also made a statement that Ramalingayya had died executing a will and that he attested it as a witness

The case of the appellants as regards the will is that it is a forged one, that in the village of Rayakuduru there are two rival factions called the Village Munsiff's party, and the Karnam's party, that they belonged to the Village Munsiff's party, that the will was brought into existence by the efforts of their cousins (deceased Ramalingayya's brother's sons) Madhavarayudu and Lakshmayya and their followers the attestors—all of whom belonged to the Karnam's party, with a view to deprive them of the suit property, actuated by fractional animosity.

In view of the findings it cannot be now disputed that Ramalingayya died on 12th March, on account of a serious attack of illness which he had on 8th, that he was confined to his room and that in his illness he was attended only by Dr. Narayana (D W 1). In support of her case, Achamma produced the unregistered will bearing her husband's alleged signature There are six attestors to the will, all of whom barring Madhavarayadu, the first attestor (who was dead), gave evidence in support of its genuineness The second attestor (D. W 4) C Ramamurti is the Karnam of the village He is a step-brother of Dr Narayana the third attestor The fourth attestor is T Someswararao (D. W 6) a natural brother of Madhavarayudu who had been adopted into a family in another village The fifth attestor (D W 3) is one Somayya, stated to have been a Gumastah of the first attestor. The sixth and last attestor (D W. 2) is the writer of the will An agreement written by him in some other connection was found to be a forgery

From the evidence it would appear that in the village of Rayakuduru there are two parties, *viz*, " the Village Munsif's " party and the Karnam's party Whether the deceased Ramalingayya was a member of one or other of the factions is not clear (*see* the High Court's judgment), but the Subordinate Judge in the course of his judgment says that he belonged to the Karnam's faction However it may be, it is clear that all the attestors belong to the Karnam's party. Dr. Narayana is an important member of the party As stated before the Karnam is his step-brother. Dr. Narayana has been a registered medical practitioner for the " last 15 years " He conducted an election which led to an election petition before the District Munsiff He was removed from membership of the Local Panchayat Board for his misconduct What this alleged misconduct was, is not mentioned in the evidence The removal happened in 1928 or so.

The evidence of all the above witnesses is that the will was written on the evening of 11th March by Seshayya (D. W. 2), it was read over to the deceased who executed it and thereupon they attested it. The rest of their evidence supports the other details of the respondents' case. Achamma gave evidence as D.W. 5 She stated that she came to Rayakuduru three days after her husband's death, that her grandfather gave her the will which had been given to him 15 days after her husband's death She said that she asked her grandfather to present it for

registration, but he said that the registration inquiry regarding the settlement deed was proceeding and it need not now be presented for registration

Before proceeding further, it is necessary to call attention to one particular item of evidence called the "Powthi report" (Ex D-32) which was very much relied on by the appellants in support of their case. This report is an official statement which the village officials have to send to the taluk office at the end of every month showing the names of the deceased "pattadars" and the individuals in whose names the pattas have to be issued On 27th March, 1939, a Powthi report was sent to the taluk office The Karnam (D W 4) wrote the original and his assistant prepared the copy The Karnam and the Village Munsiff signed both documents Achamma was described in the report as the heir of the deceased. At that time, admittedly, no reference was made in it to the will alleged to have been executed by Ramalingayya Before the report was despatched to the office the Karnam added a "shara" (a note) Ex. D-32 (*a*), in Col 4 that the deceased had executed a will on 11th March, 1939 In his evidence the Karnam said ·

"I at first failed to note in the Powthi report that Ramalingayya had executed a will One or two hours later I noted that fact in the report The Village Munsiff had gone home by then, I sent the report to the Village Munsiff for his initials, I do not know what happened subsequently"

The Village Munsiff said that the report was not sent to him after the insertion of the "shara". The Karnam was suspended for one month by the Tahsildar as a result of the inquiry which he made about this irregularity In his statement before the Tahsildar the Karnam said ;

" Somebody asked whether I had mentioned about the will in the Powthi account at the time of submitting the cover and I accordingly wrote it in the account "

The evidence makes it clear that Ex D-32 (*a*) was not written in the presence of the Village Munsiff and that it was inserted later From this document the Subordinate Judge drew the inference that "it is probable that the will was brought into existence only after the date of Ex D-32 (27th March, 1939)" Mr Rewcastle, the learned counsel for the appellants, does not go so far but he states emphatically that this feature is a strong circumstance which shows that the will cannot be genuine and must have come into existence at a later date

The Subordinate Judge held that the "will is not a genuine document" for the following amongst other grounds On comparing the disputed signature with the genuine signature of Ramalingayya the Subordinate Judge did not find "that natural flow in the writing which we find in the genuine signatures" He said "it looks as if an attempt has been made to imitate the signature of Ramalingayya, but without success" He did not rely on the evidence of any of the attesting witnesses as they and the writer, "all belonged to the same party" He specially referred to the Karnam as an unreliable witness, obviously because of his interference with the Powthi report to which attention has already been drawn. In view of the provisions of the will, the Subordinate Judge said that it was not a simple document and observed that all the property had not been left to the widow, implying that this was somewhat unnatural.

One very important suspicious circumstance that influenced the Subordinate Judge's opinion about the will was that he was not satisfied with the reasons given by the respondent's witnesses for not getting it registered To quote his own words ·

" . . . . Though Ramalingayya died more than 24 hours after the alleged execution of the will, no attempt was made to have it registered, though the prior will, Exhibit D-21, as well as its cancellation, Exhibit D-1, were both registered. Though the defendants' witnesses say that it was not expected that Ramalingayya would collapse so soon and that they thought that the will may be registered the next Monday, the fact that he was seriously ill cannot be disputed. It is impossible, therefore, to believe that registration of the will was postponed for no valid reason "

In the concluding portion of his judgment the Subordinate Judge detailed as follows many of the suspicious circumstances which made him hold that the will is not a genuine document

"The facts that Exhibit D-28 was not registered, that the existence of the will was not brought to the notice of the defendant for eight days after his death, that she was given the document only 15 days later, and that it was actually put into a public office only, in July 1939, after the plaintiffs had set up Exhibit P-1, throw considerable suspicion on its genuineness"

In appeal, the learned Judges of the High Court thought that the criticisms of the will made by the Subordinate Judge did "not affect the general probabilities of the case." After meeting the main points raised by the Subordinate Judge they concluded that the will was genuine, because it apparently carried out the desires of the testator as shown by his previous will the additions made to it being quite natural in the circumstances; and it was too much to believe that the attestors and the writer would have combined to bring a false will into existence simply on account of factional animosity. They thought the will was entirely consistent with the conduct of the deceased during the last year of his life

Their Lordships find no reason to differ from the view of the High Court that the will may be accepted as having been duly executed by the deceased. No expert evidence has been adduced to prove the genuineness of the handwriting. It was said that the Subordinate Judge knows the Telugu language in which the deceased signed his name and his opinion should be preferred to that of the learned Judges of the High Court But the Subordinate Judge has only said that there is no natural flow in the writing, he has not examined the "make up" of the deceased's signature in the light of his own knowledge of the language and its characters The learned Judges of the High Court after carefully examining the signature found no reason to reject it Their Lordships have also examined the disputed and the accepted signature of the deceased The letters forming the disputed signature appear to have been written somewhat slowly and there are small breaks between them But these can well be explained by the state of the deceased's health at the time He was a dying man and his hand could not have remained steady while writing After carefully examining the various signatures, their Lordships are not satisfied that the disputed signature does not look like the accepted signatures of the deceased

The Subordinate Judge has not accepted the testimony of the defendants' witnesses as regards the execution of the will but not because of internal inconsistencies or contradictions in their evidence or on account of their unsatisfactory demeanour while in the witness box He seems to have rejected their testimony mainly because of the fact that all of them belonged to the Karnam's party, but there is no evidence regarding the intensity of the bitterness of the party feelings The Subordinate Judge was not impressed with the evidence of the Karnam because of the later insertion by him of the "shara" in the Powthi report This is no doubt true but as pointed out by the learned Judges of the High Court this is not a sufficient reason for rejecting the evidence of the Karnam or for agreeing with the learned Judge that the writing of the "shara" shows that the will must have come into existence only at a later date In this connection their Lordships must not fail to point out—what has been pointed out by the High Court—that the learned Judge is not inclined to believe the evidence of Dr. Narayana "whose evidence he had accepted in its entirety with regard to the condition of the deceased in the settlement suit." Their Lordships agree with the High Court in thinking that there is no reason why his evidence should not be believed No doubt he belongs to the Karnam's party but he had been the deceased's family doctor and his own medical attendant for many years He had attested the earlier will and now swears to the due execution and attestation of the will in question Their Lordships see no reason to disregard the evidence of this witness or of the other witnesses regarding the execution or attestation of the will.

Their Lordships are not impressed with the argument that the non-registration of the will has not been sufficiently explained It is true that Ramalingayya remained alive for about 24 hours after the execution of the will. The answer of the respondent to the charge is that Ramalingayya was very ill, he could not be taken to the Registrar's office, the next day was a Sunday and it was intended

to get the will registered on the Monday, but he collapsed and died on the Sunday. Their Lordships cannot in the circumstances draw an inference adverse to the respondent because of the omission to register the will Further, it must also be remembered that a will did not require registration to make it valid

Their Lordships are also not prepared to draw an inference adverse to the respondent, because the will was produced only in July, 1939 The Subordinate Judge failed to note that it was put forward by the defendant at the earliest possible moment when her title was impeached by the production and attempted registration of the alleged settlement deed In the statement which the defendant made on 18th April, 1939, to the Sub-Registrar the will was mentioned, although the date was omitted

Considering the case as a whole, their Lordships agree with the High Court that the "probabilities" show that the will is genuine The testator was a man of feeble health. He would naturally desire to execute a will leaving his property to his wife There is nothing in the evidence to show that he was not fond of her. The evidence shows that he executed a will on 5th April, 1938, though he cancelled it later The terms are similar to the terms of the previous will The deceased made the same disposition of land in favour of the respondent, but he gave her now unrestricted powers of adoption He made the same alternative bequest to the Andhra University as before, adding to it a donation in favour of the sanatorium at Rajahmundry where he had lived for some time By the will, the testator did not even increase the property given to his wife which remained the same. It may also be mentioned that the will was drawn up by the same scribe who had drawn up the previous one, and the attestors include four of those who attested the previous will.

For the above reasons, the appellants have not been able to satisfy their Lordships that the conclusion reached by the High Court that the will is genuine is wrong Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs

Solicitors for Appellants *Chapman-Walkers*

Solicitors for Respondents *Lambert & White*

V S *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at North-West Frontier Province.)

PRESENT :—LORD SIMONDS, LORD RADCLIFFE AND SIR MALCOLM MACNAGHTEN

Ghulam Sarwar Khan and others *Appellants**

v

Abdul Wahab Khan and others *Respondents.*

Mortgage—Indivisibility of mortgage security—Applicability of principle—Sale of entire mortgagee rights at revenue sale—Subsequent private sale by mortgagee of his rights—Private purchaser, if can claim mortgage rights in land not referred to in the sale papers

There was a mortgage of certain lands in *A* village along with other lands for Rs 23,000 As there was arrears of land revenue in respect of the mortgaged lands, "the mortgagee rights of the value of Rs 23,000 in respect of the land in *A* village" was sold and the sale was confirmed Sometime later the mortgagee sold his mortgagee rights by a private sale to another who sued to enforce his rights

Held After the revenue sale, the original mortgagee had no mortgagee rights in respect of the original mortgage which he could sell From the fact that only the lands in *A* village was referred to in the revenue sale papers, it could not be said that the rights of the mortgagee in the other lands still subsisted because he could not part with his mortgagee rights in respect of the whole of the mortgage debt and yet retain any part of his rights in respect of some of the mortgaged lands. The general principle that except by agreement between mortgagor and mortgagee a mortgage security in indivisible will apply The position is the same whether the mortgagee sells himself or as here, his rights are sold by paramount authority

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* P C. Appeal No 20 of 1947 28th July, 1949

J D Casswell and *A G P Pullan* for Appellants.

J. M Pringle, P V Subba Rao and *M A Rahman* for Respondents.

Their Lordships' Judgment was delivered by

LORD SIMONDS —In this appeal which is brought from a judgment and decree of the Judicial Commissioner, North-West Frontier Province, dated 28th July, 1943, a large number of questions have been debated upon which their Lordships think it unnecessary to express any opinion The question which is decisive of the matters in dispute is a simple one and the relevant facts can be shortly stated.

The first respondent to this appeal, Abdul Wahab Khan, claiming that under and by virtue of a deed of 23rd August, 1939, he had acquired from one K. B Muqarrab Khan, since deceased, all the rights which the latter enjoyed under a certain mortgage dated 25th May, 1921, brought the suit out of which this appeal arises to enforce his rights as mortgagee under that mortgage. His suit was dismissed on various grounds by the Additional Subordinate Judge, Peshawar, on 24th November, 1942, but his appeal from that decision was substantially allowed by the Court of the Judicial Commissioner

It appears to their Lordships that, apart from other defences available to the appellant in the suit, it is a fatal objection to the claim of respondent 1 that under the deed of 23rd August, 1939, upon which he founds his claim, he acquired and could acquire no rights of any kind, inasmuch as K B Muqarrab Khan had already parted with the rights which he then purported to dispose of.

The history of the matter, so far as it is necessary to state it, starts with a mortgage deed of 25th May, 1921, by which one Abdul Akbar Khan (through whom the appellants claim) mortgaged with possession to K B Muqarrab Khan for Rs 23,000 certain lands in Shah Dhand and Shakara including an area of 307 kanals 4 marlas in Shah Dhand The same land had previously been mortgaged to one Tara Chand for Rs. 12,000 He was paid off out of the Rs. 23,000 and transferred his mortgage rights to K B Muqarrab Khan, who will now be referred to as "the original mortgagee" Of the steps taken by the original mortgagee to obtain possession of the mortgaged land and the disputes that have arisen in regard thereto it is not necessary to say anything In 1935, there happened the crucial event which in their Lordships' opinion is decisive On 18th May in that year the land revenue in respect of all or some part of the mortgaged land being long in arrear, and proceedings having been taken for its recovery, the Naib Tahsildar (whose duty it was to report to his superior officer in the Revenue Department) reported as follows

"Sanction for the sale by auction of the mortgagee right has been accorded by the Revenue Commissioner by letter No 123000/R A, dated 15th November, 1934

The 16th May, 1935, was fixed for holding the sale The sale having been held the final bid was knocked down in the name of Faqir Mohammad Khan, Executive Engineer Mardan, through his brother Mohammad Safdar Khan in lieu of Rs 5,500 The one-fourth Rs 1,375 has been deposited into the Treasury Hence this report is submitted for the confirmation of the final bid under section 92 (Land Revenue Act) in the name of the auction purchaser named above"

Objection was taken to this report by respondent 1 but his objection was overruled by the Deputy Commissioner at Peshawar

On 3rd June, 1935, the Collector approved of the sale of the mortgagee rights of Rs. 23,000 and the recommendation of the Assistant Collector that.

"Mr Faqir Mohammad Khan may be declared the purchaser of the mortgage rights of 307 kanals 4 marlas after which the sanction of the Revenue Commissioner for confirmation of the sale under section 92, Land Revenue Act, will be obtained"

On 25th November, 1935, a certificate was issued by the Collector to Faqir Mohammad Khan in the following terms

"Certificate of Sale under section 95, Land Revenue Act, 1887

I, the Collector of Peshawar, do hereby certify that Faqir Mohammad Khan, resident of Charsadda, Executive Engineer, Malakand Division, Tahsil Charsadda, District Peshawar, has been

declared the purchaser at sale by public auction held on 16th day of May, 1935, of the mortgagee rights of the value of Rs 23,000 in respect of 307 kanals 4 marlas of land situate in the village of Shah Dhand, Tahsil Charsadda sold for the recovery of arrears due in respect thereof and that the sale has been duly confirmed by the Revenue Commissioner under section 92, Land Revenue Act, 1887 "

In accordance with this certificate Faqir Mohammad Khan was recorded as owner of the mortgagee rights on 307 kanals 4 marlas of land in the relevant Revenue papers, and on 14th October, 1939, the remaining area in Shah Dhand covered by the mortgage was entered in the mutation register as being redeemed. This order was reviewed by the Assistant Collector but finally restored by the Revenue Commissioner on 1st March, 1940

It may be observed here, though it is not strictly relevant to the present issue that already in the proceedings the first respondent had attempted to establish his position as purchaser of the mortgagee rights of the original mortgage under a deed of transfer of 19th August, 1933, but this attempt after an original hearing and two appeals failed, all the Courts agreeing that the so-called transfer had been made without consideration It was consequent upon this that the deed of 23rd August, 1939, which has already been referred to, was executed by which the mortgagee rights of the original mortgagee for Rs. 23,000 were transferred to respondent 1

But before this the events of 1935 had happened and it appears to their Lordships that in the face of transactions and documents which, even if they are open to challenge have not been challenged, it cannot be contended that in August, 1939, the original mortgagee had any mortgage rights in respect of the original mortgage which he could sell or respondent 1 buy It may be true, as was submitted by learned counsel for respondent 1, that the normal and proper course for the Land Revenue Authorities to take was to put up for sale not the mortgage rights of the original mortgagee but a sufficient part of the mortgaged land , it may even be true that they were deflected from this course by the Lambardar who as one of the mortgagors had other interests to serve Upon these matters their Lordships express no opinion For they can only deal with the documents before them, and from these it is plain that the rights of the original mortgagee in the full sum of Rs 23,000 were transferred to Faqir Mohammad Khan and nothing was left in the original mortgagee Respondent 1 relied on the fact that the mortgage rights were stated in the relevant documents to be mortgage rights "of" or "in respect of" 307 kanals 4 marlas of land in the village of Shah Dhand, arguing from this that the mortgage rights were outstanding in the original mortgagee and his transferee, respondent 1, in respect of the rest of the land originally mortgaged To this view their Lordships cannot assent. A sufficient explanation of the limitation to 307 kanals may perhaps be found in the earlier disputes in regard to the mortgaged land to which it has not been thought necessary to refer . But, whatever the explanation of this apparent inconsistency, the original mortgagee could not part with his mortgage rights in respect of the whole of the mortgage debt and yet retain any part of his rights in respect of some part of the mortgaged land. The position is the same whether the mortgagee sells himself or, as here, his rights are sold by paramount authority.

It appears then to their Lordships that upon this aspect of the case a correct view was formed by the learned Subordinate Judge who rightly applied the general principle (properly applicable, no doubt, to the N.W. Frontier Province) that except by agreement between mortgagee and mortgagor a mortgage security is indivisible : see, *e g* , *Huthasanan Nambudri* v *Parameswaran*[1]. If it were otherwise, it would presumably be necessary in some way to apportion the amounts recoverable in respect of the mortgage debt by the purchaser Faqir Mohammad Khan and the original mortgagee respectively No feasible or satisfactory way of doing so was suggested by the learned Counsel.

In the Court of the Judicial Commissioner a different view was taken on this point upon the ground which is thus stated :

1. (1898) I.L.R. 22 Mad. 209.

"Whatever may be the position as regards that part of land, we do not think that the whole of the mortgage debt can be considered to have been sold"

If this were the right view a different conclusion might have to be reached, though the difficulty of determining what part of the mortgage debt had been sold and of working out the result might well prove insuperable. But it appears to their Lordships that the transaction does not admit of the construction placed upon it by the Court of the Judicial Commissioner The whole of the mortgage rights in respect of the sum of Rs. 23,000 became vested by purchase in Faqir Mohammad Khan, there was nothing left in the original mortgagee to transfer to respondent 1, and upon this ground their Lordships are of opinion and will humbly advise His Majesty that this appeal should be allowed, the judgment of the Court of the Judicial Commissioner set aside and that of the Subordinate Judge restored. Respondent 1 must pay the costs of the appellants of this appeal and in the Courts of the N W Frontier Province

Solicitors for Appellants *Douglas Grant & Co*

Solicitors for Respondents *Hy S L Polak & Co*

V S ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR P. V RAJAMANNAR, CHIEF JUSTICE AND MR JUSTICE KRISHNASWAMI NAIDU

M Maniappa Pillai *Appellant**

v

I Anthonisami Mudaliar and others . *Respondents*

Partnership—Dissolution—Relation between former partners, if continues to be fiduciary—Contract created by the terms of dissolution—Breach of—Liability for damages—Engagement for the performance of an act by a third person—Binding nature of—Benefit to be derived dependent upon the volition of a third person—If renders damages incapable of assessment—Measure of damages

In a deed of dissolution of partnership it was provided that in respect of licences for exporting certain textile goods to Ceylon from India and in respect of such goods for business in India and in the quotas allotted by the Government under such licences in future, the plaintiff, one of the partners, should be entitled to obtain a fourth share and the remaining three-fourth share should be taken by the first defendant, another partner Acting on this the plaintiff applied for the necessary licence and quota but the first defendant raised various objections and eventually the Export Trade Controller refused to issue to the plaintiff the quarter share of the quota and the full share due to the firm was allotted to the defendants The plaintiff claimed that the defendants were liable to account for all income derived by trading with the goods allotted in respect of the quotas obtained by them and pay the amount due to the plaintiff for his share and also as damages for breach of contract committed by the other partner

Held When the partnership came to an end on dissolution, there could no longer be any fiduciary relation between the parties

The clause in the deed of dissolution as to quotas and licences did impose a contractual obligation on the first defendant to allow and assist the plaintiff to obtain his fourth share of the quota allotted to the firm Such an engagement was binding even though the granting of the quotas depended entirely on a third person, the Export Trade Controller The first defendant had in clear breach of the agreement contained in the clause in the deed of dissolution objected to the grant of the quotas to the plaintiff and applied for the entire quota and eventually received it The chance of the plaintiff being granted a licence for a fourth share was a valuable right and as the first defendant had in breach of the obligation laid on him by the clause in the deed of dissolution prevented the plaintiff from securing the licence, not only had the plaintiff sustained a real loss but the first defendant was liable for the loss so sustained But the measure of damages could not be the profit which the first defendant might have made by trading with the goods he obtained as the quota for the firm Damages for breach of contract are intended to recompense the plaintiff for the pecuniary loss that he has sustained and do not depend upon the gain that the other party might have made

Appeal against the decree of the Court of the Subordinate Judge, Madura, dated 18th February, 1946, in O S No. 32 of 1945 on its file.

D. Ramaswami Aiyangar, P. S Srinivasa Desikan and *M. K. Anandan* for Appellant.

T. M. Krishnaswami Aiyer and *T. K. Subramania Pillai* for Respondents.

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*Appeal No. 238 of 1946. 14th September, 1949

The Judgment of the Court was delivered by

The Chief Justice.—The plaintiff appeals against the decree and judgment of the Subordinate Judge of Madura dismissing the suit filed by him on the following allegations The plaintiff appellant and defendants 1 and 2, who are respondents 1 and 2, were trading in partnership from 1941, under the name and style of C Innasimuthu Mudaliar Sons, Madura The partnership was dealing in mill piecegoods, yarn, handloom goods, towels, bedsheets, carpets, and other textiles They were also exporting such goods to Ceylon In this partnership the plaintiff was entitled to a six annas share, the first defendant, to eight annas share, and the second defendant, to two annas share On 14th April, 1943, these three persons entered into a formal deed of partnership in which it was recited that the partnership had commenced from 7th June, 1942 The partnership continued in pursuance of the terms set out in this deed till 15th June, 1944 On that date a deed of dissolution was executed by and between them and it was duly registered on 27th June, 1944 It was provided in and by the said deed that in respect of licences for exporting mill piecegoods, handloom goods, towels, bedsheets, carpets, etc., to Ceylon from India and in respect of such goods for business in India and in the quotas allotted by Government under such licences in future the plaintiff should be entitled to and obtain a fourth share and the remaining three-fourth share should be taken by the first defendant The plaintiff in pursuance of this provision attempted to submit a memorandum to the Export Trade Controller under the joint signatures of himself and defendants 1 and 2 but he could not do so because defendants 1 and 2 would not sign the memorandum The plaintiff was therefore obliged to apply to the Export Trade Controller for the issue of a quarter share of the quota allotted to him The first defendant raised various objections to this application The Export Trade Controller thereupon directed the reservation of a fourth share, claimed by the plaintiff out of the quota and required the accounts of the partnership for the years 1941-1942 and 1942-1943. In spite of repeated demands, the first defendant refused to give the accounts to the plaintiff The first defendant further sent a notice to the plaintiff denying the right of the plaintiff to a quarter share of the quota in breach of the express provision in the deed of dissolution Subsequently, the Export Trade Controller ordered defendants 1 and 2 to produce the concerned accounts The accounts were produced, it is alleged with manipulated entries suppressing the partnership of the plaintiff, and the Export Trade Controller on a perusal of the accounts refused to issue the quarter share of the quota to the plaintiff by his order dated 14th December, 1944 There was an appeal to the Chief Export Trade Controller who however refused to interfere Defendants 1 and 2 were allotted the full quota due to the firm The plaintiff charged that in law they should be deemed to have received such quota as agents and co-owners with the plaintiff, and they were therefore bound to render a true and correct account of all the incomes they had derived by trading with the goods allotted in respect of the quotas obtained by them and pay the amount due to the plaintiff for his share The plaintiff claimed this amount as also damages for breach of contract committed by defendants 1 and 2 and also as arising out of various acts of malfeasance and misfeasance committed by the defendants in denying the lawful rights of the plaintiff The plaintiff prayed for a decree declaring that he was entitled to a quarter share of the quota of all goods which had been actually issued or which was issuable to C Innasimuthu Mudaliar Sons, Madura, since 15th June, 1944, and ordering an account to be taken to determine the profits earned by the defendants by their trade with the quarter share of the quota allotted under licences obtained by them and for recovery of the amount due to him The suit was originally filed only against defendants 1 and 2 Subsequently, defendants 3 to 6 were added as parties on their application. Defendants 3 to 5 are the brothers of the first defendant and the sixth defendant is their mother They claimed an interest in the firm The plaintiff was allowed to amend his plaint and he alleged that the first defendant had been representing defendants 3 to 6 and their interest, if any, in the firm and the acts of the first defendant were binding upon them

The first defendant was the main contesting defendant. In his written statement the plea put forward by him was in short fraud, undue influence and coercion. He alleged that there was no partnership at any time between the plaintiff and defendants 1 and 2. They were only working as employees of the firm. Taking advantage of the young age and want of experience of the 1st defendant, the proprietor of the firm, the plaintiff brought about the deed of dissolution dated 15th June, 1944, by fraud, undue influence and coercion There was also a plea that the clause relied on by the plaintiff was without consideration, illegal and against public policy. The Export Trade Controller's rejection of the plaintiff's claim was quite proper The plaintiff was not therefore entitled to any relief. The second defendant adopted the written statement of the first defendant Defendants 3 to 5 and 6 filed written statements setting up the case that all the properties, rights and assets of the firm belong to the family of C Innasimuthu Mudaliar which was represented after his death by the first defendant, his eldest son. The only partners of the firm are the members of the family. They pleaded that the first defendant had no authority to enter into a partnership or to agree to the terms set out in the deed of dissolution The so-called deed of partnership was antedated and brought about with the sole view of creating some right in the plaintiff to the quota of the firm The other defences raised by them are not very material. The plaintiff filed a reply statement denying the allegations made by the defendants in their written statements.

The learned Subordinate Judge held that the deed of partnership was intended to be real, that the case set up by the first defendant in the written statement that the deed of dissolution was brought about by fraud, undue influence and coercion was not established and that there could be no doubt that from 7th June, 1942, the first defendant took in the plaintiff and the second defendant as partners. It followed that under the terms of the deed of dissolution the plaintiff could claim a quarter share in the export licence relating to the firm for the export of mill and handloom goods to Ceylon in such licences to be obtained in future There was nothing illegal or opposed to public policy in such an agreement. He found that the business belonged to the family of Innasimuthu Mudaliar and his heirs, namely, defendants 1 and 3 to 6 and the first defendant would be entitled only to a sixth share in the partnership There was nothing in law to prevent the first defendant from allotting his share of the quota to the plaintiff After having found on all these points in favour of the plaintiff, he finally dismissed his claim on the ground that the refusal to issue a licence for the export was entirely a matter within the discretion of the Controller and if he refused to grant the application, the plaintiff could have no cause of action against the defendant. What the plaintiff was entitled to under the deed of dissolution, was the right to make an application for the issue of a separate licence for a quarter share of the quota allowable to the firm but the Controller was not bound to recognise any such right. The second defendant after dissolution had no further interest in the matter and the plaintiff could claim no relief against him Equally the plaintiff was not entitled to any relief against defendants 3 to 6 who as co-heirs were interested in the firm equally with the first defendant But the first defendant had no authority to bind them or their interest by the execution of the partnership deed or deed of dissolution In the end, the suit was dismissed but the parties were directed to bear their own costs, because the first defendant had set up a false case that the plaintiff was not a partner at all, the second defendant had supported his false case and defendants 3 to 6 came on the record of their own motion.

Before us Mr T. M Krishnaswami Aiyar appearing for the contesting respondent did not challenge the finding that the deed of dissolution (Exhibit P-2) was not brought about by fraud or undue influence or coercion which was the main case of the first defendant in his written statement. He tried to build up a case that the deed of partnership was never intended to be acted upon and it was only executed to help the plaintiff to secure a share of the quota allotted to the firm by inducing the Export Trade Controller to grant to the plaintiff a share. It was not executed on the date it bears but was executed in or about December

1943. The deed of dissolution was also executed for the same ulterior purpose This certainly was not the specific case set up by the first defendant in his written statement We cannot permit him to put forward this plea now. Further, we find it impossible for the first defendant to sustain this plea without examining himself He never went into the box and the only evidence adduced by him was that of his clerk who does not support this case. We do not agree with respondent's counsel that it was for the plaintiff to explain why the deed of partnership Exhibit P-1 was antedated. Mr Krishnaswami Iyer was unable to explain away the documentary evidence on which the learned trial Judge based his finding that from 7th June, 1942, the plaintiff was a partner of the firm

Mr Krishnaswami Iyer then contended that under clause 3 of the deed of dissolution the plaintiff was entitled to apply for a fourth share but his obtaining that was subject to the discretion of the Export Trade Controller. The first defendant was not responsible if the Controller did not grant the plaintiff's application The decision of the Controller might be wrong on the facts but it was final. Even a wrong decision of the Controller cannot give rise to a cause of action against the first defendant.

Mr D Ramaswami Aiyangar for the appellant rested his case on one of two alternative bases : (1) that clause 3 of the deed of dissolution made the first defendant a trustee or at any rate made him liable under an obligation in the nature of a trust ; (2) that clause 3 was a term of the contract between the plaintiff and the first defendant and the first defendant was liable for damages as on a breach of contract

For the first position he relied upon sections 88 and 90 of the Indian Trusts Act Reference was also made to the recent decision of a Division Bench of this Court in *Chennuru Seethramamurthi Chetti* v. *Chennuru Guruswami Chetti*[1] In our opinion this contention cannot be accepted The provisions of sections 88 and 90 of the Trusts Act are founded upon a fiduciary relationship In the present case the first defendant and the plaintiff were no doubt partners up to 15th June, 1944 and as partners they were in a fiduciary relation But once the partnership came to an end and all rights and interests relating to the partnership were taken over absolutely by the first defendant, there could no longer be any fiduciary relation. There may be instances where even after formal dissolution the fiduciary relationship may continue till the final account taking. But there is no authority for the position that the fiduciary relationship continues even after the final account taking. The decision therefore in *Chennuru Seetharamamurthi Chetti* v. *Chennuru Guruswami Chetti*[1] can have no application to the facts of this case because in that case an advantage was gained by some of the partners while the partnership subsisted without the knowledge of the other partners and to their detriment.

His second contention however appears to be sound At one time, he sought to argue that the fourth share to which he would be entitled under clause 3 of Exhibit P-2 must be treated as a part of the good will of the business and therefore the plaintiff would have a proprietary interest in it. But we think that this is a far-fetched conception. After all, the Controller might not grant a licence at all or the Control order itself might cease to be in force and there might be once more free trade conditions. Realising this he was content to found his claim on contract. We are clearly of opinion that clause 3 does impose a contractual obligation on the first defendant to allow and assist the plaintiff to obtain his fourth share of the quota allotted to the firm. Otherwise we are driven to the conclusion that this clause which was specially introduced as governing the rights of parties in respect of a valuable right was thoroughly useless and of no legal effect and the first defendant in spite of it was at liberty to sabotage the plaintiff's right Mr. Krishnaswami Iyer relied upon the last part of the clause which runs thus

"in respect of the export licences, quotas, allotments and free licences, each of the three parties may hereafter get separately after the dissolution of this partnership, the other partners shall not have any right or interest whatever"

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1. (1949) 1 M L J. 400.

His argument was that if in spite of the special agreement that the plaintiff should obtain a quarter share and the first defendant a three-fourth share, nevertheless if the first defendant in breach of the agreement obtains a licence for the entire quota, he is not liable in any manner We do not agree. This provision obviously refers to licences obtained by the parties without committing a breach of the other provisions in the same clause, that is, clause 3

We are not impressed with the argument of Mr Krishnaswami Iyer that because the granting of a licence is in the discretion of the Controller, the first defendant is not liable for a breach of the terms of clause 3 It is undoubtedly a part of the law of contract well established that an engagement for the performance of an act even by a third person is binding even though the performance of such act depends entirely on the will of the latter Thus, for instance, to procure the consent of a landlord to the assignment of a lease is binding Chitty in his book on contracts gives an example, where one of several partners in a firm agreed to introduce the plaintiff, a stranger, into it, it was held that the agreement was valid although the assent of the other partners was of course essential to the admission of the plaintiff as a partner (19th Edition, page 36).

There can be no doubt whatever on the evidence that the first defendant acted in utter violation of the terms of clause 3 of Exhibit P-2 Apart from his lawyer's notice Exhibit D-1 which reveals his hostile attitude, there is the admission of his clerk D W 1 that the first defendant objected before the Export Trade Controller that one-fourth quota should not be given to the plaintiff In clear breach of the agreement contained in that clause, the first defendant applied for the entire quota and eventually received it Even assuming that the grant of a licence to the plaintiff was only a possibility or a chance dependent upon the action of a third person, that is the Controller, that fact would not prevent the plaintiff from recovering damages for the breach by the first defendant. In *Chaplin* v. *Hicks*[1], the Court of Appeal held that where by contract a man has a right to belong to a limited class of competitors for a prize, a breach of that contract by reason of which he is prevented from continuing a member of the class and is thereby deprived of all chance of obtaining the prize is a breach in respect of which he may be entitled to recover substantial damages The existence of a contingency which is dependent on the volition of a third person did not necessarily render the damages for a breach of contract incapable of assessment Fletcher Moulton, L J , said :

"The very object and scope of the contract were to give the plaintiff the chance of being selected as a prize winner, and the refusal of that chance is the breach of contract complained of and in respect of which damages are claimed as compensation for the exclusion of the plaintiff from the limited class of competitors In my judgment nothing more directly flowing from the contract and the intention of the parties can well be found "

In the present case, the chance of being granted a licence for a fourth share is a valuable right and if the first defendant has in breach of the obligation laid on him by clause 3 of Exhibit P-2 prevented the plaintiff from securing the licence, not only has the plaintiff sustained a real loss but the first defendant is liable for the loss so sustained The answer to Mr. Krishnaswami Aiyar's argument that the plaintiff's right depended on a contingency is best given in the following observations of Fletcher Moulton, L J.

" The contract gave the plaintiff a right of considerable value . therefore to hold that the plaintiff was entitled to no damages for being deprived of such a right because the final result depended on a contingency or chance would have been a misdirection "

What then is the relief that the plaintiff is entitled ? He is entitled to damages for breach of contract The measure of such damages cannot be the profit which the first defendant might have made by trading with the goods he obtained as the quota for the firm Damages for breach of contract are intended to recompense the plaintiff for the pecuniary loss that he has sustained and do not depend upon the gain that the other party might have made There is no material furnished by the parties to the Court to assess damages for this standpoint, namely, the loss sustained by the plaintiff. The case must therefore be remanded to the trial

1. (1911) 2 K.B 786.

Court to assess the damages after giving the parties an opportunity to adduce additional evidence in this matter. In calculating the damages due to the plaintiff the following facts and circumstances must be taken into account. As the basic period for mill goods was from 1st April, 1941 to 31st March, 1942, during which period the plaintiff admittedly was not a partner, the plaintiff will not be entitled to any share in the quota of mill goods. But as the basic period for handloom goods is from 1st October, 1942, to 31st March, 1943, the plaintiff would have been entitled to the quota. As the right of the family of the first defendant has not been denied, the first defendant's share would be not more than one-sixth and though under clause 3 the plaintiff would be entitled to a fourth, he could not make the first defendant liable for more than the share which he himself had in the family firm Taking these facts and the inevitable market fluctuations, the required outlay of capital by the plaintiff and other similar circumstances, the lower Court shall assess the damages to which the plaintiff would be entitled and pass a decree for the amount so ascertained.

The decree of the lower Court dismissing the suit as against defendants 2 to 6 will stand The appeal is therefore allowed in part so far as the first defendant is concerned and remanded to the lower Court for further disposal in the light of our judgment. The costs of the plaintiff and the first defendant in this appeal and in the lower Court will abide the result after remand.

V. S. *Appeal allowed in part and remanded to lower Court for assessment of damages.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR JUSTICE PANCHAPAKESA AYYAR.

A. K. Gopalan . *Petitioner* *

Criminal Procedure Code (V of 1898), section 561-A—Scope—Power of High Court to safeguard the rights of parties before it—Right of appellant undergoing imprisonment to give instructions regarding appeal to his counsel in Jail without the presence of police officers

The High Court has had the power to safeguard the rights of parties before it in civil and criminal cases, as laid down by law, ever since its inception and those rights have been safeguarded and continued under section 561-A of the Criminal Procedure Code and the High Court ought to see that those rights are not infringed

No Court shall fail in its duty of allowing a party who is undergoing imprisonment to give instructions to his vakil freely and frankly without police officers (who naturally represent the other side) being present and taking down shorthand notes of the instructions and broadcasting them thereafter to their superior officers There is also no rule under which an appellant before the High Court or before a Sessions Judge can be made, under mere executive orders of Government, to submit to the presence of a police officer at the interview between him and his counsel or to such police officer's taking down shorthand notes of the instructions between the party and his vakil The party should be allowed to have interviews and give instructions without the presence of any police officer and subject only to the restrictions imposed by rule 430 of the Madras Jail Manual

Petition praying that, in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to permit him to interview his advocates in jail without the presence of a police officer or direct the petitioner to be produced before the High Court to argue his C A. No 243 of 1948, preferred against the order of the Court of Session, North Malabar, in S. C No. 23 of 1948

A Ramachandran of *Row and Reddy* for Petitioner.

The Crown Prosecutor (*S Govind Swaminathan*) for the Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This matter arises from a petition under section 561-A, Criminal Procedure Code, filed by one A K Gopalan, convicted in S C No. 23 of 1948, on the file of the Sessions Judge, North Malabar, and sentenced to five years' rigorous

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*S. R No. 13509 of 1949 4th November, 1949.
Crl M P. sought to be preferred to the High Court.

imprisonment. He has filed Criminal Appeal No 243 of 1948 against that conviction and sentence, and that appeal is pending in this Court His complaint is that when his advocate went on 25th August, 1949, to interview him in Cuddalore Central Jail, to take instructions from him regarding this appeal, a police officer of the C I.D. insisted on being present at the interview and taking verbatim shorthand notes of what he was telling the vakil, and that all this is illegal and that if the C I D officer takes such notes he would communicate them to his superior officers and to the counsel on the opposite side, thus breaking the rules regarding the confidential nature of such communications He prays, therefore, that either this Court should order, under section 561-A, Criminal Procedure Code that no *police officer* should be present at the interview between him and his counsel, when he instructs his counsel regarding Criminal Appeal No 243 of 1948, or the other two appeals of his in the Sessions Court, Coimbatore, and take notes of his instructions to his vakil, or, in the alternative, that he be directed to be produced before this Court to argue Criminal Appeal No. 243 of 1948, in person

The learned Public Prosecutor objected that this Court has no powers under section 561-A, Criminal Procedure Code, to grant either request as the Government had directed the C I.D officer to be present at such interviews He relied on a decision of Govinda Menon and Rajagopalan, JJ , in Criminal Miscellaneous Petition No 1490 of 1949 I have looked into that ruling. It has no bearing on the requests in this petition regarding the interviews concerning the three Criminal Appeals. There, one Anandan Nambiar, a member of the Madras Legislative Assembly and a detenu under the Madras Maintenance of Public Safety Order, Act I of 1947, having no case or appeal in this Court, prayed that the Superintendent of the Jail, where he was detained should be ordered to produce him before the Speaker of the Madras Legislative Assembly during the Assembly Session to take part in the Assembly proceedings, even though he had no notice to attend such proceedings, and to direct the Speaker of the Assembly to give him notice of the Assembly proceedings Their Lordships held, and, if I may say so with respect, correctly, that section 561-A, Criminal Procedure Code, had not given *increased powers* to a Court which the Court did not possess before that section was enacted, much less *new powers*, and that it only safeguarded and guaranteed the existence of those powers which the Court already possessed Their ruling followed the ruling in *King-Emperor* v. *Khwaja Nazir Ahmad* [1] It is obvious that the requests made by Mr Anandan Nambiar in the matter before their Lordships were quite outside the scope of this Court, having nothing to do with any matter or proceeding pending before it, and that no notice also had been given to him by the speaker of the Assembly to attend the Session, and it was not alleged that he was being wrongfully kept in ignorance of such notice, or that a notice actually issued by the speaker was being wrongfully withheld from him and that he was being wrongfully prevented from attending the Assembly in obedience to such notice But, in this case, the petitioner has filed an appeal in this Court, which is pending, and has also two appeals in the Sessions Court, Coimbatore, and he has to be given by this Court all necessary facilities to instruct his counsel in those criminal appeals, like any other appellant. So, the petitioner is asking this Court only to exercise the powers of this Court regarding appellants in cases before it, and concerning their right to instruct vakils without a *police officer* being present and taking verbatim shorthand notes of his instructions Undoubtedly, this Court has had the power to safeguard the rights of parties before it in Civil and Criminal cases, as laid down by law, ever since its inception, and those rights have been safeguarded and continued under section 561-A, Criminal Procedure Code and this Court ought to see that those rights are not infringed. Of course, those rights are subject to all the laws and rules governing the matter of interviews in jail In fact, the learned counsel for the petitioner has no objection whatever to being made subject to rule 430 of the Madras Jail Manual and to have the interview in the presence of a *Jail Officer* who can be so placed as to be able to see and hear what passes between the petitioner and his counsel and to prevent any article being passed between the parties, as contemplated

1 (1945) 1 M L J 86 : L.R. 71 I.A 203 : I.L R. 1945 Lah. 1 (P C)

in rule 430 of the Madras Jail Manual He only objects to a *police officer* being present and taking shorthand notes of his instructions. I consider his objection well founded No Court shall fail in its duty of allowing a party to give instructions to his vakil freely and frankly without *police officers* (who naturally represent *the other side*) being present and taking down shorthand notes of the instructions and broadcasting them thereafter to their superior officers, etc. There is also no rule shown to me under which an appellant before this Court or before the Sessions Judge, Coimbatore, can be made, under mere *executive orders of Government*, to submit to the presence of a *police officer* at the interview between him and his counsel or to such police officer's taking down shorthand notes of the instructions between the party and the vakil, obviously for intimating the instructions to the superior officers. I, therefore, direct the Superintendent, Central Jail, Cuddalore, to allow the petitioner to have interviews and give instructions to his counsel for the purpose of his Criminal Appeals without the presence of any *police officer*, and without his instructions being taken down in shorthand and subject only to the restrictions imposed by rule 430 of the Madras Jail Manual and any other law or rule applicable to the case. A *jail officer* is quite different from a *police officer* Many a *jail officer* drafts jail appeals for prisoners Jail officers do not also represent the *other side* in criminal appeals. "Jail custody" and "police custody" are, it is well known, quite different. That is why the petitioner objects to the presence of a police officer while not objecting to that of a *jail officer.*

In view of my granting the prisoner's first request, there is no need to grant his second request which is only an alternative one.

V S *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE VISWANATHA SASTRI

Sadhu Laxmi Sundaramma *Appellant**

v

Sadhu Suryanarayana . *Respondent.*

Hindu Law—Marriage—Obligation of father to marry his daughter—Money expended on daughter's marriage by the mother, if can be recovered from the father

A Hindu father is under no legal obligation to get his daughter married and a wife who has expended money on their daughter's marriage is not entitled to recover it from her husband. The obligation to defray the expenses of the marriages of his sons and daughters is cast by the Hindu Law upon a father only if there is any joint family property in his hands and not in other cases

Sundari Ammal v *Subramania Iyer,* (1902) I L.R 26 Mad 505 and *Seshammal* v *Muniswami Mudaliar,* (1897) 8 M L J 105, followed

Subbayya v. *Anantaramayya,* (1928) 57 M L J 826 I L R. 53 Mad 84, considered

Appeal against the decree of the Court of the Subordinate Judge, Guntur, in A.S No. 242 of 1945, preferred against the decree of the court of the District Munsiff of Narasaraopet, in O S. No. 411 of 1944.

Vepa P. Sarathi for Appellant

K. Bhimasankaram for Respondent.

The Court delivered the following

JUDGMENT —This is an unfortunate dispute between a wife and her husband, appellant and respondent respectively in this second appeal. The spouses have been living apart since 1936 owing to misunderstandings and their three minor daughters have been living with the mother since then. The wife sued her husband and obtained a decree for the maintenance of herself and her children. The eldest daughter though a minor, attained marriageable age in 1942 and was got married

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*S. A No 1736 of 1946. 12th August, 1949

by the mother, the father having taken no interest in the affair. The suit out of which this second appeal arises was filed by the wife against her husband for the recovery of a sum of Rs 1,000 stated to have been spent by her in connection with the marriage of the daughter The suit was decreed by the District Munsiff On appeal the learned Subordinate Judge held that though the wife might have spent Rs 1,000 in connection with the marriage, she could not recover it from her husband, he being under no legal obligation to get his daughter married. The wife has therefore preferred this second appeal

In *Sundari Ammal* v *Subramania Aiyar*[1], Davies and Bhashyam Aiyangar, JJ., held that a Hindu father was under no legal obligation to get his daughter married, and that a wife who expended money on her daughter's marriage in circumstances like the present, was not entitled to recover it from her husband The learned Judges followed an earlier decision of a Bench of this Court in *Seshammal* v. *Muniswami Mudaliar*[2] which held that a Hindu father was under a moral but not a legal obligation to get his daughter married In *Subbayya* v *Anantaramayya*[3] Ramesam, J , referring to these decisions observed,

> " In those cases it does not appear that the father was a member of the joint family or had ancestral property The cases were discussed on the footing of the general obligation of a father to maintain or marry his daughter and it was held that the father was not under an obligation to marry his daughter. On the other hand, it may be said that at least among Brahmins and Vaisyas with whom pre-puberty marriage is compulsory as a religious injunction, the father is legally bound to marry his daughter "

It may not be possible to support this last observation of the learned Judge on the grounds stated by him, because as the combined result of Act XIX of 1929, modern economic conditions and a widespread disapprobation of infant marriages, pre-puberty marriages, are now rare even amongst Brahmins and Vaisyas But this is not to say that the old family ties have snapped or that parents have ceased to regard the marriage of their daughters as their responsibility In the latest edition of Mulla's Hindu Law (page 530), it is stated that the decision in *Sundari Ammal* v. *Subramania Aiyar*[1], requires reconsideration, without, however, stating any reasons for that opinion, beyond a reference to *Subbayya* v *Anantaramayya*[3], which, however, dealt with the liability of joint family property to meet the expenses of the marriage of the daughters of the family It has now been authoritatively held by the Judicial Committee that in the case of an unmarried daughter,

> "her right to maintenance and marriage expenses out of joint family property is in lieu of a share on partition , a provision should accordingly be made for her marriage expenses in the decree (for partition) ", *Rajagopala Aiyar* v *Venkatarama Aiyar*[4]

Where however, there is no joint family property, is the father under a legal obligation to have the marriage of his daughters performed or is the duty merely a moral one as decided by this Court ? It is true as pointed out by Mr Vepa Sarathi for the appellant, that popular sentiment might not wholly endorse the view taken by the two decisions of this court already cited and a learned Bengal lawyer of the orthodox school has expressed his dissent from the decisions of this court in strong language Sircar on Hindu Law, 6th edition, pages 151 and 155 It is true that according to the Hindu law-givers, marriage is a necessary samskara for a Hindu girl of any caste On this point it is unnecessary to refer to the texts of Hindu Law which are all assembled in the admirable judgment of Krishnaswami Aiyar, J , in *Kameswara Sastri* v *Veeracharlu*[5]. Marriage, though primarily a sacrament, also partakes of the character of a contract according to the view of Hindu legists. The Mitakshara even provided a remedy by way of restitution of moneys paid and expenses incurred with interest thereon, if the marriage fell through owing to the default of any of the parties. see Yagnavalkya, Chapter I, verse 65 and Mitakshara II-11-26 to 28 ; *Balu Bhai Hiralal* v. *Nana Bhai Bhagu Bhai*[6].

The appellant's learned advocate relies on the well-known passage of Yagnavalkya (1-53-64) in support of his argument that it is the imperative duty of the

1. (1902) 26 Mad 505
2 (1897) 8 M L J 105
3 (1928) 57 M L J 826 I L.R 53 Mad. 84 (F.B.)
4. (1947) 2 M L J 37 (P C.)
5. (1910) 20 M L J 855 . I L.R. 34 Mad. 422.
6 (1919) I L R 44 Bom. 446

father to get his daughter married before she attains puberty. The passage is as follows.

"The father, the paternal grandfather, the brother, a Sakulya or members of the same family, the mother likewise, in default of the first, the next in order if sound in mind, is to give a damsel in marriage, not giving becomes tainted with the sin of causing miscarriage at each of her courses, in default however of the (aforesaid) givers let the damsel herself choose a suitable husband"

The order of guardianship in connection with the marriage of a minor girl given above is confined to the giving of the girl in marriage, where ceremonial competency is requisite for the person giving away the girl in marriage The dire spiritual penalties—fantastic though they might appear to modern minds—attaching to the omission to give a girl in marriage before puberty, is said to be indicative of the peremptory nature of the duty cast upon the father But then not merely the father but even other relations are subject to the same penalty under the text above cited and it can hardly be supposed that a man is under a legal obligation at the present day to have the marriages of all his female relations suitably performed, even though the parents neglect their duty in this respect. There is also reason to believe that in Vedic times adult marriages were common and some of the hymns cited in connection with the marriage ritual would be singularly inapt to consecrate the union of spouses who have not attained puberty. It is only in the age of the Sutra writers and smritikars that pre-puberty marriage of girls came to be insisted upon Even these writers give the girl a right to choose a husband for herself if she remained unmarried for three years after attaining puberty—Manu, Chapter IX, verse 90; Bodhayana, IV-1, 14 The text of Yagnavalkya cited in the beginning of this paragraph does not therefore support the appellant to the full extent of his argument. At best it lays a moral or spiritual duty or obligation on the father

It is next pointed out that a Hindu is under a legal obligation to maintain his wife, his minor sons and unmarried daughters whether he possesses any joint family property or not This is a matter of personal obligation but it is doubtful whether this obligation extends beyond providing food, raiment and residence and under modern conditions, some measure of education, conformably to the status, social position and financial resources of the family Mr Vepa Sarathi would extend this obligation to the provision of expenses for the marriage of a minor daughter as well, on the strength of a decision of Horwill, J, in *Rahima Bibi* v. *Sharfuddin*[1] The learned Judge there held that the principle underlying section 68 of the Contract Act applied to the marriage expenses of minor Hindu girls and extended the same reasoning to the marriage of a minor Muhammadan girl. I am not sure whether the marriage of an infant girl can be brought under the head of "necessaries" Marriages arranged for infants sometimes serve to emphasise the blessedness of the single state and in many cases the marriage of an infant girl is a leap in the dark so far as the girl herself is concerned Marriage expenses would not come under the head "infant's necessaries" under the English law on which section 68 of the Contract Act is modelled. It is true that "necessaries" under section 68 of the Contract Act have not been confined by the decisions to such things as are necessary to the support of life, but have been extended to the other needs of a person appropriate to the station in life which he or she occupies. The incurring of expenditure for the performance of a moral and social, if not legal duty, cast on the minor which it would have been scandalous or improper to omit, might also be brought within the terms of section 68 of the Contract Act, as held by Horwill, J Be this as it may, the claim for reimbursement in this case is not against the estate of the minor but personally against her father and section 68 of the Contract Act would not therefore apply Under section 69 of the Contract Act, the appellant must show that the respondent was bound in law to pay for the expenses of his daughter's marriage, which the appellant, as a person interested in the payment, incurred out of her own funds. The interest contemplated by section 69 is an interest resting on the apprehension of some pecuniary loss, inconvenience or detriment and not an interest based on grounds of mere

1. (1946) 2 M L J. 305 I L.R 1947 Mad 541.

sentiment or moral or social obligations Section 70 of the Contract Act would also not apply to the present case It is not in every case where one person pays or spends money which should have been paid or expended by another that an obligation to repay arises .

"The question is not to be concluded by nice considerations of what may be fair and proper according to the highest morality To support such a suit there must be an obligation, express or implied, to repay" *Ram Tuhul Singh* v *Bisseswarlal Sahoo*[1], quoted in *Man Mohan Das* v *Janaki Prasad*[2]

It is true that the decisions of this court in *Sundari Ammal* v. *Subramania Aiyar*[3] and *Seshammal* v. *Muniswami Mudaliar*[4] do not state any reasons for the conclusion reached by the learned Judges I cannot however, sitting as a single Judge, ignore them on that ground or presume that the considerations I have adverted to above were not present to the minds of the learned Judges who decided those two cases In the present case, there is no averment, evidence or issue about the existence of any joint family properties in the hands of the defendant out of which the daughter could legally claim payment of her marriage expenses on the principle of the decision in *Subbayya* v *Anantaramayya*[5] The claim had been rested only on the personal legal obligation of the defendant which extends to the maintenance of his wife and minor children under all systems of law The obligation to defray the expenses of the marriages of his sons and daughters is cast by the Hindu Law upon a father only if there is any joint family property in his hands and not in other cases. I am bound by the decisions of this court though they lead to results which I may privately regret.

The defendant is a member of the legal profession and has paid a sum of Rs 500 irrespective of the legal merits of the controversy. This attitude is commendable so far as it goes, but I cannot help expressing my regret that it was not found possible to make a further concession to the unlucky wife and daughter in question especially when the husband has taken a second wife and the estrangement between him and his first wife and his children by her has become complete.

The second appeal is dismissed, but there will be no order as to costs either in this or in the lower appellate Court

No leave

V. S *Appeal dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE MACK

S Muhammad Eusoof Maricar . *Petitioner*

v.

K Subramanian Chettiar and others *Respondents*

Civil Procedure Code (V of 1908), sections 16 and 20—Jurisdiction—Test—Agreement at Karaikal to sell immoveable property in Tiruchirapalli and receipt of advance—Suit in Tiruchirapalli Court for specific performance of agreement and possession—Maintainability

The criterion for jurisdiction is whether the defendant owns property in the jurisdiction of the Court in which the suit is filed and whether the suit sought to be filed against him is to obtain relief respecting such property

When a non-resident foreigner owns property within the jurisdiction of an Indian Court and enters into a contract regarding that property, no matter where such a contract is entered into, the Indian Court clearly has jurisdiction to try that suit by reason of the immoveable properties being situate within its jurisdiction Hence, where a suit for specific performance of an agreement entered into at Karaikal for the sale of a building in Tiruchirapalli District and for possession is filed in the Tiruchirapalli Court, that Court clearly has jurisdiction to try that suit

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1 (1875) L R 2 I A 131 (P C)
2 (1945) 1 M L J 97 L R 72 I A 39 (P C)
3 (1902) 26 Mad 505
4 (1897) 8 M L J 105
5 (1928) 57 M L J 826 . I L R 53 Mad. 84

*C R P No 882 of 1948 23rd August, 1949.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the Order of the Court of the Subordinate Judge, Tiruchirapalli, dated 5th April, 1948, in O S No 208 of 1947

C A. Seshagiri Sastri for Petitioner.

T. M. Venugopala Mudaliar for Respondent

The Court delivered the following

JUDGMENT —A simple point of jurisdiction is raised in this petition by the first defendant, a permanent resident of Karaikal, who was sued in the Court of the Subordinate Judge of Tiruchirapalli by the plaintiff in the following circumstances The plaintiff alleged that he and the first defendant entered into an agreement at Karaikal on 7th August, 1947, by which the latter agreed to sell a building he owned in Manapparai in the Tiruchirapalli district to the plaintiff for Rs. 13,250, that he paid the first defendant an advance of Rs. 2,000 and that it was agreed that the first defendant should come to Manapparai and complete the conveyance and get it registered in the local Registrar's office The suit was filed for specific performance of contract and also for recovery of possession The plea of jurisdiction taken on behalf of the first defendant was that as a non-resident foreigner resident in the French territory of Karaikal he could not be sued in the Tiruchirapalli Court The learned Subordinate Judge held that the Tiruchirapalli Court had jurisdiction both under section 16 and section 20, Civil Procedure Code.

The learned advocate for the petitioner is unable to cite any authority for the position that in the circumstances the Tiruchirapalli Court had no jurisdiction. I should have been surprised if he could adduce any authority to support it His main argument is that this suit is essentially one *in personam* and that no non-resident foreigner can be sued in an Indian Court. This may be so but not if the non-resident foreigner is possessed of immoveable property in the jurisdiction of the Indian Court and this property is the subject-matter of the suit A subtle distinction is sought to be drawn between a suit for land and a suit for a specific performance of a contract relating to land which it is urged is an action *in personam* Reliance is placed on *P M A Velliappa Chettiar* v *Saha Govinda Doss*[1], a Full Bench decision of five Judges That was a decision as regards the scope of clause 12, Letters Patent and whether the High Court in its ordinary original civil jurisdiction could try a suit for specific performance of contract to sell made in Madras relating to property in the Chittoor district The finding was that such a suit was not a suit for land within the meaning of clause 12 of the Letters Patent. That decision affords us no assistance in determining this issue of jurisdiction Under the proviso to section 16, Civil Procedure Code, a suit to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction property is situate " The criterion for jurisdiction is whether the defendant owns property in the jurisdiction of the Court and whether the suit sought to be filed against him is to obtain relief respecting such property. There can be no doubt whatsoever that the relief sought for in this suit is one respecting this building in Manapparai which was the subject-matter of the contract entered into at Karaikal It is argued that section 16 to section 20 of the Civil Procedure Code does not apply to non-resident foreigners, who cannot be sued *in personam* but when the non-resident foreigner owns property within the jurisdiction of an Indian Court and enters into a contract regarding that property, no matter where such a contract is entered into, the Indian Court clearly has jurisdiction to try that suit by reason of the immoveable properties being situate within its jurisdiction. The learned Subordinate Judge was quite correct in repelling this plea of want of jurisdiction

The petition is dismissed with costs

V. S ——— *Petition dismissed.*

1 (1928) 57 M L J. 190 : 52 Mad. 809 (F B.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE BASHEER AHMED SAYEED

M Nataraja Mudaliar ... *Petitioner* *

v.

Ponnu Kannammal ... *Respondent*

Presidency Small Cause Courts Act (XV of 1882), *section* 38, *and Presidency Small Cause Courts Rules (Madras), Order* 41, *rule* 7 (*b*)—*New trial application—Findings of trial Court not supported by evidence—Proper course is to order fresh trial and not dismiss it in limine*

When any Court fails to appreciate a question of fact which is vital for the determination of the issue in the suit, it must be considered to be an error in law

Whenever it is found that the findings of the trial Court are not supported by the evidence and are such as to justify interference in revision, the proper course for the Full Bench of the Court of Small Causes would be to send back the matter to the trial Court for fresh trial and decision according to law Its jurisdiction is not always confined to questions of law alone

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the Judgment and Order of Small Cause Court, Madras, dated 6th January, 1947, in N T A No 329 of 1946 in S No 2540 of 1946

S. Ramachandra Aiyar for Petitioner.

T. S. Purushotham for Respondent

The Court delivered the following

JUDGMENT.—In this revision petition the main point that arises for consideration is whether the learned trial Judge who decreed the suit against the defendant had committed an error of law in not having adverted himself to the available records on file in the suit, *viz*, the vakalat and the plaint, when coming to the conclusion as to whether Exhibit D-1 in the suit did or did not contain the thumb impression of the plaintiff.

The suit was for the recovery of the sum of Rs 200 being the balance refundable from out of a sum of Rs 300 entrusted to the defendant by the plaintiff The defendant denied having had any transaction with the plaintiff and denied liability to refund any amount to the plaintiff The decision in the case rested mainly upon the oral evidence of the plaintiff and the defendant The lower Court believed the version of the plaintiff and decreed the suit for the sum of Rs 112-13-0 While believing the version of the plaintiff, the trial Court did not take into consideration an important circumstance which militated against the credibility of the evidence of plaintiff, *viz*, that while the plaintiff had affixed her thumb impression to Exhibit D-1, a counterfoil of Exhibit P-2, a receipt issued for the sum of Rs 84-11-0 by the Co-operative Credit Society, she denied the fact of her thumb impression *in toto* This further involved the question as to whether the transaction with the said Co-operative Credit Society was directly done by the plaintiff or it was arranged for by the defendant on behalf of the plaintiff A proper determination of this fact was very vital to the decision in the suit as to who was speaking the truth. The learned trial Judge failed to appreciate this question of fact involved in the case in the legal manner

The learned Counsel for the petitioner urges that this failure on the part of the learned trial Judge constitutes an error of law He contends that in so far as the decision of the suit depended upon the acceptance of the oral testimony of either the plaintiff or the defendant, it was incumbent upon the learned trial Judge to find out whether the plaintiff's version was true or the defendant's version was true, and particularly so with reference to a definite circumstance which was brought to the notice of the judge, *viz*, the denial by the plaintiff of the fact of having put her thumb impression on Exhibit D-1 If the learned trial Judge had only compared the thumb impression of the plaintiff on Exhibit D-1 with her thumb impression on the other documents available to him on the file, it was just possible that the learned trial Judge would have come to the conclusion that the evidence

*C R P No 1489 of 1947 ... 19th August, 1949.

of the plaintiff was not worthy of credence There is considerable force in this contention

As already observed this fact as to whether it was true or not that the plaintiff put her thumb impression on Exhibit D-1 was of vital importance, in determining as to who was speaking the truth in the case The trial Judge ought to have applied his mind to this relevant circumstance before he made up his mind to believe one of the versions In so far as the learned trial Judge has failed to perform this duty and has simply contented himself by saying that he had no means of verifying whether the thumb impression appearing in Exhibit D-1 was really that of the plaintiff or not, while actually ample means were readily available to him, he must be considered to have committed an error of law This error consists in that he failed to determine the question of fact when it was vital to the decision in the case. It will not be sufficient explanation, as contended by the learned Counsel for the respondent, that the attention of the learned trial Judge was not drawn to the existence or availability of the material on record to enable the required comparison of the impressions This view is supported by the decision in *Sheik Rahmat Illahi* v *Mohamed Hayat Khan*[1]. In that case their Lordships of the Privy Council have defined what constitutes a question of law, and have also held that when any Court fails to appreciate a question of fact which is vital for the determination of the issue in the suit, it must be considered to be an error of law The said decision has also discussed elaborately what exactly are the limits of the questions of law and questions of fact Following this decision, I feel that the learned trial Judge did fail in his duty in the appreciation of relevant evidence, which went to the root of the matter and I consider that there has been an error of law on his part which entitled the defendant to take up the matter before the Full Bench of the Court of Small Causes by way of a new trial application under section 38 of the Presidency Small Cause Courts Act and the rules framed thereunder. This ground has been specifically taken in the application filed by the defendant before the Full Bench of the Presidency Small Cause Court But the Full Bench of that Court has summarily dismissed the application of the defendant without examining the question of law raised by the defendant Section 38 and rule 7 (*b*) of Order 41 of the Presidency Small Cause Courts Rules (Madras) in my opinion do cover the present case Such being the case, the Full Bench of the Presidency Small Cause Court was not justified in dismissing the application without going into the case. Whenever it is found that the findings of the trial Court are not supported by the evidence and are such as to justify interference in revision, as has been laid down by the learned Judge in *Kuppiah Chetti* v *Saraswati Ammal*[2], the proper course for the Full Bench of the Small Cause Court would be to send back the matter to the trial Court for fresh trial and decision according to law It is to be seen from this decision that the jurisdiction of the Full Bench of the Presidency Small Cause Court is not always confined to questions of law alone In view of what I have stated above, I hold that the Full Bench of the Presidency Small Cause Court was not right in having dismissed the application *in limine*. I direct that the application should be restored to file and dealt with according to law after notice to the parties.

The petition is allowed with costs

V. P. S ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR JUSTICE VISWANATHA SASTRI

Palla Sanyasi . *Appellant* *

v.

Kayitha Guruvulu . *Respondent*

Hindu Widows' Re-marriage Act (XV of 1856)—*Section* 5—*Scope and applicability—Gift of Jewels to woman at a marriage subject to a custom of reverter to her husband's family on her re-marriage after her husband's death—Right of husband's family to recover such a gift on the widow's re-marriage, if affected by section* 5

1 (1943) L.R. 70 I A 225. (1943) 2 M L J 606 (P C) 2 (1941) 2 M L J 571

* S A. No 1840 of 1947 12th October, 1949.

Where according to an accepted custom in a particular community a woman who is presented with jewels by her husband's family is bound to return them to the family of her husband if on her husband's death, she re-marries, the gift to the woman at the time of the first marriage is not an absolute gift but one subject to the customary incidents attaching to such a gift and therefore section 5 of the Hindu Widows' Re-marriage Act would not affect the operation of the customary rule with reference to such gifts and they can be recovered by the husband's family on the widow's re-marriage

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A.S. No 90 of 1946, preferred against the decree of the Court of the District Munsif, Rajahmundry, in O S No 63 of 1945

B V Subrahmaniam for Appellant

M S Ramachandra Rao and *M Krishna Rao* for Respondents

The Court delivered the following

JUDGMENT —The first defendant is the appellant in this second appeal The plaintiff filed the suit out of which this second appeal has arisen for the recovery of certain jewels or their value from the first defendant His case was that his younger brother Pentayya married a lady by name Ramanna and that at the time of the marriage, the jewels now claimed were presented to Ramanna by the plaintiff out of his family funds Pentayya, the younger brother of the plaintiff, died in October, 1943, and his widow Ramanna married the first defendant in or about May, 1944 Ramanna died on 17th December, 1944, having committed suicide. The present suit for recovery of the jewels presented by the plaintiff to Ramanna at the time of her marriage with Pentayya, the plaintiff's younger brother, has been filed on the ground that according to the custom in the Golla community to which the parties belong, Ramanna was bound to have returned the jewels to the plaintiff on her re-marriage with the first defendant In other words, the plaintiff pleaded a custom in the community that a woman who is presented with jewels by her husband's family is bound to return them to the family of her husband, if, on her husband's death, she re-marries There is an allegation to that effect in paragraph 5 of the plaint and an issue on this point has also been framed by the trial Court

Evidence has been adduced as regards the custom in the community to which the parties belong P Ws 1 and 2 who are caste elders of the community and P.W 4 as well as D Ws 2 and 4 all speak to the fact that on the re-marriage of a woman, the jewels presented to her by her first husband's family, revert to that family This evidence has been accepted by both the lower Courts and I see no reason for holding that the custom pleaded has not been proved in the present case Mr Subramaniam, learned Advocate for the appellant, argues that by virtue of section 5 of the Hindu Widows' Re-marriage Act (Act XV of 1856) the custom pleaded cannot prevail against the provisions of that section He contends that by reason of section 123 of the Transfer of Property Act, there was an absolute gift of the jewels to Ramanna when they were delivered to her at the time of the marriage and therefore they were her absolute property at the time of her re-marriage On this hypothesis, he argues that her re-marriage would not affect her absolute title to the jewels by reason of section 5 of the Hindu Widows' Re-marriage Act The fallacy of the argument is that the original gift of the jewels to Ramanna at the time of her first marriage was itself subject to the customary incidents attaching to such gifts, *viz* , that there should be a reverter of the property gifted to the husband's family on the re-marriage of the lady Therefore it could not be said that the widow had an absolute interest in the jewels presented to her and that she was free to do what she liked with them even after her re-marriage. The gift was subject to the customary incidents of the community and therefore section 5 would not affect the operation of the customary rule with reference to the gift in question For these reasons I hold that the conclusion of the Courts below is correct and that this second appeal should be dismissed with costs. (Leave to appeal is refused).

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT.—MR. JUSTICE RAGHAVA RAO.

Rasa Goundan and another . *Appellants**

v

Ramai Goundan *Respondent.*

Madras Hindu Religious Endowments Act (II of 1927), section 44-B (2) (d) (ii), proviso—Appeal against order of Collector under section 44-B, dismissed as withdrawn—Suit within six months of such order for declaration in regard to the question already decided—Maintainability.

An appeal against an order of the Collector acting under section 44-B of Madras Hindu Religious Endowments Act holding that the inam in question consisted only of the melwaram was dismissed as withdrawn and within six months of that order the appellant therein filed a suit for a declaration that the inam constituted of both the melwaram and kudiwaram On a question of the maintainability of the suit,

Held The word "decided" in the proviso to sub-clause (ii) of clause (*d*) to sub-section (2) of section 44-B, *prima facie* imports a decision on the merits and excludes, at any rate, an order dismissing an appeal as withdrawn and further the plaintiff in the suit cannot be said to be "aggrieved" by the order which is an order of his own solicitation and he cannot therefore complain of an act of his own doing

Appeal against the decree of the District Court, Coimbatore, in A S. No. 285 of 1945, preferred against the decree of the Court of the District Munsif, Tirupur, in O S. No 66 of 1944

G. Chandrasekhara Sastri for Appellants

K. V. Ramachandra Aiyar for Respondent

The Court delivered the following

JUDGMENT.—Within six months of an order of the District Collector dismissing as withdrawn an appeal preferred by the respondent before me against an order of the Collector acting under section 44-B of the Madras Hindu Religious Endowments Act holding that the inam in question consisted only of the melwaram, the respondent filed the suit out of which this second appeal arises for a declaration that the inam constituted of both the melwaram and the kudiwaram The appellants before me as defendants in the suit contended *inter alia* as follows in paragraph (6) of their written statement,

"The plaintiff filed an appeal before the District Collector, Coimbatore, but did not press the appeal Therefore, there was no judicial order by the District Collector on the appeal petition as contemplated by section 44-B (2) (*d*) (i) of the said Act and the plaintiff had no reasons to be aggrieved and therefore the suit is barred by limitation since he cannot rely on the order of the District Collector. The cause of action alleged is not correct The plaintiff is not entitled to the remedy by way of suit and is clearly out of time"

The suit was decreed in the Courts below.

The short and neat point taken for the appellants by their learned Counsel, Mr G. Chandrasekhara Sastri, is that the plaintiff cannot be said to be a person aggrieved, and that the District Collector cannot be said to have decided the appeal, as these two words "aggrieved" and "decided" used in the proviso to sub-clause (ii) of clause (*d*) to sub-section (2) of section 44-B of the Act ought to be understood Says the learned Counsel, the plaintiff chose not to press the appeal to the District Collector which did not therefore go to a decision. That was a step which he took of his own free volition. The District Collector could not and did not therefore decide the appeal There was no need for him in fact and in truth to go into the merits So asks the learned Counsel, how on earth can it be said that the plaintiff is a person aggrieved when the order of which he is complaining is an order of his own solicitation procured by him on an express invitation made by himself to the District Collector not to deal with the appeal but to dismiss it? Learned Counsel is, in my opinion, perfectly right. The meaning of the word "aggrieved" as given in the Oxford English Dictionary is "injuriously affected by the action of any one", and no one can ordinarily be allowed to complain of an act of his own doing. The word 'decided' *prima facie* imports a decision on the merits, and its use in the relevant section of the

* S A No 1790 of 1946 16th September, 1949.

relevant Act certainly excludes, at any rate, an order of the kind that we have before us

Mr Ramabhadrachariar for the respondent has in his usual, forceful and resourceful argument sought to surmount this obstacle in his way but not with success. He suggested first that in this form the contention was not raised in the Courts below He conceded however fairly and frankly that the written statement does raise the contention in this very form. Issue 2 was undoubtedly intended to cover the point, and although the point does not seem to have been raised in the Memorandum of first appeal or argued before the lower appellate Court, it cannot be treated as abandoned The appellant's learned Counsel is entitled therefore to raise it and I am entitled to entertain it here It was next submitted by Mr Ramabhadrachariar on the analogy of a Bench ruling of this Court in *Cannanore Bank, Ltd.* v. *Madhavi*[1], that if a person getting his claim petition dismissed as not pressed would be regarded as a person against whom an order is made within the language of Order 21, rule 63 of the Civil Procedure Code there is no reason why the plaintiff should not be treated as a person aggrieved within the language of the relevant provisions of the Madras Hindu Religious Endowments Act referred to above. Assuming the analogy to be otherwise well founded it fails certainly for the reason that the order under the relevant provisions of the Act must be an order in an appeal *decided* by the District Collector which does not take in a dismissal of the appeal on the ground that it is not pressed Reliance was also placed by the learned Counsel for the respondent on the authority of Ex parte *Poulton and Son* : In re *Copyright Acts*[2], in support of his contention that his client may well be regarded as a person aggrieved I am not satisfied that the ruling has any application to the present case There under 5 and 6 Vict 45, section 14, which gives power to make an order to vary an entry in the register of copyright under that Act upon the application of any person who shall deem himself aggrieved by any "such entry" the Court made an order varying an entry in a register of copyright upon the application of the person who had caused the entry to be made. Any person "who shall deem himself aggrieved by any entry in the register of copyright" is entitled under the statute there in question to apply, whereas under the statutory provisions with which we are concerned here the person entitled to sue is a person aggrieved, *i e*, actually aggrieved, not a person who merely shall deem himself aggrieved

For the reasons indicated, in the foregoing, the suit is not maintainable, and the second appeal must therefore be allowed but in the circumstances without costs right through

No Leave

K C *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE HORWILL AND MR JUSTICE RAGHAVA RAO

Shanmugam *alias* Muthukaruppan *Appellant**

v

N S Radhakrishna Sarma and another *Respondents*

Civil Procedure Code (V of 1908), Order 21, rule 16 and Order 34, rule 6—Application under Order 34, rule 6, by assignee-decree-holder—Maintainability—Requisites—Proceedings in execution of final decree, if should have been completed by actual delivery—Assignee to bear profit and loss of transaction—Validity of assignment

It is not necessary for the maintainability of an application under Order 34, rule 6, Civil Procedure Code, that the proceedings in execution of the final decree should be completed by actual delivery of the property sold in execution to the auction-purchaser All that Order 34, rule 6, requires is that the net proceeds of any sale held under rule 5 should be found insufficient to pay the amount due to the plaintiff If that condition is satisfied the application under Order 34, rule 6, becomes maintainable

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1 (1941) 2 M L J 956 I L R 1942 Mad 336 (F B)

2 (1884) L J Q B 320

* Appeal No 45 of 1946 10th March, 1949

There are no words of restriction or exclusion to be found in rule 6 of Order 34 as would justify the contention that the right to apply under Order 34, rule 6, Civil Procedure Code, is peculiar or personal to the *original* plaintiff in the mortgage action and does not avail an assignee from the plaintiff

The mere fact that under the assignment deed, it was stated that the assignee was to bear the profit and loss of the *transaction* would not make it invalid as being a mere right to litigate and not transferable under section 6 (*e*) of the Transfer of Property Act

Rajamanickam Chetty v *Abdul Halim Sahib*, (1941) 1 M L J 22, distinguished

Appeal against the decree of the Court of the Subordinate Judge of Mathurai, dated the 24th day of October, 1944, and passed in E A. No 106 of 1944, in O S No 139 of 1926

K S. Ramabhadra Aiyar for Appellant

K V Srinivasa Aiyar for Respondents

The Judgment of the Court was delivered by

Raghava Rao, J—The facts of the application under Order 21, rule 16 and Order 34, rule 6, Civil Procedure Code, out of which this appeal arises, are as follows :—

The appellant here was the second respondent to the application in the Court below, while the 1st respondent here was the applicant there The application prayed that the assignment in favour of the applicant of rights under the final decree in a mortgage suit, O. S No 139 of 1926, Sub-Court, Madura, by the decree-holder therein, may be recognised, and that a decree may be passed against the first judgment-debtor, the father of the second personally and against the joint family assets of the two defendants for Rs 34,538-14-11, being the unrealised balance still outstanding after the sale in execution of the final decree in the suit. The assignment relied on as the basis of the application was one effected by the original decree-holder after the confirmation of the execution sale under the final decree. The deed of assignment is filed as Exhibit P-1 and is dated 26th January, 1943. It provided that the profit and loss incidental to the assignment was to be the assignee's own concern and described the first item of the B schedule attached to it, which is the item with which we are concerned in this appeal, as the right to obtain a personal decree against defendants 1 and 2 in O S No 139 of 1926, Sub-Court, Madura, as per the mortgage decree already passed therein, after giving credit to the sum of Rs 11,100 realised by the auction sale of the properties comprised in the mortgage decree The respondents to the application resisted it—the first respondent, the father of the appellant before us, contending that the assignment in favour of the petitioner was inoperative, being a benami transaction unsupported by consideration, the second respondent, the appellant before us, contending that the decree was liable to be scaled down under Madras Act IV of 1938 and that if that was done, no further amount would be found due. The Principal Subordinate Judge of Madura, who tried the application, raised two points for determination . (1) whether the assignment is true and valid ; and (2) whether the second defendant is entitled to have the decree scaled down He found on both the points in favour of the petitioner and allowed the application Against this order the second respondent in the Court below has preferred this appeal

Both the points have been reiterated before us in appeal by Mr. K S Ramabhadra Ayyar, the learned advocate for the appellant, with the emphasis and exhaustiveness characteristic of him The learned advocate also raised a further point of the unmaintainability of the application out of which this appeal arises, to which we shall in detail refer in the sequel.

On the first of the points, the learned Subordinate Judge in the Court below held that in spite of the inadequacy of the consideration for the assignment as found by him which was apparently the only circumstance pressed before him in connection with this point—the assignment could not be regarded as necessarily nominal and consequently inoperative We accept his finding. On the second of the points the learned Subordinate Judge observes that *admittedly* the first defen-

dant is not an agriculturist within the meaning of Madras Act IV of 1938 and holds that under section 6 of the Act the second defendant, his son, must also be deemed a non-agriculturist Against this view of the learned Subordinate Judge it is contended by Mr Ramabhadra Ayyar firstly that it is very material for the decision of this latter point to know whether the first respondent was assessed in his individual capacity or as manager of the joint family of which his son is a member, and that in the absence of proof that the assignment was in the latter capacity, the disqualification attaching to the father under proviso (*a*) to section 3 of the Act would not extend to the son In support of this contention he cited *Rajoo* v. *Palaniappa Chettiar*[1] It is next contended by him that the burden of proving the facts required by the proviso to the section lay upon the creditor. In support of this submission he cited *Periasami Pillai* v *Sivathia Pillai*[2] We have come to the conclusion that both the contentions must be negatived. The first was not a point raised in the lower Court, and the second bears no force in view of the admission made in the lower Court

In addition to these points raised in the Court below, which, as we have held were rightly decided by the Court below, there is a new point taken in appeal before us by Mr Ramabhadra Ayyar, namely, that the application itself was unmaintainable under Order 21, rule 16, as well as under Order 34, rule 6, Civil Procedure Code, under which it was presented Under Order 21, rule 16, Civil Procedure Code, it has, counsel urges, no legs to stand upon, because that provision of the Code presupposes an executable decree, whereas hereafter the execution of the final decree no personal decree has yet come into being. It is unnecessary for us to deal with the merits of this submission, as the learned advocate for the respondents accepts the position and urges the maintainability of the application only under Order 34, rule 6, Civil Procedure Code

Mr. Ramabhadra Ayyar contends that under Order 34, rule 6, Civil Procedure Code, it is equally unmaintainable, because, firstly, till proceedings in execution of the final decree are completed by actual delivery of the property sold in execution to the auction-purchaser the provision of Order 34, rule 6, Civil Procedure Code, cannot be invoked ; secondly, the right to apply under that provision is peculiar and personal to the original plaintiff in the mortgage action and does not avail an assignee from him ; thirdly, the right sought to be transferred by Ex P-1 is a mere right to litigate, rather, as counsel put it, a right to gamble in litigation, and is not validly transferable under section 6 (*e*) of the Transfer of Property Act , and fourthly, the application for a personal decree is contrary to the terms of the High Court's decree, dated 25th September, 1936, passed in the appeal preferred against the revised preliminary decree, dated 25th September, 1933

As regards the first of these grounds, it is sufficient to say that there is no warrant for the importation into the Rule of the condition contended for by the advocate for the appellant That would be to re-write the enactment which is none of our business and not to construe it, which is all our function All that Order 34, rule 6, Civil Procedure Code, requires is that the net proceeds of any sale held under rule 5 should be found insufficient to pay the amount due to the plaintiff. It is not disputed that that condition is satisfied in the present case.

With reference to the second of these grounds, we are of opinion that although rule 6 does only use the word " the plaintiff " that does not mean that an assignee from the plaintiff cannot have the right to apply under that rule There are no words of restriction or exclusion to be found in the rule such as would justify the contention urged Moreover, the mortgage suit is obviously pending at the stage contemplated by the rule, and Order 22, rule 10, Civil Procedure Code, can well govern the case of a devolution of interest like the one involved in Ex P-1.

1. (1940) 2 M L J 817 2. (1940) 2 M L J 498

The third of the grounds too is, in our judgment, devoid of substance. The case reported in *Rajamanickam Chetty* v. *Abdul Halim Sahib*[1], which is relied upon by the learned advocate for the appellant, enunciates no principle that can assist the appellant, nor does it bear any parity or parallel to the facts of the case before us, except that there also the deed of assignment said that the assignee was to bear the profit and loss of the transaction—which is not a material point of analogy that attracts the decision All that is ruled in and by that case is that there cannot be an assignment of a suit which has been filed for the purpose of recovering damages either in contract or in tort, but that it is lawful for a plaintiff in such a pending suit to assign the benefit which he may obtain under the decree to be passed in the suit, that that does not however give the assignee the right to interfere in proceedings in the action There is another case also cited by the learned advocate, *V. P R V. Chockalingam Chetty* v *Seethai Ache and others*[2], which is, we think, likewise not in point The observation in the judgment of the Privy Council delivered by Sir John Wallis in that case which is relied upon is at page 34 and runs in these terms

" . Sales by an Official Assignee of lands in possession of alienees from an insolvent are, in substance if not in form, nothing more than sales of the right to litigate, and, assuming that they do not come within the prohibition in the Transfer of Property Act, against the transfer of a mere right to sue—which has not been contended—they are open to the same objection and in their Lordships' opinion are strongly to be deprecated "

The irrelevancy of the citation is too obvious to need any elaboration.

The fourth of the grounds urged is, of course, a new point not raised in the lower Court, no question of the unmaintainability of the application having been at all raised there. The record does not disclose any relevant facts proved to show how or where exactly the contravention of the High Court's decree lay Nor does it appear possible for us to hold that any irregularities in the matter of the execution sale already held, on a proper holding of which only it is contended that the right to apply under Order 34, rule 6, Civil Procedure Code, arises can be ripped open collaterally without proper proceedings independently taken to set aside the sale—which apparently there have not been in the present case

In the result the appeal fails and is dismissed with costs

This appeal having been posted this day for being mentioned, the Court delivered the following

JUDGMENT —It is suggested by Mr Ramabhadra Ayyar that the expression occurring in the decree " from family properties " may be replaced by " from joint family properties " which is the expression used in the judgment. There can be no objection to this suggestion *which* is accordingly accepted. The amendment will be therefore carried out by the decree of this Court

The appellant will pay the court-fee due to Government.

V S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE HORWILL

Pati Banda Bharadrajulu . *Petitioner**

v

Pisipati Lakshminarayana .. *Respondent*

Civil Procedure Code (V of 1908), section 35-A—Compensatory costs—Conditions necessary for awarding—Exercise of discretion—Interference by revisional Court.

Before awarding compensatory costs under section 35-A, Civil Procedure Code, the Court has to satisfy itself that the claim was false or vexatious to the knowledge of the plaintiff, that the interests of justice require compensatory costs to be awarded, and that the defendant had put forward his objection that the suit was false or vexatious at the earliest opportunity

1. (1941) 1 M L J. 22.
2. (1927) 54 M L J 88 : I L R 6 Rang. 29 (P C).

*C.R P No 106 of 1947. 12th August, 1949.

Compensatory costs should be awarded with some caution, but a revisional Court would be reluctant to interfere with the exercise of any discretion by the lower Court regarding costs, unless it has proceeded on some perverse, or at any rate some wrong considerations, or has disregarded the ordinary rules of law relating to the awarding of costs

Petition under section 25 of Act IX of 1887 praying that the High Court will be pleased to revise the decree of the Court of the District Munsiff, Guntur, in S C. S No. 401 of 1946

K. Mangachari for Petitioner

N Subrahmanyam for Respondent

The Court delivered the following

JUDGMENT —This is a civil revision petition against the decree of the Principal District Munsiff of Guntur dismissing the plaintiff's suit for arrears of rent and awarding to the defendant compensatory costs.

On the merits there is little that can be said. It is alleged that a reading of the judgment indicates that the learned District Munsiff approached the matter that had to be decided with some prejudice against the plaintiff It is, of course, clear that the District Munsiff held a very strong opinion that the conduct of the plaintiff had been reprehensible ; but that was an opinion that he was entitled to form after seeing the plaintiff and the defendant in the box, examining the evidence, and hearing the arguments

Compensatory costs should be awarded with some caution ; but a revisional Court is reluctant to interfere with the exercise of any discretion by the lower Court regarding costs, unless it has proceeded on some perverse, or at any rate, some wrong considerations, or has disregarded the ordinary rules of law relating to the awarding of costs. Before awarding compensatory costs under section 35-A, Civil Procedure Code, the Court has to satisfy itself that the claim was false or vexatious to the knowledge of the plaintiff, that the interests of justice require compensatory costs to be awarded, and that the defendant had put forward his objection that the suit was false or vexatious at the earliest opportunity The defendant filed an application for compensatory costs only on the day before the order was delivered , and so it can be said that he put forward his objection at the earliest opportunity only if it can be read into his written statement. It is not there in express terms ; but reading the written statement as a whole, there can be no doubt that the defendant did mean to say that the claim of the plaintiff was false and that he knew it to be false That the claim was false to the knowledge of the plaintiff the lower Court clearly found I am therefore unable to find any cause for interfering with the lower Court's order

The petition is dismissed with costs

V. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR

K. Vedanta Desikan . *Petitioner.**

Criminal Procedure Code (V of 1898), section 544 and Criminal Rules of Practice, rule 384—Summoning of defence witnesses at Government expense—Matter of discretion—Giving of reason for refusal—Necessity

The use of the word " may " instead of " shall " in section 544, Criminal Procedure Code, shows that summoning of defence witnesses at Government expense is discretionary and not mandatory. This is further emphasised by the words, " if it thinks fit " Rule 384 of the Criminal Rules of Practice not only makes it discretionary for the Magistrate to pay such batta, but lays down the limits within which alone the discretion can be exercised

Magistrates will do well when refusing to summon defence witnesses at Government expense to give the reason for the order

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*Cr.R C No 1279 of 1949 20th October, 1949
(Cr R P. No. 1210 of 1949).

Where in a prosecution for non-payment of sales tax, the Magistrate refuses to summon defence witnesses at Government expense, it cannot be said that the Court was wrong in refusing to summon such witnesses at public expense in these days of financial stringency

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate, Cheyyar, dated 3rd August, 1949, in C C No. 108 of 1948

V S Rangaswami Aiyangar for Petitioner.

The Assistant Public Prosecutor (*A S Sivakaminathan*) for the Crown

The Court made the following

ORDER —This is a petition to revise the order of the Sub-Divisional Magistrate, Cheyyar, refusing the request of the petitioner, who is accused, in C C. No 108 of 1948, on the file of the Sub-Divisional Magistrate, Cheyyar, of the offence of failure to pay the sales tax due to Government, under section 15 of the Madras General Sales Tax Act, to summon defence witnesses at Government expense, and directing him to pay the batta of Rs. 140 required for the defence witnesses he wanted to be summoned

I have heard the learned counsel for the petitioner and the learned Public Prosecutor *contra* The learned Public Prosecutor strongly opposes this petition I agree with him The position in law is clear Section 544 of the Criminal Procedure Code says,

" Subject to any rules made by the Provincial Government, any Criminal Court *may, if it thinks fit,* order payment, on the part of Government of the reasonable expenses of any complainant, or witness attending for the purpose of any inquiry, trial or other proceeding before such Court under this Code "

It is significant that the word there used is " *may* ", not " *shall* ", that is, *discretionary,* not *mandatory* The phrase " if it thinks fit " further emphasises this But the learned counsel for the petitioner relied on rule 384 of the Criminal Rules of Practice for showing that it is mandatory That too will not help him Firstly, the provisions of the Criminal Procedure Code will overrule any provision of the Criminal Rules of Practice, if there is a conflict Secondly, there is no conflict here Rule 384 says

" Subject to the provisions of rules 384-A and 384-B the Criminal Courts will pay, at the rates specified in rule 387, the expenses of complainants and witnesses in cases in which the prosecution is instituted or carried on by, or under the orders, or with the sanction of the Government, or of any Judge Magistrate, or other Public Officer, or *when it shall appear to the Judge or Magistrate presiding over such Courts to be directly in furtherance of the interests of public justice* , also in cases entered in column 5 of the Schedule II appended to the Code of Criminal Procedure, as *not bailable* , and in all cases in which *the witnesses are compelled to attend* by a Magistrate under the provisions of Chapter XLVI of the Code.

The Courts may make reasonable advances to witnesses compelled to attend to give evidence when such pre-payment is considered necessary "

None of the portions marked in italics apply to this case The significant relevant portion is

" when it shall appear to the Judge or Magistrate presiding over such Courts to be directly in furtherance of the interests of public justice "

That makes it not only *discretionary* for the Magistrate to pay such batta, but lays down the limits within which alone the discretion can be exercised.

I do not consider that, in this case, where a person was prosecuted, under section 15 of the Sales Tax Act, for the failure to pay the sales tax, the lower Court was wrong in refusing to summon his costly defence witnesses at *public expense* in these days of financial stringency. The discretion was used rightly. This petitioner, who was said to be liable to pay the sales tax and thus augment the public revenues, wanted to diminish the public revenues by asking for his costly witnesses in this bailable case, to be summoned at public expense, and his attempt was rightly nipped in the bud ; he was not a pauper unable to pay the batta, and he was unable to show any special reason also for the Government to shoulder

a burden which should be normally his However, Magistrates will do well, when passing orders, refusing like this, to give the reason for the orders, namely, that they do not consider this spending of Government moneys in the particular cases to be in direct furtherance of the interests of public justice. That will prevent the putting of such petitions having no substance in them With these remarks this petition is dismissed.

V. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE HORWILL

Kakumanu Pattabhiramayya . *Petitioner**

v

Mekala Mallareddi and others *Respondents.*

Civil Procedure Code (V of 1908), section 21—Objection as to territorial jurisdiction—If can be raised in execution Court

The question of territorial jurisdiction could not be raised in the executing Court. A person against whom a decree has been passed in a Court which had no jurisdiction, must raise the matter by way of an appeal or in revision If he does not do so, he cannot raise the matter in execution or by way of collateral proceedings

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Guntur, dated 29th March, 1947, in A S No. 330 of 1946 preferred against the order of the Court of the District Munsiff of Narasaraopet, dated 18th September, 1946, in E. P. No. 31 of 1946 in Gokulapadu V. C No 5 of 1939

M. Subrahmanya Sarma for Petitioner.

Respondent not represented

The Court delivered the following

JUDGMENT—The appellant instituted a suit in a Village Munsiff's Court which had no jurisdiction; and a decree was passed. In execution, he sought to proceed against the property of the defendant. Various objections raised by the defendant to the execution of the decree were overruled and execution ordered to proceed. In appeal to the Court of Subordinate Judge, a question was taken as to the jurisdiction of the Village Court; and it was held that since the suit was instituted in a Court having no territorial jurisdiction, the decree was a nullity and could not therefore be executed The appeal was therefore allowed and the execution petition dismissed.

In revision, various contentions have been raised The only argument of substance is that the lower appellate Court was wrong in holding that the decree was a nullity. The learned Subordinate Judge overlooked the provisions of section 21 of the Civil Procedure Code, which says:

> "No objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, and unless there has been a consequent failure of justice"

As pointed out in *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*[1] the question of territorial jurisdiction could not be raised in the executing court; for a person against whom a decree has been passed in a Court which had no jurisdiction must raise the matter by way of an appeal or in revision If he does not do so, he cannot raise the matter in execution or by way of collateral proceedings The lower appellate Court relied on a Calcutta decision which we have been unable to trace and on *Sri Rajah Kotagiri Madhava Rao Bahadur* v *Papayya Rao*[2] This case was

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* C R P No 1685 of 1947. 26th August, 1949.

1. (1920) 39 M L J 203 I.L.R 43 Mad 675 (F.B.).

2 (1946) 1 M.L J 287: I L R. 1946 Mad. 760.

one in which a Revenue Court passed a decree in a case over which it had no jurisdiction; and it was held by the learned Judges of this Court that the decree of the Revenue Court was a nullity That case, however, can be distinguished from the case under consideration, in that section 21, Civil Procedure Code, did not apply to that case as it does to this Section 21, Civil Procedure Code, would not render valid a decree passed by a Revenue Court having no jurisdiction in a matter that should have been brought in a Civil Court. Section 21 relates only to matters which affect the territorial jurisdiction of Courts

The petition is therefore allowed, the order of the lower appellate Court set aside, and the order of the District Munsiff of Narasaraopet restored. The respondents will pay costs to the petitioner in this Court and in the lower appellate Court.

V.S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE KRISHNASWAMI NAYUDU

Adisesha Aiyar .. *Appellant**

v.

Papammal .. *Respondent.*

Execution proceedings—Constructive res judicata*—Service in earlier petition by affixture—No finding that service was sufficient—Civil Procedure Code (V of 1908), Order 5, rule 19*

The principle of *res judicata* should be applied cautiously to execution petitions. When a notice of an execution application is ordered by Court to be served on the defendant and the notice has to be affixed to the door of the dwelling house owing to the reported absence of the defendant, the Court must either declare it to be sufficient or order such service as it thinks fit, as it is imperatively required to do so under Order 5, rule 19 of the Civil Procedure Code and in a case where it is sought to apply the constructive principle of *res judicata* against the defendant, the omission of the Court to make such a declaration as enjoined by the Code is fatal

Azhagappa Chetti v *Ramanathan Chettiar,* (1933) 64 M L J. 629, followed

Appeal against the order of the District Court, Coimbatore, dated the 27th November, 1945, in A S. No. 97 of 1945 preferred against the order of the Court of the District Munsiff, Dharapuram, in E. P. No 160 of 1943 in O.S. No. 621 of 1930 dated 6th December, 1944

T.V. Ramanatha Aiyar and *K S. Ramamurthi* for Appellant.

T. R Srinivasan and *S. Gopalarathnam* for Respondent.

The Court delivered the following

JUDGMENT.—The question for decision in this second appeal is whether the second defendant (judgment-debtor) was precluded from raising her objection to the attachment of the properties by reason of the orders made in previous execution petitions, *i e.,* E P. No. 1661 of 1936 and E P. No. 1165 of 1940 on the file of the same Court The appellant (decree-holder) obtained a decree in O. S No. 621 of 1930 against the first defendant the mother of the 2nd defendant for Rs. 480 and for costs and in E. P. No. 687 of 1933 applied for attachment and sale of certain properties. Some properties were sold in execution of the decree and the decree-holder purchased the same. The first defendant, who is the mother, died some time in September 1936. E. P. No. 1661 of 1936 was filed on 3rd November, 1936, for the balance of the decree amount and the mode in which the assistance was sought in the execution petition was to implead the second defendant who was her only daughter as her legal representative and for attachment and sale of the immoveable properties belonging to the first defendant and described in the schedule to the said petition. On this execution petition notice was ordered to the second defendant for 5th December, 1936. The following endorsement appears on the petition :

* A. A. A. O. No. 258 of 1946. 12th October, 1949.

"Defendant 2 affixed V M attests L R of defendant 1 to be added as defendant 2 Attach item 1 D 2 absent L.R of D-1 added as D-2 Attach item 1 7th January, 1937.

Initialled D M,
5th December, 1936"

I perused the endorsement in the original execution petition and I find that the order made by the learned District Munsiff was only "D 2 absent L. R. of D. 1 added as D 2 Attach item 1." The other endorsements are apparently made by the office Then in pursuance of that attachment sale papers were filed and sale notices were issued by the order of the learned District Munsiff dated 18th March, 1937, returnable on 9th April; 1937 On 9th April, 1937, the order of the learned District Munsiff was that "defendant absent, proclamation of sale on 6-7, and batta in three days". There too an endorsement of the office appears as "D. 2 respondent affixed. V. M. attests." There was also an application taken by the decree-holder, E A. No 1080 of 1937 for permission to bid and set-off and this application is said to have been personally served on 10th August, 1937 and the thumb impression of the second defendant is stated to have been taken. On 28th September, 1937, lot No. 1 was sold, the decree-holder himself purchasing it and the sale was confirmed on 1st November, 1937

Subsequently the decree-holder in order to realise the balance still due under the decree, filed E. P. No. 1165 of 1940 for attachment and sale of the rights of the first defendant's husband in a usufructuary mortgage executed in his favour dated 28th October, 1911. In that execution petition as well notice was taken out to the second defendant and her thumb impression appears to have been affixed and the learned District Munsiff held that the service was sufficient. That execution petition was not however pressed and it was dismissed.

The present execution petition No. 160 of 1943 was filed on 4th March, 1943, for recovery of the balance still due and for attachment and sale of the immoveable properties mentioned in the schedule. The objection to this execution petition was, among others, that the properties were not liable to be attached as they were not the properties of the first defendant A plea of *res judicata* was raised by the decree-holder appellant that by reason of the earlier execution petition it was not competent for the second defendant to raise the question as the properties that were sought to be attached in the present execution petition were attached in E P. No. 1661 of 1936 to which the second defendant was a party It may be stated that there is no dispute that the properties that were sought to be attached in the present execution petition were attached in E. P No 1661 of 1936 to which the second defendant was added as a party, but, the contention of the second defendant is that she had no notice of the execution petition No 1661 of 1936, that she was not properly served, and that therefore she was not bound by the decision in that execution petition. Both the Courts found in her favour and the appeal is by the decree-holder.

The learned counsel for the appellant argues that in so far as the order in E. P No. 1661 of 1936 was concerned, since it was made after notice was ordered to the second defendant even though there was no declaration, it must be held to be sufficient notice in law, the notice having been affixed and the Court having declared her *ex parte*, brought her on record and directed the attachment. The second contention is that in any event the order in E P. No. 1165 of 1940, though the petition was dismissed, was made after notice to the second defendant was held to be sufficient and a declaration was made to that effect and as such by reason of E. P. No. 1165 of 1940 it was not competent for the second defendant to raise an objection to the attachment in the present execution petition.

As regards the first contention, Order 5, rule 19, Civil Procedure Code, lays down the procedure to be followed in considering and deciding as to what is the proper service in regard to summons which is also applicable to notices. Order 5, rule 19 reads as follows:

"Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine

the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit."

In this case, from the endorsement I am unable to say that the learned District Munsiff has proceeded under rule 19 He appears to have accepted the endorsement of the office, "D 2 affixed. V M attests" as sufficient compliance of what is required under rule 19 The learned counsel, however, relies on a decision in *Adhilakshmi Ammal* v. *Srinivasa Goundan*[1], where it was held that in regard to service one has to consider the facts of each case and decide on those facts whether the failure to declare a judgment-debtor *ex parte* was a mere omission, and, the subsequent procedure made it clear that the judge did consider the service of notice sufficient, or whether the facts of the case left in some doubt the question whether there was a proper service or not. In that case it was held that the defendant refused service on the frivolous ground that his father's name was not correct, despite the fact that his father was served at the same time and was a party to the same proceedings and that the executing Court should have considered the service sufficient. The learned Judge held that the failure in that case to declare the judgment-debtor as *ex parte* was a mere omission and the subsequent procedure made it clear that the judge did consider the service sufficient Reliance on the circumstances and the nature of the excuse for not receiving the summons was also taken into account and I do not think that the facts of the present case would warrant the application of the principle laid down in *Adhilakshmi Ammal* v. *Srinivasa Goundan*[1].

The learned counsel has also relied on the decision in *Venkata Rayanim Varu* v. *China Bapanna*[2]. There the question of service was considered in an application for setting aside an *ex parte* decree. The learned Judges observe that

"Even though it is desirable that all Courts should observe the mandatory provision of Order 5, rule 19 and 'either declare that the summons has been duly served or order such further service as it thinks fit', the absence of such an express declaration will not involve as a necessary consequence a finding that a summons has not been duly served"

There is this circumstance in that case that the learned Subordinate Judge held that the appellant really knew all about the suit as it was going on The other case is *Govindakrishna Aiyar* v. *Sankaralinga Naicker*[3] which refers to the decision in *Venkata Rayanim Varu* v *China Bapanna*[2]. That is a case of declaring a guardian of defendants *ex parte*. There what happened was that notice was taken out and the return of notice was that the guardian was evading service On this return being brought to the notice of the Court, the Court declared the defendants *ex parte*

I do not think that the failure to comply strictly with what is laid down in Order 5, rule 19 could be applied to a case of this kind where the 2nd defendant is to be precluded rom raising the plea which is open to her by application of the constructive principle of *res judicata* It is essential that in such cases it should be satisfactorily proved that she was a party to the earlier proceedings and was properly served Admittedly there was no personal service of the execution petition and the service, which is sought to be relied upon, is the endorsement of the office that notice has been affixed and the V. M has attested it. The V M. was not examined, nor was the process server, and the Court has not applied its mind and held that it was sufficient The principle of *res judicata* should be applied very cautiously to execution petitions The learned counsel for the respondent Mr Srinivasan, has cited *Azhagappa Chetti* v. *Ramanathan Chettiar*[4] which correctly appreciates the position regarding the application of the principle of constructive *res judicata* in execution petitions and with reference to the service of notice, it was held that·

"When a notice of an execution application is ordered by Court to be served on the defendant and the notice has to be affixed to the door of the dwelling house owing to the reported absence of the defendant, the Court must either declare it sufficient or order such service as it thinks fit, as it is

1. (1944) 1 M L.J 36
2. (1939) 2 M L J. 926.
3. (1942) 2 M L J. 558
4 (1933) 64 M.L J. 629.

imperatively required to do so under Order 5, rule 19 of the Civil Procedure Code and in a case where it is sought to apply the constructive principle of *res judicata* against the defendant, the omission of the Court to make such a declaration as enjoined by the Code is fatal "

That judgment was again reiterated by Pakenham Walsh, J, in *Ramaswami Chettiar* v. *Chinnappa Chetti*[1] It was also argued that in any event the second defendant-respondent had notice of the subsequent proceedings relating to sale where there was a personal service by reason of the affixture of the thumb impression in the notice issued on the application for leave to bid (E A No. 1080 of 1937) and as regards the notice of the settlement of the sale proclamation, but I do not think that notice was sufficient as it was not open to her at this stage to raise an objection that the properties that are sought to be sold are not liable to be proceeded against. (Vide *Chidambaram Chetti* v *Theivanai Ammal*[2])

The other contention of the appellant that in any event E P No 1165 of 1940 filed by the appellant for attachment of the usufructuary mortgage debt in which notice was affixed and where there was a declaration that the service was sufficient, would be a bar to the raising of the plea that the properties which are the subject-matter of the present execution petition are not liable to be attached The simple answer to that objection is that the properties that were sought to be attached and sold in E P No 1165 of 1940 are different from the one in the present execution petition The issue that could be said to be *res judicata* is whether the property belonged to the first defendant or not and the property being different it cannot be said that the decision in respect of ownership of one property could be a decision with regard to the ownership of a different property.

In the result, the appeal is dismissed with costs.

V P.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE SATYANARAYANA RAO AND MR JUSTICE VISWANATHA SASTRI

C T Ramanathan Chettiar *Appellant**

v

A R L N L N. Ramanathan Chettiar *Respondent*

Hindu law—Joint family—Ancestral banking business—Manager—Debts incurred by—Binding on coparceners—Division in status—Effect—Partition of some properties—If implies division in status

In the case of a family carrying on an ancestral banking business, receiving deposits of money from customers and borrowing money on negotiable instruments, are incidental to the business and would constitute necessities of the family, though they would not be such in the case of a non-trading family The business is presumably conducted on the credit of the whole of the family property and the manager of the family business has power to pledge the credit of the family for the ordinary purposes of the business which, in the case of a banking business, would include the receiving of deposits from customers and borrowing of monies In the case of Nattukkottai Chettiars no distinction can be made between their family property and their trading assets in the absence of a specific contract to that effect between the members of the family

Chidambaram Chettiar v *Ramaswami Chettiar*, (1914) 27 M L J 631, *Arunachalam Chetty* v *Valliappa Chetty*, (1914) 27 M L J 654 and *Bank of Bengal* v *Ramanatham Chetty*, (1915) M W N 180, relied on

In respect of a debt binding on the family the manager can give joint family property as security

But after a partition the power of the father or the manager to represent the other members of the family is at an end and a decree passed against the manager after partition cannot be executed against the divided members of the family who are neither actual parties, nor on any theory of representation could be deemed to have been parties to the suit or decree

Venkatanarayana v *Somaraju*, (1937) 2 M L J 251 I L R 1937 Mad 880 (F B), commented upon. *Sat Narain* v *Kishendas*, (1936) 71 M L J 812 L R 63 I A 384 · I L R 17 Lah 644 (P C) and *Sundar Singh Majithia* v *Commissioner of Income-tax, United and Central Provinces*, (1942) 2 M.L J. 691 I.L R. 1943 Mad 248 (F B), relied on

A junior member of the family after partition is not in the same position as a partner of a dissolved firm and the power of the erstwhile manager to incur liabilities so as to bind the other members is a limited power to be exercised for the preservation of the business as an asset of the family pending a final partition

1 (1933) 64 M L.J. 637 2. (1923) 45 M L J 346 I L R 46 Mad 768 (F B.).

*Appeal No 43 of 1946 27th July, 1949

An unregistered *Cadjan muri* which *ex facie* purports to embody a division by metes and bounds of a house worth some lakhs of rupees is inadmissible to prove a division.

Ramayya v *Achamma*, (1944) 2 M.L.J. 164. I.L.R. 1945 Mad. 160 (F.B.), relied on.

The mere fact that the members of a joint Hindu family divide among themselves a portion of the family assets, does not by itself create or imply a division in status among them. Such intention to become divided in status must appear from the terms of the document relied upon as effecting the division.

Appavu v *Manikkam*, (1945) 2 M.L.J. 504. I.L.R. 1946 Mad. 557, relied on.

[In the present case it was found that there was no division and therefore a sale in execution of the family property was binding on the coparcener's share.]

Appeal against the decree of the Court of the Subordinate Judge, Devakottai, dated 31st August, 1945, in O.S. No. 37 of 1944.

R. Gopalaswami Ayyangar for Appellant.

T. L. Venkatarama Aiyar for Respondent.

The Judgment of the Court was delivered by

Viswanatha Sastri, J.—The plaintiff appeals against the decree of the Court of the Subordinate Judge of Devakottai, dismissing his suit for declaration of his title to a quarter share of a large residential house in Devakottai and for setting aside an adverse order of the Subordinate Judge dated 26th March, 1943, in E.A. No. 510 of 1942. This litigation has had an antecedent history to which a brief reference is necessary in order to appreciate the contentions in this appeal.

The parties to the suit belong to the Nattukottai Chettiar community. Ramanathan Chettiar the grandfather of the plaintiff was an affluent person owning considerable property and a money-lending business conducted through agents in several places in South India and also in Rangoon and Saigon, with the vilasam of "RM. M. ST." There was a branch of the business at Madras which received deposits, lent out monies and cashed hundies. Ramanathan Chettiar died leaving two sons, Chidambaram Chettiar and Vairavan Chettiar, on whom the entire family properties devolved by survivorship. The banking business was continued by his two sons till 1907 when Chidambaram Chettiar died and thereafter by Vairavan Chettiar himself till his death in 1937. Chidambaram Chettiar left a widow Valliammai. Vairavan Chettiar had an only son, the plaintiff, whom he gave away in adoption to Valliammai in 1924 when he was about 2 years of age. The factum and validity of this adoption are not in dispute. Vairavan Chettiar died on 22nd December, 1937, leaving two widows surviving him. Among the family properties of RM. M. ST. was a substantial and costly residential building in Devakottai completed in 1925 at a cost of Rs. 3 to 5 lakhs, according to the different estimates given. The RM. M. ST. family consisting of Vairavan Chettiar and the plaintiff, who by reason of his adoption to Chidambaram Chettiar became the nephew of his natural father, Vairavan Chettiar, owned a half share in the building, two other families with the respective vilasams of "L. A. R." and "M. L. M." each owning quarter share. The plaintiff claims in his own right one-fourth share out of the house which belonged to the RM. M. ST. family and this claim is the subject of the present litigation.

The defendant claims to have purchased the entire half share of the RM. M. ST. family in the building above referred to, including the plaintiff's share, in execution of the decree in C.S. No. 381 of 1929 on the file of this Court, obtained by him against Vairavan Chettiar. The genesis of the defendant's claim is as follows.

On 6th July, 1900, a sum of Rs. 7,000 representing the stridhana money of the defendant's mother was deposited in the banking business of RM. M. ST. Ramanathan Chettiar, the grandfather of the plaintiff, the said sum carrying interest at the Madras nadapu rate. The hundi evidencing this deposit is Ex. D-3. On 13th April, 1923, when Ramanathan Chettiar's son, Vairavan Chettiar was managing the banking business, the deposit in question had swelled with accretions of interest to Rs. 51,185-1-0 as shown by Vairavan Chettiar's letter, Ex. D-3 (*a*) dated 11th September, 1923. This sum was credited in the RM. M. ST. accounts to the defendant, his mother having died leaving him as her heir. On 21st October,

1925, Vairavan Chettiar conveyed some of the immoveable properties of the family under Ex. D-1 for Rs 32,500 to the defendant in partial discharge of the amount due to him The balance of the deposit remained unpaid and the defendant sued RM. M. ST. Vairavan Chettiar in C. S No 381 of 1929 on the file of this Court and obtained a decree originally passed *ex parte* against Vairavan Chettiar, but subsequently set aside on Vairavan Chettiar furnishing security of the half share of the family in the house, the subject of the present dispute, to the extent of Rs. 40,000 The suit C. S. No 381 of 1929 was eventually decreed by consent on 29th November, 1932, against Vairavan Chettiar for Rs 40,000 with subsequent interest at 6 per cent from 29th Nevember, 1933, till realisation. It was a term of this consent decree that the half share of the house which had been given as security by Vairavan Chettiar in connection with his application to set aside the *ex parte* decree should continue as security for the realisation of the amount decreed by consent as aforesaid

Vairavan Chettiar died, as already stated, on 22nd December, 1937. In E. P. No. 253 of 1938, the defendant applied to this Court for execution of his decree in C. S No. 381 of 1929, by bringing on record the plaintiff as well as the two widows of Vairavan Chettiar as his legal representatives, and for transmission of the decree to the Court of the Subordinate Judge, Devakottai, for execution against the half share of the house given as security under the decree. The plaintiff objected to his being brought on record on the ground that he became divided from Viravan Chettiar, his uncle, before the date of the suit, C S. No. 381 of 1929, and that his quarter share of the house was unaffected by the security created by the consent decree and could not therefore be sold in execution of the decree against Vairavan Chettiar. The Master overruled this objection, brought the plaintiff on record as a legal representative of the deceased Vairavan Chettiar along with his two widows and ordered transmission of the decree to the Court of the Subordinate Judge, Devakottai, for execution. The order of the Master is Ex. D-7 dated 4th September, 1941. An appeal filed by the plaintiff from the order of the Master to this Court was withdrawn by him without prejudice to his raising his contentions in a separate suit, Ex. P-39, dated 12th January, 1942 The defendant thereupon filed E P No 94 of 1942 in the Court of the Subordinate Judge, Devakottai, for sale of a half share of the house given as security under the consent decree. The plaintiff filed E. A. No. 510 of 1942, raising the same objections as he did before the Master. The learned Subordinate Judge overruled the objection of the plaintiff to the execution of the decree and observed at the same time that the remedy of the plaintiff was by way of a suit for a declaration that the consent decree passed by this Court did not affect his interest in the property given as security by Vairavan Chettiar. *Vide* Ex. P-1 dated 26th March, 1943. The plaintiff preferred C. M. A No 404 of 1943 to this Court against the order of the Subordinate Judge but withdrew it and allowed it to be dismissed—*see* Ex P-1 (*b*) dated 12th January, 1944.

On 14th March, 1944, the present suit was filed for setting aside the order of the Subordinate Judge of Devakottai in E. A. No. 510 of 1942 dated 26th March, 1943, Ex P-1 and for declaring that the plaintiff's quarter share in the house given as security by Vairavan Chettiar under the decree in C. S No. 381 of 1929 was not liable to be sold in execution thereof. The basis of the plaintiff's claim as set out in paragraphs 6 and 10 of the plaint is that he and Vairavan Chettiar became divided in status as early as 13th August, 1926, and that he was in separate possession and enjoyment of a portion of the suit house which had been allotted as and for his one-fourth share The consent decree against Vairavan Chettiar in C. S No 381 of 1929, in so far as it purported to charge the plaintiff's share of the house at the instance of Vairavan Chettiar, could not legally affect his interest, he being a divided nephew of Vairavan Chettiar at the time. The plaintiff's case further is that the decree in question was passed against Vairavan Chettiar personally in respect of his own individual liability and therefore the plaintiff's share could not be sold in execution of the decree against Vairavan Chettiar even on the assumption that there had been no division between Vairavan Chettiar and himself.

In this Court, the learned counsel for the plaintiff raised a further contention that there was no necessity for Vairavan Chettiar to give any security for the debt due to the defendant in as much as the debt could have been easily discharged from the funds of the money-lending business and therefore the plaintiff's share of the property was not affected by the charge created by Vairavan Chettiar

It will be apparent from the preceding narration of facts that the plaintiff belongs to a Nattukottai Chettiar family which had been carrying on money-lending business for a long time, certainly from the days of his grandfather, Ramanathan Chettiar with the vilasam of RM M ST The initial deposit of the money now claimed by the defendant was made with this Ramanathan Chettiar in 1900. After the death of Ramanathan Chettiar, his two sons, Chidambaram Chettiar and Vairavan Chettiar carried on money-lending business of RM M ST. till 1907 when Chidambaram Chettier died. Thereafter, Vairavan Chettiar, the natural father of the plaintiff and his uncle by adoption, carried on the family money-lending business till his death in 1937.

In 1925 Vairavan Chettiar paid off a portion of the debt due to the defendant by disposing of the immoveable properties under Ex D-1, for Rs 32,500. It was the balance of the deposit that was claimed by the defendant in C. S. No. 381 of 1929 against Vairavan Chettiar and it was in respect of this balance that a consent decree for Rs 40,000 was passed. If the plaintiff and Vairavan Chettiar were undivided and the decree in C S No 381 of 1929 was passed in respect of a debt binding on the family, it is clear that the plaintiff's share of the family properties would be liable for the debt even though the decree was one against Vairavan Chettiar The debt in question would be an ancestral debt, contracted in 1900 by the grandfather of the plaintiff, though renewed subsequently in 1928 by Vairavan Chettiar If the family remained undivided, the plaintiff would be under a pious obligation to discharge the debt from the ancestral family properties, inclusive of his share therein Even assuming, as argued by Mr. Gopalaswami Iyengar for the appellant, that the defendant's money must be deemed to have been deposited afresh with the Madras branch of RM M. ST. in 1928, when Vairavan Chettiar was in management of the business, the plaintiff's share of the joint family property would still be liable for the debt and could be proceeded against in execution of the decree against Vairavan Chettiar The banking business being an ancestral business carried on by the managers of the joint family for the time being, Ramanathan Chettiar, Chidambaram Chettiar and Vairavan Chettiar in succession, the plaintiff as an undivided junior member of the family, would be liable for debts incurred by the manager in the course of the business. In the case of a family carrying on an ancestral banking business, receiving deposits of money from customers and borrowing money on negotiable instruments, are incidental to the business and would constitute necessities of the family, though they would not be such in the case of a non-trading family. Credit is the essence of a banking business and the necessity for receiving deposits and borrowing monies arises from the very nature and extent of such business. The business is presumably conducted on the credit of the whole of the family property and the manager of the family business has power to pledge the credit of the family for the ordinary purposes of the business which, in the case of a banking business, would include the receiving of deposits from customers and borrowing of monies. In the case of Nattukottai Chettiars, it has been held by this Court that no distinction can be made between their family property and their trading assets in the absence of a specific contract to that effect between the members of the family, *Chidambaram Chetty* v *Ramaswami Chettiar*[1], *Arunachalam Chetty* v. *Vellappa Chetty*[2], *Bank of Bengal* v. *Ramanathan Chetti*[3]. Even though the plaintiff was a minor in 1928, when Vairavan Chettiar renewed the deposit of the defendant, the plaintiff's share of the entire family property would be liable for the debt due to the defendant from the RM. M. ST. banking business, managed by Vairavan Chettiar the business being an ancestral one,

1. (1914) 27 M L J 631
2 (1914) 27 M L J 654
3 (1915) M W.N. 180.

presumed to be carried on on the credit of the entire family property. As observed in *Muthayya Pillai* v *Tinnevelly South Indian Bank*[1],

"The family property is swelled by the profits earned in the business and it would be not only unjust to confine liability to the extent of the appellant's share in the assets of the business but it would be impossible in a case of this nature to say what is the extent of the property embarked on the business" See also *Meyyappa Chettiar* v *Palaniappa Chettiar*[2].

Another contention of the learned advocate for the appellant is that the claim in C S No 381 of 1929 was against Vairavan Chettiar personally under the summary procedure and therefore he could not validly charge the minor's share of the property under the consent decree, even though they were members of an undivided family. Reliance is placed for this contention on the decision in *Maruthamuthu Naicker* v. *Kadir Baksha Rowther*[3] The short answer to this argument is that the suit, C S No. 381 of 1929, was one for the recovery of a debt and not a suit on a promissory note If the debt was one binding on the joint family, Vairavan Chettiar was justified in giving the share of the plaintiff in the suit house as security. Yet another contention of the appellant is that Vairavan Chettiar might have paid off the debt from the cash assets of the family and need not have encumbered the family estate by giving it as a security for the debt This plea was not put forward in the plaint and was not even attempted to be substantiated by anything appearing in the evidence The RM M ST accounts, which would disclose the available fluid assets of the family in 1932 have not been filed This is a mere speculative argument devoid of any basis It will be shown later in the course of this judgment that even in 1926, the creditors of the family began to press for payment and Vairavan Chettiar found it impossible to pay all of them in cash He had to satisfy some of his creditors by conveying considerable portions of the family properties in their favour Suits were also filed against Vairavan Chettiar by a number of creditors during the years 1932 to 1935 for large sums of money, the largest decree-holder being the Imperial Bank of India, whose decree amounting to Rs 3 lakhs, was satisfied by a conveyance of family lands in favour of the bank under Ex P-5 dated 30th December, 1931 The suggestion that in 1932, Vairavan Chettiar could have discharged the debt due to the defendant from the cash assets of the family is therefore futile By furnishing the security of the house, Vairavan Chettiar got a substantial reduction of the debt due from him to the defendant and also obtained a year's time for payment without liability for interest If, therefore, the plaintiff and Vairavan Chettiar were undivided, the plaintiff cannot escape liability on the grounds stated above

The plaintiff therefore naturally concentrated his attention on issues Nos. 1 and 2 which raised the question of a division between him and Vairavan Chettiar in 1926 Before we consider this issue, it is desirable to deal shortly with the arguments of Mr T L Venkatarama Aiyar, the learned counsel for the respondent, to the effect that even if the division in status set up by the plaintiff were true, he would still be bound by the security given by Vairavan Chettiar and his share of the house could be validly sold in execution of the consent decree in asmuchas the debt is one binding on the family. In *Venkatanarayana* v. *Somaraju*[4] two of the learned Judges (Venkatasubba Rao and Venkataramana Rao, JJ) were of the opinion that if, pending a suit in respect of a money claim against a person who happened to be the manager of a joint Hindu family, a partition is effected among the members of the family, the money decree passed in the suit against the quandom manager could be executed against the shares of the family property allotted by the partition to the junior members, provided the debt was one binding on the family. The weight of authority, both before and after the decision above referred to in which this opinion was given, is against this view. After a partition the power of the father or the manager to represent the other members of the family is at an end and it is difficult to see how the decree passed against the manager after partition can be executed against the divided members of the family who

1. (1916) 5 L W 341
2. (1947) 2 M L J 589 at 594
3. (1938) 1 M L J 378 I L R 1938 Mad 568 (F B)
4. (1937) 2 M L J 251 I L R. 1937 Mad. 880 (F B)

are neither actual parties, nor on any theory of representation could be deemed to have been parties to the suit or decree. The disposing power of the father or manager over the shares of the other members for satisfying debts binding on the family having come to an end by the division (see *Satnarayan* v. *Sri Kishandas*[1]), it is difficult to see how a Court executing the decree passed against the quandom manager of the family can sell the shares of the junior members which the judgment-debtor himself could not have sold Reliance cannot now be placed on the opinion of the two learned Judges in *Venkatanarayana* v *Somaraju*[2], in view of the observations of the later Full Bench reported in *Nagi Reddi* v. *Somappa*[3] We therefore hold that if the division in status alleged by the plaintiff to have taken place were true, it is not open to the defendant to sell the plaintiff's share of the family house in execution of the decree in C S. No. 381 of 1929 which was passed only against Vairavan Chettiar. See also *Kuppan Chettiar* v *Masa Goundan*[4], *Official Receiver, Guntur* v *Seshayya*[5], *Rangaswami Goundan* v. *Kandaswami Goundan*[6] The fact that Vairavan Chettiar consented to a charge being created on the plaintiff's share of the house as part of the decree in C S. No. 381 of 1929 would not make any difference.

Mr. T. L. Venkatarama Aiyar, however, argued that even though there was a division in status in 1926, it was within the authority of Vairavan Chettiar to conduct the banking business of RM M. ST. on behalf of the family, to collect and conserve its assets to discharge its liabilities and in the course of such management to alienate or give a mortgage over the family property, including the share of the plaintiff in order to secure a debt incurred in the course of the business He relied on the analogy furnished by sections 45 and 47 of the Indian Partnership Act which substantially reproduced the corresponding provisions of the English Act and on the decision in In re *Clough* : *Bradford Commercial Banking Co.* v *Cure*[7] and In re *Bourne* : *Bourne* v *Bourne*[8]. The decision of North, J., in the first of the two cases above referred to went on this line of reasoning, namely, that the surviving partner could have paid off out of the assets of the firm any existing debt and therefore he could equally well satisfy any creditor by giving a security upon a part of the assets in the course and for the purpose of winding up the firm In the second of the two cases cited above, Romer, L J., observed as follows :

"The power of the surviving partner of course extends to a sale , and it also extends to giving a mortgage on any particular part of the property belonging to the partnership to secure in good faith one of the partnership debts "

This statement of the law considered in the context in which it occurs, means that the transaction is incidental to and for the purpose of winding up of the partnership. It is not permissible to give it any wider meaning or a general application to analogous cases. In the case of a dissolved partnership, it is settled law that the partners are entitled to an account of the assets of the partnership property free from debts secured or unsecured incurred by the managing partner except in so far as those were incurred for the purpose of winding up or so far as the creditors *bona fide* and reasonably believed that they were so incurred. See *Govindoss* v *Official Assignee of Madras*[9] We need hardly point out that the Partnership Act as such has no application to a joint Hindu family business and a trade or business is like any other asset of the joint family subject to the rules of Hindu law and the limitations on the powers of a manager which arise as a consequence of a partition in the family. As we have already pointed out, partition puts an end to the power of the manager of the family to alienate the interests of the junior members in the family properties even to the extent of discharging pre-partition debts of the family. If we accept Mr. Venkatarama Aiyar's arguments *in toto*, it would result in the recognition of

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1. (1936) 71 M L J 812 : L R 63 I A. 384 : I.L R. 17 Lah 644 (P C)
2. (1937) 2 M L J 251 I L R 1937 Mad 880 (F B)
3. (1942) 2 M L J 691 I L R 1943 Mad 248 (F B)
4. (1937) 1 M L J. 249 I L.R 1937 Mad 1004
5. (1940) 2 M L J 860
6. (1942) 2 M L J. 361.
7. (1885) 31 Ch D 324.
8. (1906) 2 Ch 427
9. (1934) 67 M L J 167 : L R 61 I A 257 : I L R. 57 Mad 931 (P.C)

a power in *A* to sell *B's* property for a debt for which both *A* and *B* might be liable without reference to *B* or even against his wishes. Such a power can be exercised only if sanctioned by some statutory provision or well-recognised rule of Hindu law and not on grounds of mere convenience or expediency. Mr Venkatarama Aiyar, however, states that the strict rule of Hindu law must be and has been considerably modified to suit the exigencies of modern business and to protect the interests of creditors *bona fide* dealing with the manager of as Hindu trading family. We find it difficult to grasp with precision what, according to him, are the metes and bounds of the field within which an ex-manager of a family business can act so as to bind the interests of the other members.

Reliance has been placed on two recent decisions of this Court reported in *Ramaswami Chettiar* v. *Srinivasa Iyer*[1] and *Ramachandrappa* v *Narayanappa*[2]. Both these decisions recognise that it is not possible to apply the principles of the law of partnership to a joint family business and that, apart from any question of estoppel by holding out, a junior member of the family after partition is not in the same position as a partner of a dissolved firm Dealing with the position of the manager of a joint family business *vis-a-vis* the junior members after partition, Venkatasubba Rao, O.C J , in the first of the two cases referred to above, observed :

"His (manager's) powers are not those of a manager of a joint family but of a co-owner or a tenant-in-common in management In other words, on division, the right he possesses, is merely to preserve the trade so that it may not, as an item of the family property, be destroyed If, for the purpose of preserving it, it becomes necessary to enter into fresh engagements, he may do so, but the object must be the preservation of the trade and not the continuing of it"

In the second of the two cases above quoted, Varadachariar, J., states the position thus :

"As long as the family remains joint, the managing member enjoyed under the law, and not by any contract or arrangement, certain powers in respect of the carrying on of the family business ; but on the disruption of joint status, these powers so far as they rested only on his status as managing member must be held to come to an end It is true that it may be some time before the properties are actually divided between the members but in the meanwhile, it is the duty of the person in possession or management merely to preserve the estate and not to enter into new transactions unless he is prepared to do so on his own responsibility or the new transactions are necessary merely to fulfil obligations already contracted or to prevent loss to the estate "

It is only to a limited extent therefore that the authority of the manager of a joint family business after partition, to enter into transactions binding his erstwhile coparceners, has been recognised by these two decisions It may well be that in this corner of the law, it is not possible to lay down with precision an exact and exhaustive rule applicable to every case that may arise The learned Judges who decided the two cases did not refer to any statutory provision in support of the limited authority they conceded to the manager of a joint family business after a division in status and pending the final partition of the family assets and liabilities In the interests of the members of the family and for the preservation of the business as an asset of the family pending a final partition, a limited power to incur liabilities so as to bind the other members, has, no doubt, been conceded to an ertswhile manager of the family, either as a rule of Hindu law or as a rule of justice, equity and good conscience. If the manager has himself incurred a liability or expended his own monies for the preservation of the business as an asset of the family, pending a final partition, he can claim reimbursement from the other members of the family under section 70 of the Contract Act or claim credit for such expenditure at the time of taking accounts with a view to effect a final partition. It is one thing for a tenant-in-common to incur debts or pecuniary obligations for and on behalf of his co-tenants so as to entitle him to claim reimbursement but a quite different thing for him to alienate the property of his co-tenants We are not prepared to extend the rule recognised by the two decisions above cited and to uphold an alienation by way of mortgage of immoveable properties belonging to the family by a manager after partition, so as to bind the interests of the junior members of the family even though the debt to secure

1 (1935) 70 M.L J 214

2. A I.R 1940 Mad. 339.

which the alienation was made, might have been realisable from the entire joint family property at the instance of the creditor in a suit to which the junior members are made parties

In this case, there is nothing to show that the security given by Vairavan Chettiar in 1932 was for the preservation of the family business as an asset of the family As early as 1926, the business had become unprofitable and later on suits were filed at the instance of several creditors for large sums of money. There was therefore no possibility in 1932 of preserving the business as a valuable asset of the family and the charge created by Vairavan Chettiar under the decree in C S. No. 381 of 1929 could not be justified on this principle.

One further legal contention of Mr. Venkatarama Aiyar remains now to be noticed. The plaintiff relies on a cadjan muri, Ex. P-2, dated 13th August, 1926, to prove his case of a division in status The muri purports to allot different portions of the house which forms the subject of this litigation to the plaintiff and Vairavan Chettiar respectively The genuineness of this muri is seriously disputed and will be considered later in the course of this judgment Mr. Venkatarama Aiyar states that even assuming the muri, Ex P-2 to be genuine, it cannot be received in evidence for the purpose of proving a partition of the house, the document being unregistered and the property sought to be divided thereunder being worth some lakhs of rupees Though Ex P-2 recites the prior drawing of lots, it embodies the terms of the partition arrangement, including the allotment of different portions of the house to the two shares and the covenants entered into between them regarding the upkeep of the house and the sharing of the common expenditure. In our view, Ex P-2 cannot be construed as containing merely recitals of an anterior and completed partition *Ex facie*, it purports to embody a division by metes and bounds and being unregistered, is inadmissible to prove a division, vide *Ramayya* v *Achamma*[1] Mr. Gopalaswami Aiyangar for the appellant did not controvert this position It has throughout been the case for the plaintiff that there was a division in status, total and complete, with reference to the entire estate and not merely with reference to the house now in question In the course of his reply, however, Mr Gopalaswami Aiyangar sought to develop an argument that Ex P-2 would be available to prove a division in status between the plaintiff and Vairavan Chettiar *quoad* the house dealt with by the document, though not a division by metes and bounds This argument was based on the decision in *Subba Rao* v *Mahalakshmamma*[2] The view of Sadasiva Aiyar, J , in *Pothi Naicken* v. *Naganna Naicken*[3], on which reliance was placed by Mr. Venkatarama Aiyar, for the position that an unregistered partition deed is inoperative to effect a severance in status even though there was an express declaration to that effect in the deed, must be considered to have been overruled by the subsequent decisions of this Court as observed in *Subba Rao* v *Mahalakshmamma*[2] Mr. Venkatarama Aiyar contended as a matter of law that a member of a joint family cannot be divided in status with reference to a portion of the joint family property and remain undivided as regards the rest. He referred to a division in status brought about by a unilateral declaration of intention to become divided and a preliminary decree for partition, which operate and can only operate with reference to the entire family estate. A man cannot be divided in status as to a part of the family property and undivided as to the rest So ran the argument It was said that while there could be a partition by metes and bounds of a portion of the joint family property by mutual agreement, leaving the remaining property to retain its character of joint family property, the same principle should not be applied to a division in status which is a matter of status affecting the relationship of a member of the family to the entire family estate. No authority was cited in support of this proposition Such authority, however, as we have been able to find is against this contention To start with, there is the oft-quoted passage in *Appovier* v *Ramasubba Aiyan*[4],

1. (1944) 2 M L J 164 I L R 1945 Mad 160 (F B)
2. (1930) 59 M.L J 558 I.L R 54 Mad. 27.
3 (1915) 30 M L J 62
4 (1866) 11 M I A 75

"But if the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain defined shares, then the character of an undivided property and joint enjoyment is taken away *from the subject-matter so agreed to be dealt with*, and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided"

In *Ramalinga Annavi* v. *Narayana Annavi*[1], in a passage omitted from the report of the case in the Indian Appeals and the Indian Law Reports, the Judicial Committee observed,

"It is open to the members of a joint family to make a division and a severance of interest in respect of a part of the joint estate whilst retaining their status as a joint family and holding the rest as the properties of a joint undivided family"

In a later case, the Judicial Committee observed that it was open to the members of a joint family to enter into a partnership in respect of a portion of the joint family property—a sugar factory in that case—after dividing that item into specific shares. There was no division by metes and bounds of the factory in that case *Sundar Singh Majithia* v. *Commissioner of Income-tax, United and Central Provinces*[2]. If there can be a partial partition by metes and bounds in respect of a portion of the joint family property by mutual agreement, leaving the rest of the family property joint and undivided, there is no reason why by mutual agreement, the members of the family could not become divided in status with reference to that portion ; in other words, there is no reason why they could not agree to hold that portion in defined shares either because a division by metes and bounds is not feasible or profitable or for other reasons But the mere fact that the members of a joint Hindu family divide among themselves a portion of the family assets, does not by itself create or imply a division in status among them Such intention to become divided in status must appear from the terms of the document relied upon as effecting the division—vide *Appavu* v *Manikkam*[3].

In the present case, Ex P-2 does not disclose any intention on the part of the parties thereto to become divided in status The usual clause as to the cesser of proprietary interest and the continuance of blood-relationship alone, found in vernacular documents of partition, is absent in Ex P-2 which merely purports to allot different portions of the house to the plaintiff and Vairavan Chettiar and does not refer to the status of the members of the family There was no apparent reason why the plaintiff, an infant of 4 years of age and the only son of Vairavan Chettiar, should have thought of a division in status in 1926 The learned Subordinate Judge observed that the mere fact of the plaintiff living with his adoptive mother Valliammai in one portion of the house, his natural father, Vairavan Chettiar, occupying another portion, does not imply or involve a division in status, having regard to the habits of Nattukottai Chettiar families

[Then their lordships deal with the question whether there was a division in status in 1926 between the plaintiff and Vairavan Chettiar and conclude]

For the reasons above narrated, we agree with the lower Court in its finding on issues Nos. 1 and 2 We hold that it is unsafe to act upon Ex P-2 as an authentic record of a partition between the plaintiff and Vairavan Chettiar We find that there was no division in status between the plaintiff and Vairavan Chettiar. In this view, the defendant has secured a valid title to the half share in the house purchased by him in execution of the decree in C. S No 381 of 1929 and the plaintiff is bound by the Court sale This conclusion renders it unnecessary to consider at length the arguments of Mr Venkatarama Aiyar as regards the effect of the order of Mr. Justice Lakshmana Rao, in E P No. 253 of 1938 and of the Court of the Subordinate Judge, Devakottai, in E A No. 510 of 1942 We might observe that there was no decision on the points now debated either in the

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1 (1922) 43 M L J 428 L R 49 I A 168 : I.L R. 45 Mad 489 (P C)
2 (1942) 2 M L J 761 · L.R. 69 I.A. 119 : I L R. 1943 All 69 (P C)
3. (1945) 2 M L J. 504 · I L R 1946 Mad. 557.

order of Mr. Justice Lakshmana Rao or of the Subordinate Judge of Devakottai and it is difficult to hold that the present suit is barred by *res judicata*.

In the result, we direct that the appeal be dismissed with costs

K S. *Appeal dismissed.*

[PRIVY COUNCIL]

(On appeal from the High Court of Judicature at Calcutta.)

PRESENT.—LORD SIMONDS, LORD RADCLIFFE AND SIR MALCOLM MAGNAGHTEN.

Durga Prosad Chamria and another . *Appellants* *

v.

Sewkishendas Bhattar and others . *Respondents*

Arbitration—Award—Power of Court to interfere with—Error on points of law specifically referred to arbitrator—Reference to unregistered documents in the award—If and when an error of law, appearing on the face of the record—Indefiniteness of award—Test.

Where points of law have been specifically referred to an arbitrator and his award is alleged to be vitiated by his erroneous decision in regard to them, the Court would not interfere with the award even if the Court itself would have taken a different view of the points had they been before it

In re *King & Duveen*, (1913) 2 K B 32 and *F R Absalom, Ltd* v *Great West (London) Garden Village Society*, (1933) A C 592 relied on.

Where the agreed terms of reference are such that an arbitrator acting under them is dispensed from observing legal rules of evidence, and many of the ordinary rules of the conduct of a trial, a mere reference in the award to certain unregistered documents is insufficient to establish that it was wrong in law to refer to them Unless those who attack the award could demonstrate affirmatively that the law was departed from by the arbitrator in noticing the existence of those documents, they could not succeed in establishing an error appearing on the face of the award

It is not enough to detect a possible inconsistency in the terms of an award to enable a Court to set it aside or remit it It must be "so indefinite as to be incapable of execution"

D. Foot and *R. Millner* for Appellants.

Sir T. Strangman, L M. Jopling for Respondent No. 1

R Parikh for Respondents Nos. 3 and 4.

Their Lordships' Judgment was delivered by

LORD RADCLIFFE.—The purpose of this appeal is to secure the setting aside of an interim award made on 9th January, 1941, by Sir Manmatha Nath Mukherjee, sitting as sole arbitrator appointed by agreement of the parties to a partnership suit. An application by appellant 1 to set aside, remit or modify the award was dismissed by the High Court at Calcutta on 7th March, 1941 and on 10th March, 1941, the same Court made a decree that the award should be carried into effect. An appeal was taken to the High Court in its appellate jurisdiction and on 28th May, 1946, that appeal was dismissed It is from the judgment and orders made on that appeal that the present appeal reaches this Board

It is necessary to make some reference to the facts that led up to the arbitration in order to appreciate what it is of which the appellants complain The arbitration concerned the affairs of a partnership business known as Hurdutroy Chamria or Hurdutroy Chamria & Co The business seems to have been originally in the sole hands of Hurdutroy Chamria, but at any rate by 6th October, 1910, he had made a written agreement associating with him as a partner his nephew Ramprotap Hurdutroy married three times, his third wife being Anardeyi Sethani, whose legal personal representative is respondent 1 in this appeal. By her he had two sons, Radhakissen Chamria, respondent 3 and Motilal Chamria, respondent 4. The appellant Durga Prosad was an adopted son of Hurdutroy, the adoption having been effected during the period of Hurdutroy's first marriage. The appellant Keshardeo Chamria is by birth a son of Durga Prosad but became the adopted son of Amolakchand, Ramprotap's brother, by an adoption effected after Amolakchand's death by his widow Surji, respondent 5.

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*P.C Appeal No 19 of 1948 28th July, 1949.

The crucial year for the purpose of this narrative is the year 1916. On 2nd December of that year Hurdutroy died. It is apparent from what has been said previously that the interest in Hurdutroy Chamria & Co., was divided between his branch of the family and the branch represented by Ramprotap. It is also apparent that there were possibilities of disputes in his own family owing to the presence of an adopted elder son and two younger sons by his third marriage.

Three written agreements were made shortly before Hurdutroy's death in 1916. It is not necessary to give any details of their respective contents but in order to understand the arbitrator's award and the objections made to it it is necessary to state what they were. On 1st October, 1916, Hurdutroy and Ramprotap entered into a new partnership agreement, under which the partnership business was to be continued for 20 years from that date, an 11 annas share going to Hurdutroy and a 5 annas share to Ramprotap. On 16th November, 1916, a memorandum, which has been referred to as "the family settlement," was signed by Anardeyi, and by Hurdutroy as father and guardian of Radhakissen and Motilal, both of whom were then minors. It was witnessed by Ramprotap and it contained certain terms defining the interests of Hurdutroy's family in his various properties, including his share in the partnership business of Hurdutroy Chamria & Co. On the same day another memorandum was drawn up. This, which has been referred to as "the partnership arrangement," was signed by Ramprotap for himself and Surji, by Durga Prosad and by Hurdutroy as father and guardian of Radhakissen and Motilal. Its main purpose was evidently to specify the shares in the partnership business on and from 1st January, 1917. The shares were set out in the usual division of 16 annas, but nothing was allotted to Anardeyi. It also contained the words "Neither Rai Hurdutrai Chamria Bahadur nor his estate will have any interest in the said business of Hurdutroy Chamria & Co."

It is the significance of this partnership arrangement and its true place in the intended dispositions of the members of these two families that have since proved one of the main subjects of dispute between them.

For disputes there certainly have been. Prior to the institution of the suit in which the arbitration took place (1840 of 1930), ther were two partnership suits (120 of 1922 and 2472 of 1928) instituted by Ramprotap and Keshardeo respectively. There was also a suit (367 of 1924) instituted by Motilal to obtain partition of Hurdutroy's estate. For various reasons no final result seems to have emerged from any of these proceedings, but it is to be noted that in Motilal's suit (367 of 1924), to which the appellant Durga Prosad was a party, a decree was made by consent that scheduled terms of settlement should be carried out, and that these terms contained undertakings to abide by the family settlement of 1916; while in Keshardeo's suit (2472 of 1928), to which Durga Prosad, Radhakissen, Motilal and Surji were parties, a decree was made by consent that terms of settlement defining the shares in the partnership business according to the partnership agreement of 1916 should be carried into effect.

Suit 1840 of 1930 was instituted originally by the Official Receiver as receiver appointed by the High Court in Suit No. 367 of 1924. Later Anardeyi was substituted as plaintiff. Its object was to obtain a declaration as to the shares in the partnership business, dissolution and winding up. By March, 1935, sufficient progress had been made in preliminary proceedings to enable Panckridge, J., in the High Court, to frame 12 issues. It will be convenient to defer until later any specific reference to what those issues were. On 29th June, 1937, an order was made by consent of the parties that agreed terms of settlement set out in the schedule to the order should be carried into effect. These terms provided for reference to arbitration of "the outstanding matters in this suit." The primary reference was to three named arbitrators but if they should fail to make a unanimous award or should disagree or refuse or fail to act, then, Sir Manmatha Nath Mukherjee, a retired Judge of the High Court at Calcutta, was appointed to act as sole arbitrator. The terms of settlement conferred upon the arbitrators or arbitrator a list of special enumerated powers, of which it is sufficient to say that they were of

such a nature as to show that the arbitration was not intended to be conducted either according to the ordinary rules that would govern the conduct of an action at law or upon the basis of legal rules as to the admissibility of evidence .

In the result the arbitration fell to the sole arbitrator After a protracted hearing (one of the affidavits in these proceedings speaks of the arguments lasting "for a total length of near about 40 days"), the arbitrator published an interim award on 9th January, 1941 The material parts of the award were as follows .

"(1) I find that by the deed of family settlement dated 16th November, 1916. the plaintiff became co-owner in respect of all properties which belonged to Rai Bahadur Hardutroy Chamria on that date and also that she became a partner in the firm of Hardutroy Chamria & Co , wherein, up to that date, leaving out such shares as outsiders may have had in particular transactions, Hardutroy had 11 annas and Ram Protap 5 annas share as specified in the deed of partnership, dated 6th October, 1910 and 1st October, 1916

(2) I find that the share of the plaintiff as such partner and co-owner as aforesaid was one quarter or a 4 annas share taking Hardut Roy's 11 annas share as 16 annas, in other words, as 11/64ths or 2 annas 9 pies share in the whole

(3) I find that under the deed of family settlement, dated 16th November, 1916, the business of the firm was to be carried on as before up to 31st December, 1916 but under the Memorandum of Terms of Arrangement dated 16th November, 1916, the partners of the said firm of Hardut Roy Chamria & Co , with the exception of the plaintiff, together with some other persons were to carry on as from 1st January, 1917, the business of the said firm under the firm's name and with certain shares for themselves as specified in the said Memorandum I am unable to hold either of these documents invalid on any of the grounds on which their validity has been questioned The two documents, in my opinion, have to be read together

(4) I find that the arrangement last mentioned was binding as amongst the parties thereto but did not purport to disturb the plaintiff's status as a partner in the firm and that the assets which belonged to her as such partner were utilised for carrying on the business thereafter

(5) I find that there has been no dissolution of the firm as it existed in 1916 nor any exclusion of the plaintiff, so as to bar the plaintiff's claim on the ground of limitation

(6) I hold that in order to award reliefs to the plaintiff, accounts should be taken (*a*) To ascertain the value of the assets which the plaintiff came to have by the deed of family settlement, dated 16th November, 1916 , (*b*) To ascertain what profits were earned by the said assets (i) up to 31st December, 1916 and (ii) from 1st January, 1917, till the business was closed

(7) I hold also that for ascertaining the assets as mentioned in paragraph 6 (*a*) above, a 2 annas share of profits should be deducted as belonging to Amlakchand in respect of such business in which he had that share but in respect of such transactions only whereof the origin may be attributed to a point of time when he was alive

(8) I hold that the interests of the parties in the firm of Hardut Roy Chamria & Co , were the following

(*a*) From 1st October, 1916, to 31st December, 1916

Ramprotap's branch	5 annas
Sm Anardei Sethani	Each 4 annas of 11 annas
Durga Prosad	11/64th each
Radhakissen Motilal	2 annas 9 pies each

(*b*) From 1st January, 1917

Sm Anardei Sethani—Returns attributable to her 2 annas 9 pies share in the assets as on 31st December, 1916

Others—as per Memorandum of 16th November, 1916, after deducting the amount due as aforesaid to Sm Anardei Sethani

Other questions arising in the suit will be dealt with hereafter "

Objections to the award were immediately raised by the appellant Durga Prosad, and on 29th January, 1941, he filed a petition asking that it should be set aside, remitted or modified by the High Court. This petition was heard by Edgley, J , exercising the Court's ordinary original civil jurisdiction, and by an order dated 7th March, 1941, he directed that the petition should be dismissed. On 10th March, 1941, a consequential order was made by the same Judge declaring that the award ought to be carried into effect and decreeing accordingly. From these orders Durga Prosad appealed to the High Court in its civil appellate jurisdiction and on 28th May, 1946, Gentle and Das, JJ., dismissed the appeals. Durga Prosad, who is joined in his appeal by Keshardeo, now appeals to His Majesty in Council.

Before the Courts in India numerous grounds were urged as reasons for interfering with the interim award Before their Lordships the appellants' grounds were most clearly compressed into four points which may be stated as follows : (1) That the award ought to be set aside as showing error of law on the face of it, in that (*a*) the arbitrator had admitted as evidence the family settlement and the partnership arrangement of 1916, neither of which, though each related (it was said) to immoveable property, had been registered as required by the Indian Registration Act, and (*b*) the arbitrator ought to have held that Anardeyi's suit was in any event barred by limitation. (2) That the arbitrator in his award had exceeded the scope of the reference (3) That the award was so indefinite as to be incapable of execution

Their Lordships do not take the view that this award ought to be set aside or remitted as showing error of law on the face of it. In their view the reference was of such a nature that the arbitrator must be treated as having been appointed by the parties to decide, amongst others, those specific questions of law which he is now said to have decided wrongly What are the facts ? Before any submission to arbitration had been agreed upon by the parties certain issues had been settled by Mr Justice Panckridge in the High Court in the action that was then pending. Of these issues two may be quoted —

" 1 (*b*) Is the agreement, dated 16th November, 1916, relating to the alleged family settlement valid or admissible in evidence ?

* * * * * *

9 Is the plaintiff's claim or any portion thereof barred by limitation ?"

After these issues had been settled the parties agreed to refer to arbitration " the outstanding matters in the suit ". It is indeed true that at the conclusion of the hearing before the arbitrator he did, in the presence of Counsel for the respective parties, re-frame the issues before him and that in so doing he did not include an issue as to the admissibility in evidence of the 1916 family settlement. It is not suggested that, except for this, the issues as framed by him differed in substance from those originally framed by Mr. Justice Panckridge. It would need a fuller knowledge of the course of the arbitration proceedings than is available in these proceedings to know for certain why he did not at that time think it necessary to frame an issue as to the admissibility in evidence of either or both of the two 1916 documents. He may have been satisfied by that time that all the parties were agreed to regard them as admissible before him or he may, not unreasonably, have supposed that having regard to the very special powers given to him by the terms of reference the admissibility of these documents was a question which he could decide for himself at his discretion However that may be, their Lordships are satisfied that the two points of law as to which it is said that the arbitrator's error vitiates the award were specifically referred to him to decide : and, if this is so, it would be contrary to well-established principles such as are laid down in In re *King and Duveen*[1] and *F R. Absalom, Ltd* v. *Great West (London) Garden Village Society*[2] for a Court of law to interfere with the award even if the Court itself would have taken a different view of either of the points of law had they been before it.

But, apart from this conclusion, which by itself disposes of the first two grounds of objection that were urged upon the Board, their Lordships think it right to add that they do not accept that any error of law does appear on the face of the award in the reference to the family settlement or the partnership arrangement of 1916. Firstly, because the agreed terms of reference were such that an arbitrator acting under them was dispensed from observing legal rules of evidence, as he was dispensed from many of the ordinary rules of the conduct of a trial. Secondly, because the mere reference to these documents in the award is insufficient to establish that it was wrong in law to refer to them. During the course of the long hearing admission may have been made or other methods of proof resorted to that made it strictly proper for the arbitrator to take notice of the fact that the family settle-

1. (1913) 2 K.B. 32 2. (1933) A C 592.

ment or the partnership arrangement was made It is impossible to say. But unless the appellants could demonstrate affirmatively that the law was departed from by the arbitrator in noticing the existence or contents of these documents they could not succeed in any event in establishing an error appearing on the face of the award.

It remains to deal with the other two grounds of appeal It was said that the arbitrator had exceeded the scope of his reference in that he had made a finding in paragraph 1 of his Award that Anardeyi became co-owner in respect of all properties which belonged to Hurdutroy Chamria at 16th November, 1916, and in paragraph 2 had found what that share was Their Lordships are not able to entertain this objection They take the same view as that expressed by the Judges in both the Courts below The arbitrator's references to the plaintiff's interest as co-owner in Hurdutroy Chamria's property are merely introductory to his finding that she enjoyed an aliquot share as a partner in the firm of Hurdutroy Chamria & Co., and are intended to explain the purpose and scope of the deed of family settlement It is paragraph 8 of the award, which contains the arbitrator's findings as to the interest of the parties in the firm at different dates and is confined to their respective interests in that firm, that indicates and limits the scope of the award.

Finally it was urged that the award was so indefinite as to be incapable of execution. Stress was laid on the difficulty of reconciling the basis of the accounts directed by paragraph 6 of the award with the declaration of partnership interests which is contained in paragraph 8. There is a difficulty But it is not enough to detect a possible inconsistency in the terms of an award to enable a Court to set it aside or remit it. It must be " so indefinite as to be incapable of execution ". Their Lordships are unable to perceive any indefiniteness of this kind in the award which, it must be remembered, was framed and published as an interim award. The facts with which the arbitrator was faced were themselves complicated and the conception upon which is founded his interpretation of the respective legal rights of the parties in the assets of the partnership or partnerships is a subtle one. But there is neither indefiniteness nor ambiguity in his holding as to the interests of the parties in the firm of Hurdutroy Chamria & Co , which is set out in paragraph 8, and this is, after all, the essence of the matter Neither of the Courts below has felt itself faced with any difficulty in interpreting the effect of the award and their Lordships do not think that it would be right for them to entertain an appeal to set aside or remit it on this ground

In the result their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs of those of the respondents who have appeared in the appeal.

Solicitors for Appellants . *T L Wilson & Co*

Solicitors for Respondents . *Sanderson Lee & Co.* (for No 1).
Giles & Hunter (for Nos 2 and 3)

V.S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE KRISHNASWAMI NAYUDU

Ayyammal and another . *Appellants**

v.

Thangavelu Padayachi . *Respondent.*

Civil Procedure Code (V of 1908), sections 47 and 151—Delivery of property in contravention of stay order—Application for re-delivery—Appeal against an order on such application—Maintainability—Order for sale obtained with knowledge of order of stay of execution—Fraud on the Court

An application to set aside the sale held in contravention of a stay order is, as between the parties to the suit, an application under section 47, Civil Procedure Code. It cannot be said that

*A. A. A. O No 90 of 1949 6th October, 1949

an application to direct re-delivery of a property delivery of which was ordered in execution of a decree could be said to be not as one relating to execution of a decree In any event it is an application maintainable under section 151 of the Code and an order thereon is appealable

Having been aware of the order of stay, to apply for execution as if there was no stay would amount to practising fraud on the court and an order obtained in such circumstances could not be allowed to stand

An order dismissing the application for stay of execution before the Appellate Court pending disposal of the appeal, on the ground that there was nothing to stay, would not be a bar to the maintainability of an application for re delivery of property delivered

Appeal against the order of the Court of the Subordinate Judge, Trichinopoly, dated 20th April, 1949, in A S No 887 of 1948, preferred against the order of the Court of the District Munsiff, Ariyalur, dated 25th September, 1948, in E A. No. 231 of 1948, in E P No 146 of 1948, in O S No 395 of 1947, on the file of the District Munsiff's Court of Turaiyur

K S. Desikan and *T R Ramachandran* for Appellants

S Amudachari for Respondent.

The Court delivered the following

JUDGMENT —This is an appeal by the plaintiffs in O. S No. 395 of 1947 on the file of the Court of the District Munsiff of Turaiyur against the appellate order in A S No 887 of 1948, directing them to re-deliver possession of a house to the respondent in this appeal The appellants who are plaintiffs in O. S. No. 395 of 1947 obtained a decree for possession of a house on the 8th March, 1948. The defendant-respondent filed an application E. A No. 194 of 1948 on the 15th April, 1948, for stay of execution of the decree pending his filing an appeal and obtaining an order of stay from the appellate Court. Notice of this application was served on the pleader for the plaintiffs, and this application, after several adjournments and after objection raised on behalf of the plaintiffs, was finally heard on the 11th June, 1948, when stay of execution of the decree was granted by the District Munsiff of Turaiyur pending the obtaining of stay from the appellate Court. The decree in O S. No 395 of 1947 was apparently transmitted to the District Munsiff's Court of Ariyalur for execution, and it is not shown to me how the decree was transmitted for execution to a different Munsiff altogether However, it is not material for a consideration of the points raised in this case On 15th June, 1948, the appellants filed an execution petition in the Court of the District Munsiff of Ariyalur for recovery of possession of the suit house in execution of the decree without bringing to the notice of that Court the order of stay passed on the 11th June, 1948, by the Court which passed the decree A delivery order was made on that date and the warrant for delivery of possession was executed on the 19th June, 1948 Plaintiffs recovered possession of the property On the 21st June, 1948, the respondents filed their appeal in the District Court of Tiruchirapalli and applied for stay of the lower Court's decree, and after interim stay was granted a report was called for on the objection of the appellants that in fact the property had been taken possession of in execution, and on the strength of the report of the Commissioner the District Court made the final order on the 28th July, 1948, whereby the stay granted by that Court dated the 29th June, 1948, was made absolute with regard to the portion not delivered, *viz*, one room In other respects the petition was dismissed, as it was found from the report of the Commissioner that excepting one room the rest of the property was delivered over to the appellants The respondent filed an application E A. No 231 of 1948, in the District Munsiff's Court of Ariyalur under sections 47, 144 and 151 of the Civil Procedure Code praying that the Court may be pleased to set aside the order of delivery dated the 19th June, 1948, and order re-delivery of the property. The learned District Munsiff of Ariyalur dismissed the petition observing that if at all, a case was made out for contempt of Court rather than for re-delivery As against that order A. S No. 887 of 1948 was filed by the respondent and the learned Subordinate Judge of Tiruchirapalli allowed the appeal and directed re-delivery. This appeal is against the order of the learned Subordinate Judge.

The learned Counsel for the appellants contends that no appeal lay from the order of the District Munsiff of Ariyalur in E A. No 231 of 1948 as it did not come under any of the provisions, *viz*, sections 47, 144 and 151 of the Code The learned counsel urges that it is not a matter relating to execution, and as such it would not come under section 47, nor was it an application under section 144 as there is no restitution. The lower appellate Court, held, relying on *Sahu Nand Kishore* v *Shadi Ram*[1], *Superior Bank, Ld*, *Muzaffarnagar* v. *Budh Singh*[2] and *Mulraj* v *Buramal*[3], that such an application could come within the scope of section 47 of the Civil Procedure Code. In those cases it was held that where a sale takes place in contravention of the express direction of Court, the Court has inherent power to set aside the sale *suo motu*. It was also held that an application to set aside the sale held in contravention of a stay order is, as between parties to the suit, an application under section 47 of the Civil Procedure Code. I am of opinion that it cannot be said that an application to direct re-delivery of a property delivery of which was ordered in execution of a decree could be said to be not as one relating to the execution of a decree. In any event the application is in my view maintainable under section 151 of the Civil Procedure Code.

The next contention is that the order directing delivery of possession on the 15th June, 1948, by the District Munsiff of Ariyalur was in ignorance of the stay order passed by the District Munsiff of Turaiyur in E A. No. 194 of 1948 and that there was nothing to show that the order of stay of the Turaiyur Court had been communicated to the Ariyalur Court, and in the absence of communication orders passed in ignorance could not be held to be illegal or void. For this position the learned counsel relied on the Full Bench case in *Venkatachalapatirao* v. *Kameswaramma*[4]. There the question referred for opinion of the Full Bench was as follows :

> "Where subsequent to an interim order for stay of execution made by the appellate Court without notice to the decree-holder but before its communication to the Court of First Inastance, an order for attachment has been made by the latter Court, is the order of attachment void and ineffectual as having been made without jurisdiction ?"

The learned Judges of the Full Bench held that the attachment would not be void or ineffectual and would be perfectly legal. In this case the stay of execution was made with notice and the order for delivery of possession was made at the instance of the appellants who must be deemed to have been aware of the stay granted by the Turaiyur Court, they having been parties to the application represented by counsel who took part in the proceedings, and it could not therefore be said that they were unaware of it. Having been aware of the order of stay, to apply for execution as if there was no stay would amount to a conduct which cannot be approved by any Court. Further, it appears to me that the appellants practised a fraud on the Court by failing to disclose the information to the Court and asking for execution, having been aware of the stay already granted by the Court which passed the decree. I do not think that an order obtained under these circumstances could be allowed to stand, and the Court had perfect jurisdiction to vacate such an order To allow such a state of things would be to encourage practices whereby orders of Court are made ineffective by conduct of parties.

It is further contended by the learned counsel for the appellants that the order dismissing in effect the application for stay of execution filed before the appellate Court pending disposal of the appeal excepting in respect of a room, would be a bar to the executing Court in Ariyalur to order re-delivery of possession, and further it was the duty of the respondent to have brought it to the notice of the appellate Court when the application for stay of execution was filed about the fact of delivery having been made and asked for appropriate direction from the appellate Court itself. What the appellate Court was concerned with was whether an application for stay of execution of the decree pending disposal of the appeal could be granted, and when it was pointed out the appellate Court must have felt that there was

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1. A I R 1926 All 457.
2. A I.R. 1924 All 698.
3. (1931) I.L.R. 12 Lah 602.
4. (1917) 33 M.L J 515. I.L R. 41 Mad 151 (F B)

nothing to stay and therefore must have dismissed the application. The proper procedure for the respondent was therefore to have gone to the Court which made a wrong order in ignorance of the order of stay to have it corrected by vacating the same and directing re-delivery I think the order of the District Court dismissing the application for stay of execution cannot be said to be a bar to directing re-delivery of possession

In the result, the appeal is dismissed with costs.

Leave refused.

V. P S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE PANCHAPAKESA AYYAR.

M. Muniswami Naicker . *Petitioner**

v.

P. Kanniappa Naicker .. *Respondent.*

Penal Code (*XLV of* 1860), *section* 504—*Gravamen of offence under*

The gravamen of the offence under section 504 of the Penal Code lies in the utterer provoking the victim by his words to commit an immediate breach of the peace That can only occur if he utters the words in the presence of the victim or has them conveyed to him by letter or messenger, and not in a case where the victim is told about them without the utterer asking them to be conveyed to him

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the First Class Bench of Magistrates, Tiruvottiyur, dated 22nd November, 1947, in S. T. No 333 of 1946.

Askar Ali for *A A. S Mustafa* for Petitioner.

S Venkatachalam for *B C Seshachalam* for Respondent.

The Assistant Public Prosecutor (*A. S Sivakaminathan*) on behalf of the Crown.

The Court made the following

ORDER —This is an interesting case. The First Class Bench Court, Tiruvottiyur, discharged the respondent Kanniappa, in a case under section 504, Indian Penal Code The respondent abused the petitioner in obscene terms stating "May his wife be ravished! May the hydrocelic fellow (the petitioner is said to have hydrocele) be beaten till his hydrocele is blown to bits!" This abuse was uttered in the absence of the petitioner, but the people who heard the abuse, they were members of the Panchayat, conveyed it to the petitioner, Muniswami Naicker, who felt highly put out on hearing their report and felt like committing a breach of the peace but restrained himself with an effort.

The question is whether, in these circumstances, an offence under section 504, Indian Penal Code, was or was not made out *prima facie*. Mr Asker Ali, for the petitioner, urged with great vehemence, that there is really no distinction between a man who utters such words to panchayatdars and asks them to convey the words to the petitioner and a person who sends such insulting words by letter to the petitioner and, that it has been held by the Bombay High Court, in *Silvestervaz* v. *Louis Dias*[1], that if insulting words likely to provoke a person to a breach of the peace are conveyed to him in a letter *by post* the man sending such a letter will be liable under section 504, Indian Penal Code The learned Public Prosecutor agrees, and I too agree But the point here is whether the respondent not only uttered the abuse to the panchayatdars but asked the panchayatdars to convey it to the petitioner If a man stands before another's house, or near where he is, and utters insulting words calculated to provoke a breach of the peace even in his

*Cr R C No 353 of 1948 (Cr R. P No 323 of 1948) — 20th October, 1949.

1. A I.R. 1930 Bom. 120.

absence and wants them to be conveyed to the man he abuses and waits there to see what would happen, he will, in my opinion, be liable under section 504, Indian Penal Code, as such a message, by messengers, stands on even a stronger footing than a message by letter But, as the learned Public Prosecutor has rightly urged, there is no evidence in this case to show that the respondent asked the panchayatdars before whom he uttered the insulting words regarding the petitioner to convey them to the petitioner. Such a request is, in my opinion, essential to make a *prima facie* case, under section 504, Indian Penal Code As that is absent, the discharge was right Mr Asker Ali argues that if insulting words like these are uttered, and are conveyed to the person about whom they are uttered, they are likely to provoke a breach of the peace when the victim is told about them whether the utterer asks them to be conveyed to him or not, and would therefore, amount to an offence under section 504 I cannot agree. If that were so, any defamatory words, like that a man's wife or daughter is immoral, will come under section 504, Indian Penal Code, even if they are uttered a thousand miles away, if they are conveyed to the man by some obliging friends, nor can the distance be a criterion. The gravamen of the offence under section 504, Indian Penal Code, lies in the utterer provoking the victim by his words to commit an immediate breach of the peace. That can only occur if he utters the words in the presence of the victim or has them conveyed to him by letter or messenger Few sane persons will commit a breach of the peace on mere hearsay evidence of abuse, and without even verification. In this case, as there is no evidence to show that the utterer asked the panchayatdars to convey his insulting words, uttered in his absence, to the petitioner, I am of opinion that the lower Court's order discharging the respondent cannot be said to be illegal, incorrect, improper or irregular, or to have occasioned a failure of justice

The petition deserves to be and is hereby dismissed.

V.P S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE HORWILL, AND MR JUSTICE BALAKRISHNA AYYAR.

Anumolu Tirupatirayolu (died) and others *Appellants**

v.

Kaluri Venkata Subba Rao and others *Respondents*

Madras Agriculturists Relief Act (IV of 1938), *section* 8, *Explanation III (added by the Amending Act XXIII of* 1948)—*Splitting of debt—Continuity of debt—If lost—Scope of Explanation* (iii)—*Notice to Official Receiver of application to scale down debt by insolvent—Necessity*

Where a debt is split up and the debtors execute separate promissory notes for their respective portions of the debt, the continuity of the debt is lost This view of the law as laid down in *Ramasubbier* v *Rama Iyer*, (1941) 1 M L J 39 and *Venkateswarlu* v *Venkataraju*, (1941) 1 M L J 718, is not in any way affected by the new Explanation III added to section 8 of the Madras Agriculturists Relief Act by the Amending Act XXIII of 1948 The purport of the amendment is only to make a debt a continuous one notwithstanding a change in the creditor or debtor It does not purport to affect the law with regard to splitting up of a debt If the Legislature had intended by Explanation III to bring about a change in the law relating to the continuity of a debt after it had been split up, one would have expected the Legislature to have introduced expressions in the amendment which clearly brought about that result

Although notice to the Official Receiver in an application to scale down by an insolvent is desirable, because it will give the Official Receiver an opportunity of seeing that the application is properly prosecuted, yet it is not legally necessary that he should be impleaded or even given notice of the application

Appeal against the decree of the Court of the Subordinate Judge, Guntur, dated 6th April, 1946, in I A No 1284 of 1945, in O S. No 120 of 1931.

V. Rangachari for Appellants

M. S Ramachandra Rao for Respondents

* A. A O. No. 474 of 1946. 25th August, 1949.

The Judgment of the Court was delivered by

Horwill, J.—This is an appeal by the decree-holder in O. S. No. 120 of 1931 against the order of the Principal Subordinate Judge of Guntur scaling down the decree debt in a manner which the appellant considers to be unduly favourable to the judgment-debtor

The point in dispute between the parties is a simple one. A promissory note was executed in renewal of two earlier promissory notes, Exs P-1 and P-2, in which a further sum of Rs. 5,000 was advanced, making a total of Rs. 15,000 due by defendants 1 and 2 and one P Prakasa Rao. On the 12th March, 1931, an arrangement was entered into between the creditor and the debtors whereby Prakasa Rao undertook half the liability under the note, which amounted to Rs. 9,700, and for that amount he executed a mortgage bond in favour of the creditor. The defendants executed the suit promissory note for the other Rs 9,700. The question arising in this appeal is whether we must regard the splitting up of the old debt on the 12th March, 1931, as a creation of two new debts, in which case the 12th March, 1931, will be the earliest date to which the judgment-debtors would be entitled to go back to reopen the decree debt, or we must regard the two new debts as continuations of the old one. A third alternative suggested was that the Rs. 9,700 paid by Prakasa Rao should be regarded as a partial discharge of the debt then existing. In the two last cases, the judgment-debtors would be entitled to go back to the 10th May, 1925, the date of execution of Ex. P-1, the original promissory note

We consider that this question is settled by authority In *Ramasubbier* v. *Rama Aiyar*[1], there was a division in the family of the creditors and the debt divided between the two members of the family in unequal shares, the debtors executing fresh promissory notes in favour of the two members of the family. Patanjali Sastri, J , in the judgment delivered by him on behalf of the Bench, stated :

> " it seems to us that the Explanation to section 8 requires that the debt must continue in substance to be the same though the amount and the parties under the various documents given as vouchers for it need not be strictly identical This requirement cannot be regarded as satisfied when the debt is divided among the heirs of the creditor and the debtor executes a separate instrument for a part of the debt in favour of each of such heirs We are therefore of opinion that the promissory notes executed by the debtors separately cannot be said to represent a *renewal of the original debt or its inclusion in fresh documents* within the meaning of the Explanation "

This decision was followed by the same Bench in *Venkateswarlu* v *Venkataraju*[2] and has been the recognised law relating to this type of transaction These two cases were sought to be distinguished from the present case by the circumstance that there the debt was divided between two creditors, whereas here the debt was divided between two debtors We are unable to see how that difference affects the reasoning of the learned Judges in the passage quoted above.

Since these judgments were delivered, Madras Act IV of 1938 has been amended; and it is argued that the new Explanation III to section 8 has effected such a change that *Ramasubbier* v *Rama Aiyar*[1] and *Venkateswarlu* v *Venkataraju*[2] are no longer good law Explanation (iii) now reads

> " Where a debt has been renewed or included in a fresh document executed before or after the commencement of this Act, whether by the same or a different debtor and whether in favour of the same or a different creditor, the principal originally advanced together with such sums, if any, as have been subsequently advanced as principal shall alone be treated as the principal sum repayable under this section "

The purport of the amendment is thus to make a debt a continuous one, notwithstanding a change in the creditor or debtor It does not purport to affect the law with regard to a splitting up of a debt It is a well-recognised canon of interpretation of amendments intended to bring about desirable changes in the law or to overcome interpretations put on the law by Courts, that the law existing before the amendment was made must be considered to continue to be good law, except in so far as the amendment makes it clear on the face of it that a change in the law as it stood before the amendment was intended. If the Legislature had

1. (1941) 1 M.L J 39 2 (1941) 1 M.L.J. 718.

intended by Explanation III to bring about a change in the law relating to the continuity of a debt after it had been split up, one would have expected the Legislature to have introduced expressions in the amendment which clearly brought about that result. It is true that the word "document" includes documents, "creditor" creditors, and "debtor" debtors in this Explanation; but the point made by the learned Judges in *Ramasubbier* v *Rama Aiyar*[1], as will be seen from the passage cited above, was that the debt could not be said to be *renewed* within the meaning of the Act when it was split up in that way. Although the Legislature has now made it clear that the debt shall not be considered to lose its continuity by virtue of a change of creditor or debtor; yet the word "renewed" is retained. We are unable therefore to say that the new Explanation (iii) in any way affects the law laid down in the above cases When a debt is split up, the continuity of the debt is lost.

It was argued in support of the decision arrived at by the lower Court that the transaction entered into by Prakasa Rao should be regarded as a repayment of a half of the debt and a re-investment by the creditor of the sum in a mortgage. It seems clear to us that the transaction cannot be regarded in that light. It was intended to separate the joint liability of three debtors into liabilities by the first and second defendants on the one hand for half of the decree amount and by Prakasa Rao for the other half.

It has finally been argued that since the Official Receiver was not given notice of the application in the lower Court, the application to scale down should now be remanded in order to give the Official Receiver an opportunity of raising fresh points and canvassing the findings already arrived at. Although notice to the Official Receiver in an application to scale down by an insolvent is desirable, because it will give the Official Receiver an opportunity of seeing that the application is properly prosecuted; yet it has been more than once laid down that it is not legally necessary that he should be impleaded or even given notice of the application. It has been stated from the Bar that the judgment-debtor was directed by the Official Receiver to file this application. That seems not improbable, as the application could be filed only by the insolvent himself, for he is an agriculturist, wheras the Official Receiver is not. No injustice seems to have resulted from a want of notice to the Official Receiver, because a counsel was engaged on behalf of the insolvent and various points taken and argued before the lower Court in the same way, as far as we can see, that the Official Receiver himself would have prosecuted the application, had he been made a party.

If the transaction of the 12th March, 1931, resulted in the creation of new debts, then the calculation memo filed by the decree-holder in the Court below, except with regard to a slight modification in the rate of interest, has to be accepted as correct. All interest from the 12th March, 1931, to the 1st October, 1937, would have to be wiped out. The decree-holder would. be entitled to the principal of Rs. 9,700, together with interest at 6 per cent per annum from 1st October, 1937, till date of payment, and the decree costs. The appellant is entitled to his costs in this Court and in the Court below, to be paid out of the insolvents' estate.

V. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VISWANATHA SASTRI.

Penjuri Govindappa .. *Appellant**

v.

D. Chayyappa . *Respondent.*

Madras Estates Land Act (I of 1908), sections 3, 27 and 28—Payment of a particular rent for 20 years—Presumption—Charging of mera, *fishery rent and fee for use of landlord's thrashing floor—Whether illegal.*

1. (1941) 1 M.L.J 39

*S. As. Nos. 1474 and 2113 of 1946. 4th October, 1949

Where it appears that the ryot had been paying rent to the landholder at the rate now decreed, for a period of 20 years, a presumption arises under section 27 of the Act that he holds at the same rate and under the same conditions as he did in the preceding revenue year It is however open to the ryot to show that the rent charged or paid for the preceding year was not a fair or an equitable rent or that it included items of illegal levy, which the landholder was not entitled to collect

Mera is a sum payable as a perquisite to hereditary village officers and where the payment has been made for a series of years, it being connected with the agricultural economy of the village, it cannot be said charging such *mera* is in the nature of an illegal levy

Under section 3, clause (1) of the Act fishery rents are also deemed to be rent and realisable as such by the landholder Cess has to be paid by a ryot who owing to the want of a thrashing floor of his own uses the thrashing floor provided by the landlord

Appeal against the decrees of the District Court, Anantapur, in A.S. Nos. 108 and 118 of 1945, preferred against the decrees of the Court of the Deputy Collector, Anantapur, in R. S. No. 1 of 1941 and Suit No. 3 of 1943, respectively.

Ch Suryanarayana Rao for Appellant.

K. Srinivasa Rao for Respondent.

The Court delivered the following

JUDGMENT —These two second appeals arise out of two suits instituted by a landlord, one for rent and the other for acceptance of patta by the ryot. S. S. No. 1 of 1941, from which S. A. No 1474 of 1946 arises was a suit by the landholder, an Inamdar, for recovery of rent for fasli 1349 instituted under section 77 of the Madras Estates Land Act. S S. No 3 of 1943 from which S. A No. 2113 arises was a suit instituted by the same landholder against the same ryot as in S. S. No. 1 of 1941 for enforecement of acceptance of patta by the ryot There was a second appeal to this Court (S A No 1033 of 1943) from S S No 1 of 1941 in which it was held by Byers, J , that the landholder was not entitled to charge water cess in addition to the rent payable by the ryot, because the water that was used by the ryot was not the landholder's water but that of the Government S S No 1 of 1941 was remanded to the trial Court by the learned Judge for determining the dry rate of rent payable on the lands in question. After the remand, the Revenue Divisional Officer who tried the suit and the learned District Judge who heard the appeal have held that the dry rate payable on the lands was at the rate of Re. 1-13-10 per acre for all the items except item 11 for which the rent was fixed at Re 0-8-6 per acre In S S No 3 of 1943 which was a suit for acceptance of patta, the same rate of rent as had been determined in S S No. 1 of 1941 was held to be the proper rate of rent to be specified in the patta which had to be accepted by the ryot. The ryot has now preferred these two second appeals and the main objection of Mr Suryanarayana, the learned advocate for the appellant, is that the Courts below erred in fixing the rate of rent payable at a sum of Re. 1-13-10 per acre The contention of the ryot in the Courts below was that he was liable to pay only at the rate of four annas per acre for cist and seven pies per acre in respect of land cess and the rest of the claim of the landholder was illegal and untenable.

It appears from the evidence of the appellant himself that for a period of 20 years preceding fasli 1349 he had been paying rent to the landholder at the rate now decreed by the two Courts Consequently, under section 27 of the Madras Estates Land Act, a presumption arises that he holds at the same rate and under the same conditions as he did in the preceding revenue year Of course, it is open to the ryot to show that the rent charged or paid for the preceding year was not a fair or an equitable rent or that it included several items of illegal levy which the landholder was not entitled to collect from the ryot. Under section 28 of the Madras Estates Land Act, whether it is a suit for rent or a suit to enforce acceptance of patta, the rent or rate of rent for the time being lawfully payable by a ryot shall be presumed to be fair and equitable until the contrary is shown. It is no doubt true that in or about the year 1862 the neighbouring rate of dry assessment was about four annas per acre, but this is by no means decisive of the rights of parties. Where for about 20 years even according to the admission of

the defendant, a rent higher than what was paid in 1861 has been paid, it cannot be said that the rent so paid during these latter years was not fair rent within the meaning of section 28 of the Madras Estates Land Act. Mr Suryanarayana argues that even under section 28, the rent or rate of rent claimed by the landholder must be shown to be lawfully payable before the presumption in section 28 can be applied to the case. He contends that the component parts of the claim made by the landlord shows that except a sum of Re 0-4-7, the rest of the items claimed by him cannot be legally claimed as rent within the meaning of section 3 (11) of the Act Among the items objected to by the appellant are a sum of Re. 1-0-0 per acre charged as *mera*, a sum of Re 0-8-0 per acre charged as fishing rent and a sum of Re 0-1-3 per acre charged for the amenities provided in the shape of a thrashing floor and other aids to good husbandry It is contended that *mera* is a sum payable as a perquisite to hereditary village officers and that the ryot is not bound to pay the whole or any part of this sum especially when it is not paid as consideration for the beneficial use and occupation of the land. There is no doubt considerable force in the argument, but section 3, Cl. (11) includes in the category of rent any sum lawfully payable to a landholder by a ryot as such in addition to the rent due according to law or usage having the force of law It has been held in *Sree Sankaracharı Swamıar* v *Varada Pillai*[1] that *mera* of this kind can be lawfully claimed by a landholder from a ryot along with the rent under section 4 of the old Rent Recovery Act It is no doubt pointed out by Stone, J , in *Basudeva Das* v. *Raja Harischand*[2] that there is a difference between the language employed in section 4 of the old Rent Recovery Act and section 3, clause (11) of Madras Act I of 1908 I do not, however, consider that there is any substantial difference between the language of the two provisions and it is significant that Pandrang Row, J , who was also a party to the decision in *Basudeva Das* v *Raja Harischand*[2] did not express his concurrence with this part of the reasoning of Stone, J. The payment having been made for a series of years and being connected with the agricultural economy of the village, it cannot be said that it is in the nature of an illegal levy.

The next item that is objected to is a sum of Re 0-8-0 per acre payable as fishery rent Under section 3, clause (1), sub-clause (*b*) of the Estates Land Act, fishery rents are also deemed to be rent and realisable as such by the landholder. There is the evidence of the plaintiff that the ryots enjoy fishery rights in the village. Therefore, no objection can be taken to the inclusion of this sum in the claim for rent As regards the sum of Re 0-1-3 charged for the provision of amenities like thrashing floor, etc , there is the authority of this Court in *Vadamalai Thiruvanatha Sevuga Pandia Thevar* v *Sankaramoorthi Naidu*[3] that the cess has to be paid by the ryot who owing to the want of a thrashing floor belonging to him uses the thrashing floor provided by the landlord If, however, the tenant has a thrashing floor of his own which he is using, the cess is not leviable. In the present case, there is no evidence that the ryot has got a thrashing floor of his own which he is using and therefore does not stand in need of the thrashing floor provided by the landlord. For these reasons, I hold that the rate of Re. 1-13-10 per acre fixed as rent payable by the ryot to the landholder in these two suits fixed for item 11 for which a rate of Re 0-8-6 has been fixed must be accepted

The result is that these two second appeals fail and must be dismissed with costs.

There is a memorandum of cross-objections in S A No. 2113 which relates to the water cess payable by the landholder and which is sought to be recovered from the ryot There being no evidence that the landholder has paid any amount as water cess, the claim is unsustainable. The memorandum of objections is therefore dismissed with costs.

V.P.S. *Appeals dismissed.*

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1. (1903) I L R 27 Mad 332 at 336
2. (1935) 69 M.L J 917 . I L R. 59 Mad. 498.
3. (1918) 36 M.L J 109 : I L R. 42 Mad. 197 at 202.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE PANCHAPAKESA AYYAR.

K S M Mohammad Abdul Kadar Marakayar *Petitioner* *

Indian Penal Code (XLV of 1860), section 282—Overloading of boats—Negligence of owner—Plea of want of direct knowledge—If affects question of guilt

An owner, who knowingly or negligently allows overloading of his boats so as to endanger life of persons sailing therein is liable under section 282 of the Indian Penal Code He cannot plead in defence that the *tindal* who was in actual charge of the boat was alone liable.

Bachalal v *Rex*, (1948) All L J 354, distinguished

Even if direct knowledge of the owner of the overloading is not proved, his negligence in that he did not take due care and attention will make him liable

Petition under sections 435 and 439, Criminal Procedure Code (V of 1898), praying that the High Court will be pleased to revise the orders of the Sub-Divisional Magistrate, Ramnad, in C A Nos 36, 35 and 34 of 1948, respectively (C C Nos 1148, 1147 and 1146 of 1948, respectively, Stationary Sub-Magistrate, Ramnad)

S K Ahmed Meeran for Petitioner.

The Assistant Public Prosecutor (*A S Sivakaminathan*) for the Crown

The Court made the following

ORDER —The petitioner in all these petitions is one Mohammad Abdul Kadar Marakayar He has been convicted under section 282, Indian Penal Code and sentenced to pay a fine of Rs 40, Rs 75 and Rs 100, respectively, in these three cases, for having knowingly and negligently conveyed or caused to be conveyed for hire persons so loaded on his three boats as to endanger the life of the persons travelling in the boats In Crl R C. No 451 of 1949, 36 passengers were carried as against 24 passengers allowed under the rules In Crl R C No. 453 of 1949 also there was even more gross overloading, the number of passengers conveyed being 30 instead of the 12 allowed In Crl R C No 452, 52 passengers were carried instead of the 30 allowed The learned counsel for the petitioner, Mr. Ahmed Meeran, has raised three main contentions

The first is that the petitioner is not the owner of the boat concerned in Crl. R C. No 452, and that he has also denied the ownership in the Courts below, and that the prosecution has failed to prove his ownership or liability for the overloading in that boat That is so The learned Public Prosecutor also agrees. Therefore, the petitioner's conviction and sentence in C. C No. 1147 of 1948, covered by Crl R. C No 452, must be set aside, and are hereby set aside, and the fine, if paid, ordered to be refunded to him.

In the other two cases, the petitioner is, admittedly, the owner of the boats which carried such terrific overloads and endangering the safety of the passengers. The number of passengers is fixed for each boat under the rules, taking everything into consideration including sea-worthiness, safety, etc , the safety of the passengers being the paramount consideration Boats are likely to capsize, and drown the passengers travelling in them, if they are overloaded like this The contention of the learned counsel for the petitioner in these two cases is that the *tindal* is the man in direct charge of the boats, and is the person made liable under the Indian Ports Act, and that, under the ruling in *Bachalal* v *Rex*[1], owners of motor vechicles not proved to have known personally about the overloading of the motor vehicles are not liable, but only the drivers, and that the presumption of knowledge by owners does not extend to section 72 (3) (*b*) of the Motor Vehicles Act, 1939 Mr Ahmed Meeran urged that the same principle will apply to boats I cannot agree The *tindal* is undoubtedly liable for overloading boats, but that does not mean that no other body will be liable There are cases, under our law, both civil and criminal, when several persons will be jointly liable for acts and omissions, and it is no defence for one, when charged, to say that another person liable is not

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* Crl R C Nos 451, 452 and 453 of 1949 20th October, 1949
Crl. R P Nos. 401, 402 and 403 of 1949.

1. (1948) All. L. J. 354,

charged. He may, of course, show that the others alone are liable Here, therefore, the fact that the *tindal* a man of straw, has not been prosecuted for these offences, is irrelevant as the petitioner a man of substance and the owner is also liable The ruling relied on will not have any application to this case, which relates to overloading a boat, under section 282, Indian Penal Code and endangering the lives of passengers That was a ruling under the Motor Vehicles Act, and under a specific section thereunder It was not a ruling relating to boats or under section 282, Indian Penal Code, where there is the significant phrase " or negligently " which is not found in the section in the Motor Vehicles Act considered in the ruling I am convinced that the owner who knowingly or *negligently* allows overloading of his boat so as to endanger the life of the persons therein will be liable under section 282, Indian Penal Code

Then the question is whether this petitioner, the owner, was guilty of either knowledge or negligence There is no proof that he *actually knew*, as a matter of fact, about this overloading on his two boats, but there is not the least doubt that he was guilty of *negligence*, and that this negligence was directly responsible for the overloading of his boats, endangering the safety of the persons travelling therein If he had exercised due care and caution, especially as the boats were only plying from Danushkodi, when he was living in nearby Pamban, this overloading would never have happened He was, doubtless, content not to enquire of his *tindal* or ask inconvenient questions but to take the proceeds of such overloading That will make him liable for negligence, as he did not take due care and attention. Many accidents and fatalities have occurred all over India by boats being so overloaded, in the Godavari, in the Narmada, in the Brahmaputra, and in several other places This is a thing which ought to be stopped, and, if the owner is not caught and punished for his negligence, it will never be stopped effectively

It was urged that this petitioner was living at Pamban, two miles away, and not at Danushkodi, and so could not be aware of the overloading of these boats. I cannot agree If he had gone on a pilgrimage to Mecca, or was so far away that he could not reasonably be expected to know what was happening to his boats, he could have urged lack of negligence , but, when he was living in nearby Pamban, and daily getting his proceeds from the boats, the plea sounds hollow and unconvincing. I, therefore, confirm the convictions of the petitioner in C C. No 1148 of 1948 and 1146 of 1948, but reduce the fines imposed on him to Rs 10 in each case, as this appears to be his first offence, and direct knowledge by him has not been proved, but only negligence. The excess fines, if paid, will be refunded.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE GOVINDA MENON AND MR. JUSTICE BASHEER AHMED SAYEED.

Sri Rajah Yenumula Suryanarayanamurthy Dora Garu . *Appellant**

v.

Sri Chitrapu Buchi Venkayya Pantulu . *Respondent*

Guardians and Wards Act (VIII of 1890), *sections* 39 *and* 41—*Appointment of guardian where all the members are minors—One of the minors becoming major—Right to resume properties unconditionally*

Where all the members of a joint family are minors, the Court has power under the Guardians and Wards Act to appoint a guardian for the whole of the joint family property in case there are no adult male members But when once one of the minors becomes a major he is *ipso facto* entitled to the resumption of the entire property in his favour and he could act as the natural guardian of the minor, not as the certificated guardian and as such he cannot be directed to furnish security before he recovered possession of the joint family properties

Appeal against the Order of the District Court, East Godavari, at Rajahmundry dated 21st April, 1947, in C. M. P. No. 120 of 1947.

P. Satyanarayana Raju and *M B Rama Sarma* for Appellant.

Respondent not represented.

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*A. A. O No 555 of 1947. 31st August, 1949.

The Judgment of the Court was delivered by

Govinda Menon, J—This is an appeal under section 47 of the Guardians and Wards Act against the order of the learned District Judge of Rajahmundry appointing the appellant herein guardian of his minor brother and directing the delivery of possession of the family properties to him on certain conditions imposed upon by the learned District Judge The order was that it was only on the fulfilment of those conditions by the petitioner that he is entitled to recover possession of the properties, or to act as the guardian of his minor brother The learned Judge held that as the elder brother has furnished security as ordered, he was to be appointed as guardian of the property of the minor on usual conditions O P No. 92 of 1935 was an application for the appointment of a property guardian for the petitioner and his minor brother on the ground that both of them were minors and that a guardian should be appointed, because the joint family consisted only of these two minors and there was no adult major member at all Accordingly, the respondent to this appeal Mr Buchi Venkayya Pantulu, a legal practitioner, was appointed as guardian and he managed the estate of the petitioner and his minor brother. The petitioner became a major on the 15th October, 1945 and thereafter applied for recovery of possession of joint family properties under section 39 (*a*) and section 41 (2) (*c*) and clause (3) of the Guardians and Wards Act. The learned Judge passed the order, which is the subject of appeal adverted to above.

It is clearly established that where all the members of a joint family are minors, the Court has power under the Guardians and Wards Act to appoint a guardian in case there are no adult male members At page 299 of Mayne's Hindu Law (10th Edition), the learned author states as follows :

> " When all the coparceners of a Mitakshara joint family are minors, the Court can appoint a guardian of the property of the minors, though in such a case as soon as the eldest member of the family attains majority, the guardianship is *ipso facto* determined as regards all the members."

Bindaji v. *Mathurabai*[1], *Ramachandra* v *Krishna Rao*[2], *Shaminath Sahi* v *Laljichaube*[3], *Jagannath Prasad* v. *Chunilal*[4], *Chandrapal* v. *Sarabjit*[5], are cited in support of this view. To the same effect are the statements of law in Mulla's Hindu Law, page 589, section 519 It is stated there that if all the sons are minors, the Court may appoint a guardian for the whole of the joint property until one of them attains majority and the authority cited is *Bindaji* v *Mathurabai*[1] and *Khikar Lakshmu* v. *Marudevi*[6]. These decisions were considered and followed by this Court by Ramesam and Jackson, JJ , in C M A No. 268 of 1928 where the learned Judges went further and said that if in addition to the minors there is an adult member, who on account of unsoundness of mind is incapable of managing the property, then a property guardian can be appointed for the minor's share. It is now well settled that a guardian *cannot* be appointed for the property of the minor members of a joint family. *Sham Kuar* v *Mohanunde Sahoy*[7], *Virupakshappa* v. *Nilgangava*[8] and the decision of the Privy Council in *Garibulla* v. *Khalak Singh*[9], authoritatively lay down the above proposition Therefore the appointment of guardian was justified , but when once one of the minors becomes a major, he is *ipso facto* entitled to the resumption of the entire property in his favour and he could act as the natural guardian of the minor, not as the certificated guardian That proposition is well settled by the statement of the law in Mayne's Hindu Law and the cases which have been quoted thereunder. Such being the case, the learned District Judge was wrong in directing the petitioner to furnish security before he recovered possession of the joint family properties Probably the attention of the learned Judge was not specifically invited to the position of law, which is by this time very well settled. In these circumstances, the order of the lower Court being unsustainable *cannot* be maintained and is therefore set aside The appeal is

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1 (1905) I L R. 30 Bom 152
2 (1908) I L.R 32 Bom 259
3 (1913) I L R. 35 All 150
4. A I R. 1933 All 180
5. (1935) I.L R. 11 Luck. 67.
6 (1908) I L R 32 Mad 139
7 (1891) I L R 19 Cal 301
8 (1894) I L R. 19 Bom 309
9. (1903) L R 30 I A 165. I.L.R 25 All. 407 (P.C.)

allowed and the appellant is entitled to get possession of the entire properties of the joint family without any conditions being attached whatever As the respondent did not appear and as he himself is a legal practitioner, who has not objected to the surrender of possession of the property, we direct that the appellant do pay his costs in Court.

V S ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR. JUSTICE KRISHNASWAMI NAYUDU.

Kottan *Petitioner**

v.

K. V. Kannan and another . *Respondents*

Negotiable Instruments Act (XXVI of 1881), *sections* 64 *and* 74—*Suit by endorsee of simple on demand promissory note—Endorsee not entitled to decree against his endorser without proof of presentment for payment to maker and without notice of dishonour to the endorser.*

Where the endorsee of a promissory note seeks to make the endorser liable the fact of presentment to the maker and issue of notice of dishonour to the endorser should be made clear in the plaint itself as notice of dishonour is a material part of the cause of action Requirements of "presentation" and "notice of dishonour" considered

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree and judgment of the District Munsiffs Court, Kasargod, dated 27th November, 1947, in S C. S No 74 of 1947.

A. Achuthan Nambiar for Petitioner.

K. Vittal Rao for Respondents

The Court delivered the following

JUDGMENT.—The point for determination in this revision petition is whether an endorsee of a simple on demand promissory note will be entitled to a decree against an endorser without proof of presentment for payment to the maker and without notice of dishonour to the endorser

The suit was on a promissory note for Rs 240 executed on the 12th March, 1944, by the first defendant in favour of the second defendant On the 14th April, 1944, the second defendant endorsed in favour of the plaintiff for consideration The suit was filed on the 13th February, 1947. The allegation in the plaint is that the defendants failed to pay the amount on several oral demands and the registered notice sent to the defendants by the plaintiff on the 10th February, 1946, proved of no avail and hence the plaintiff was constrained to file this suit. The first defendant was *ex parte* The second defendant pleaded that the moneys paid under the promissory note belonged to the plaintiff and that he was a name-lender to the promissory note and that at the request of the plaintiff it was endorsed over to him. A decree was passed against both defendants.

The counsel for the petitioner argues that there was no presentment of the pronote for payment and no notice of dishonour in order to make the endorser liable This plea was not raised in the written statement, but however this appears to have been raised in arguments and the lower Court simply referred to sections 35, 93 and 106 of the Negotiable Instruments Act and the decision in *Jagannadha Reddiar* v. *Lakshmana Reddiar*[1] which held that the liability of the endorser of a promissory note was not governed by section 35 of the Negotiable Instruments Act and that in order to make the endorser liable it must be presented for payment within a reasonable time after the endorsement, but however did not deal with the question whether notice of dishonour was necessary or was given in order to make the second defendant liable The lower Court finds that there was a written demand made by the plaintiff to the endorser, the second defendant and also found that

*C R P. No. 789 of 1948. 19th August, 1949.

1. (1924) 47 M.L.J. 475.

there were several demands now and then to the defendants in respect of the promissory note There is no evidence of any oral demand , but I am not prepared to go behind the finding of the lower Court that there were several demands in view of the failure of the second defendant to deny the allegations in the plaint where the plaintiff specifically stated that he made several demands on the defendants It is however to be considered whether there was presentment for payment and notice of dishonour in order to make the endorser liable on the pronote

In view of my accepting the finding of the lower Court that there were several oral demands and also that there was a written demand, Ex A-2, it is to be examined whether the oral demands about which there was no evidence as to when they were made and under what circumstances, and Ex A-2 would be sufficient to satisfy the requirements of presentment for payment and notice of dishonour as provided in the Negotiable Instruments Act Under section 74 of the Negotiable Instruments Act, a negotiable instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder There is however no evidence to that effect in this case, excepting some demands made without any further particulars. Section 64 lays down that promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof respectively by or *on behalf of* the holder as hereinafter provided. In default of such presentment the other parties thereto are not liable thereon to such holder The learned counsel for the petitioner referred me to *Uppalapati Hemadri* v *Kodali Seshamma*[1], where it was held that such presentment for payment under section 64 was necessary if the endorser is to be made liable But the question is in what manner the presentment is to be made *Prima facie* it appears to me, reading the language of the sections that the presentment must be made personally and the note has to be produced In this case the learned counsel for the respondent argues that when there is an oral demand it must be presumed that he must have had the promissory note ready with him to be discharged when demand was made by the maker I would be inclined to accept this contention if only there was some evidence in the case that an oral demand was made at a particular time and the circumstances under which it was made Further to satisfy the requirements of section 74 it is necessary that the negotiable instrument which was in this case a promissory note must be presented for payment within a reasonable time In the absence of evidence it is impossible to say whether it was presented, if so, within a reasonable time I do not think therefore that the note was presented for payment to the maker in order to make the endorser liable.

In this connection it is necessary to consider whether in the case of a simple on demand promissory note the presentment for payment should be made and the note produced when the demand is made. It is argued relying on (1938) M.L J , Short Notes, page 4, that a registered notice of demand by a pleader demanding payment is not a presentment in law The learned Judges relied on decisions in *Mahomed Rowthan* v *Mahomed Hussain*[2], and *Simulu Ebrahim Rowthan* v *Abdul Rahiman Mahomed*[3] But there the question of the manner or method of presentment did not arise Even in 1938 M L J when I looked into the original judgment I find that it was a case which arose under the Stamp Act But however the learned Judges observed with reference to a letter of demand written by the vakil to the maker of the promissory note that

> " this is not good presentment unless the note or instrument is actually shown or exhibited to the person required to pay or to honour it , merely making a demand cannot be said to be equivalent to presentment "

No doubt this seems to be the meaning of the word " presentment " under sections 64 and 74 It is no doubt correct that a notice of demand on behalf of the holder would not amount to sufficient presentment since the promissory note could not have been sent along with the notice The following passage from Bhashyam and Adiga's Commentaries on Negotiable Instruments Act may be cited :

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1. A.I R. 1931 Mad 113
2. (1899) 9 M L J 135 I.L R 22 Mad. 337.
3. (1898) 8 M L J. 182.

"It is, however, not necessary that the presentor should carry the instrument in his hand at the time of the demand, provided the bill is in fact near and accessible, though not in his personal custody In fact, it seems that a demand otherwise valid is not vitiated, simply because the note or bill is not exhibited unless the maker or the acceptor should refuse to pay on that account"

That passage appears to have been taken from Parson's Book on Negotiable Instruments, Volume I, page 368 I am inclined to agree with this view. If only it is shown that demand was made and the person making the demand was in possession of the note and was in a position to hand it over on payment, it should be sufficient for a presentment for payment especially in the case of on demand promissory note. It must be proved in such a case that there has been a demand and the person making the demand had the promissory note with him or was in a position to produce it on payment being made. That does not however arise in this case where there is no evidence as to the oral demand having been made within a reasonable time after endorsement.

The next point argued by the learned counsel for the petitioner is whether there was any notice of dishonour. The lower Court relies on Ex A-2 but however does not say it amounts to a notice of dishonour I do not think that the terms of that notice would be sufficient to be a notice of dishonour as required by law. Section 93 of the Negotiable Instruments Act makes it incumbent on the holder of a promissory note which has been dishonoured by non-payment to give notice that the instrument has been so dishonoured to all other parties whom the holder seeks to make severally liable thereon and in this case the endorser.

The learned counsel for the petitioner relied on the decision in *DeSouza* v. *Coles*[1], where the question arose as to the place of cause of action, the learned Judges observed that the obligation of the maker of promissory note, or of the endorser of bill of exchange and probably of the acceptor also, is not complete without delivery of the instrument to the payee, endorsee, or drawer, and in a suit against the maker, or endorser, or acceptor, the whole cause of action does arise where the complete contract is made but not elsewhere, subject to this qualification as regards actions against endorsers, in which notice of dishonour is necessary, that such notice is also a material part of the cause of action and must also be given within the jurisdiction In *Hartley* v *Richard Jesson Case the Younger*[2], it was held that a notice of a dishonour of bill of exchange must contain an intimation that payment of the bill has been refused by the acceptor, and, therefore, a letter merely containing a demand of payment was held not to be a sufficient notice. The following passage from the judgment of Abbot, C J, will be relevant .

"There is no precise form of words necessary to be used in giving notice of the dishonour of a bill of exchange, but the language used must be such as to convey notice to the party what the bill is, and that payment has been refused by the acceptor"

In this case apart from the oral demands reference is made in the plaint to the notice Ex. A-2, dated 10th December, 1946. It is only a notice calling upon both the maker and the endorser to make the payment There is also a reference in it that whenever the demand was made the amounts, principal and interest, were not paid and that defendants were saying that it will be given and that they were evading. The learned counsel wants me to assume from these words that there must have been oral demands, presentment of the promissory note should have been made and the fact of dishonour should also have been intimated to the endorser I am unable to imply all these from the language of Ex A-2 Moreover as pointed out by Abbot, C J, in *Hartley* v. *Richard Jesson Case the Younger*[2], there should be something to indicate in the notice itself that there has been failure of payment on presentment and therefore dishonour of the promissory note. There is no such indication in Ex A-2 to that effect It is no doubt correct that the notice of dishonour need not be in writing because section 94 states that a notice of dishonour may be oral or written But there is no such proof of even a oral notice of dishonour in this case. It is therefore necessary that in case where the endorsee of a promissory note seeks to make

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1. (1868) 3 M.H.C.R. 384 at 397.
2. (1825) 107 E.R. 1085.

the endorser liable, the fact of presentment and issue of notice of dishonour should be made clear in the plaint itself as notice of dishonour has been held to be a material part of the cause of action. There is no such allegation in the plaint nor is there any proof of the same. In the circumstances, I think, the judgment of the lower Court cannot stand and I allow the petition but in the circumstances without costs.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Amaravathamma .. *Petitioner**

v.

Chinna Venkat Reddi and others .. *Respondents.*

Practice—Suit by next friend of a minor to set aside compromise decree in an earlier partition suit as not binding—Suit decreed and matters in issue in the prior suit tried and preliminary decree passed—No need to revive the earlier suit.

Where a suit by the next friend of a minor to set aside as not binding on the minor a compromise decree in an earlier partition suit in which the minor was one of the defendants, a declaration in favour of the minor is given and the matters which have been in issue in the previous suit have been tried and a preliminary decree has been passed in the minor's suit, there is no necessity nor any justification for the Court for reviving the earlier suit and allowing it to be tried.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge, Chittoor, dated 28th March, 1946, in M. P. No. 367 of 1945, in O. S. No. 53 of 1940.

S. V. Venugopalachari and *C. V. Dikshitulu* for Petitioner.

K. S. Desikan for Respondents.

The Court delivered the following

JUDGMENT :—The petitioner is the plaintiff in O. S. No. 53 of 1940, which was a suit for partition instituted in the Subordinate Judge's Court of Chittoor. The petitioner is the widow of one Anjaneyalu Reddi. She claimed one-third share of the joint family properties against her father-in-law the first defendant, the second defendant who was her husband's minor brother and the third defendant, the mother of the first defendant. On 5th August, 1940, a compromise decree was passed but the second defendant being a minor the Court sanctioned the compromise. It was found later that the required certificate by the advocate as to the reasonableness of the compromise was not filed. A suit was filed on behalf of the second defendant by his next friend for setting aside the compromise decree which is O. S. No. 44 of 1942 on the file of the same Court. In the plaint in that suit the present second defendant prayed for a declaration that the compromise decree in O. S. No. 53 of 1940 was invalid, inoperative and void and not binding on the plaintiff or on his interest in the joint family properties and for an injunction restraining the second defendant from interfering with the plaintiff's possession and enjoyment of the said properties, for declaring the second defendant's right to a half share to the immoveable properties and for division of the same by metes and bounds and for other reliefs. In the plaint the second defendant alleged that the decree was not binding on him and moreover the plaintiff in O. S. No. 53 of 1940 was given a share to which she was not entitled by virtue of the Hindu Women's Rights to Property Act. To this plaint the plaintiff as second defendant filed a written statement stating among others that the insurance policy amount claimed by the second defendant in the suit was the separate property of her husband and also claiming that the properties conveyed under the settlement deed were the self-acquired and separate properties of her husband besides other contentions. Issues were framed raising besides the question as to the validity

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* C.R.P. No. 1210 of 1946. 4th October, 1949.

and binding nature of the compromise decree, other questions as to what are the family properties, moveable and immoveable, to be divided, and what the plaintiff's share therein was and also an issue as to the nature of the properties conveyed under the settlement deed A preliminary decree was passed in the said suit, O. S. No. 44 of 1942, declaring that the compromise decree in O S No. 53 of 1940 on the file of that Court was not binding on the plaintiff and that the parties should be restored to their *status quo ante* as it stood before the said compromise decree; that the second defendant and his father were each entitled to a half-share in the joint family agricultural properties; that the plaintiff was entitled to a one-third share in the joint family moveable and immoveable properties other than agricultural lands and that the plaintiff was solely entitled to the insurance amount got under her husband's life insurance policy and that the properties conveyed under Ex. P-2, the settlement deed, were the private properties of Anjaneya Reddi and not of the joint family.

The plaintiff applied in I. A No. 95 of 1945 filed in the said suit O. S. No. 44 of 1942 for passing a final decree in respect of the properties described in the schedule to that petition, for a division into three shares as per directions in the preliminary decree and for the appointment of a commissioner, if necessary, to make the division either in specie or otherwise. The second defendant opposed the said application and in his counter-affidavit he stated that it was not open to the plaintiff to ask for inclusion in the final decree new moveables mentioned in the schedule to the application which were not the subject-matter of the suit or of the preliminary decree. On that an order was passed dismissing the petition, the Court observing that most of the properties sought to be partitioned were not included in the suit and that she has to seek her remedies otherwise and that she cannot be allowed to agitate the matter here after once the preliminary decree had been passed.

Soon after, the order in I. A. No. 95 of 1945, the plaintiff filed I. A. No. 367 of 1945 in O. S. No. 53 of 1940 for an order to restore the suit O. S. No. 53 of 1940 to file and proceed to try the same on merits and dispose it off according to law. In the affidavit she stated that she is entitled to such an order by reason of the clause in the preliminary decree in O S. No. 44 of 1942, that the compromise decree in O. S. No. 53 of 1940 was not binding and that the parties should be restored to *status quo ante* and on the observations of the lower Court in the order in her application for passing a final decree that she might seek other remedies in respect of the properties which were not mentioned in the plaint or in the preliminary decree. The application was opposed on the ground that there was no provision of law under which she could ask that the suit O S. No 53 of 1940 could be restored to file and tried afresh. The lower Court found in favour of the respondent that such an application was not maintainable and the present petitioner was at liberty to seek such proper and legal remedies as are open to her to get all the properties of the joint family divided if they were really left out in the prior partition.

It is contended on behalf of the petitioner that she is entitled to have the same tried on merits by virtue of clause (*a*) of the decree in O. S No 44 of 1942. The decree declares that the compromise decree in O. S. No 53 of 1940 is not binding and adds that the parties should be restored to *status quo ante* as it stood before the compromise decree. It is argued relying on the latter part of the clause that she is entitled to be relegated to the position of the plaintiff in O S. No. 53 of 1940 and to proceed with the trial of that suit. It would no doubt be a correct contention if the trial in O S No 44 of 1942 related only to the validity of the compromise decree and did not deal with the other questions raised in the suit, *viz.*, the rights of the parties to partition, their respective shares and the properties in which they would be entitled to a share, the subject-matter of the suit in O. S. No. 44 of 1942 being practically the same as in the previous suit O S. No. 53 of 1940. The petitioner sought to file a written statement, allowed issues to be raised not only on the question of compromise decree but on other matters and the Court gave its finding

on several of the issues and passed a decree declaring the shares of the parties, directing a partition and giving other reliefs. It may be pointed out that there was no appeal against the preliminary decree and at no time any contention was raised that it was not open in O S No 44 of 1942 to decide any other issue excepting the issue relating to the compromise decree Not content with that the petitioner also accepted the preliminary decree and in pursuance of it applied for a final decree in I A. No 95 of 1945, but did not get the order which was sought for in that application. I do not think that on the ground that she was not allowed to have other properties mentioned in the preliminary decree brought in for partition she could seek this remedy of re-opening a suit the questions involved in which having been raised and disposed of in the subsequent suit, O. S. No. 44 of 1942.

The learned counsel relied on the decision in *Lakhanlal and another* v. *Sitaram*[1] where it is held that when a decree against a minor is set aside on the ground that the minor was not properly represented in the suit, the original suit is not wiped out as against the minor but will continue from the stage at which the minor had a right to defend the claim against him That will no doubt be the correct position here, if, as I have already pointed out, the lower Court in O. S. No. 44 of 1942 had dealt with the issue relating to the compromise decree alone. To similar effect is the other decision cited by the learned counsel for the petitioner in *Loke Nath Das Purkayastha* v *Biharee Lal Shaha*[2] There it was held that when a decree passed against a minor is declared to be invalid and inoperative against him in a subsequent suit by the minor on the ground that there was no proper appointment of a guardian-*ad-litem* the Court has the power to revive the former suit against the minor. The objection to the revival of the suit was raised on the ground that it was only a declaratory decree and there was no direction as to the revival of the other suit. The learned Judges held that a further decision was not necessary, a simple declaration would be sufficient. In *Manoharlal* v. *Jadunath Singh*[3], which was an appeal against the decree of the Judicial Commissioner of Oudh where the Judicial Commissioners set aside certain compromise and decrees in a foreclosure suit and specifically directed that they be set aside "in their entirety" and that they "have to be decided afresh", their Lordships of the Privy Council held that it would be quite sufficient if there was a declaration that the compromises and decrees were not binding upon the minor and the minor would be remitted to his original rights. Clause (*a*) of the decree in O. S. No. 44 of 1942 is in the same terms as laid down by the Privy Council meaning thereby that the parties should be restored to their *status quo ante*. If their original rights being the matters involved in the previous suit had not been decided they would be entitled to proceed with the suit and have the same adjudicated. Their Lordships of the Privy Council have thought it necessary to say that the language of the decree of the lower Court was rather too wide and that it would be sufficient if there was a declaration. It is therefore enough if there was a mere declaration since the steps to be taken in consequence of the declaration would depend on the particular circumstances of each case. The lower Court could have contented itself by giving a declaration without mentioning that the parties should be restored to their *status quo ante*. The addition however does not change the position but was only superfluous In this case the matters which have been in issue in the previous suit having been tried and a preliminary decree having been passed in O. S. No. 44 of 1942, there was no necessity, nor any justification for the Court for reviving the earlier suit O S No. 53 of 1940 and allow it to be tried. I am therefore of opinion that the order of the Subordinate Judge s Court of Chittor is right, in holding that the petition was not maintainable.

The civil revision petition is dismissed with costs

K. S. *Petition dismissed.*

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1. I.L R (1937) Nag 360.
2. (1936) I.L.R. 63 Cal. 1227.
3. (1906) 16 M L J 291 : L.R. 33 I.A. 128; I.L.R. 28 All. 585 (P.C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNASWAMI NAYUDU.

Minor Veluchami Pillai by next friend Chellathayee *alias* Meenakshi Ammal .. *Petitioner**

v.

K. R. Sankaralingam Pillai and others . *Respondents.*

Court-Fees Act (VII of 1870), Schedule II, Article 17-B—Applicability—Appeal against the final decree in a suit for partition—Court-fee payable.

The appeal against either a preliminary or a final decree, arising out of a suit for partition, must be treated as one incapable of valuation and Article 17-B of Schedule II of the Court-Fees Act is the only Article that would be applicable. Article 1 of Schedule I is not applicable and *ad valorem* court-fee cannot be charged

Where the subject-matter of an appeal against a final decree for partition is the amount of the owelty payable to the plaintiff on partition, as also the amount of the share of profits, consequent on his being declared entitled to a share in profits, they are ordinary incidents in a suit for partition.

If an appeal arises in a suit for partition, the court-fee payable will be the fee provided for under Article 17-B of Schedule II of the Court-Fees Act.

Petition under section 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the District Court of Mathurai dated 3rd November, 1947 and made on the check slip in A. S. No. 85 of 1947 (O. S. No. 20 of 1937, Sub-Court, Mathurai).

R. Sethurama Sastri for Petitioner.

The Government Pleader (*K Kuttikrishna Menon*) for the Government.

Respondents not represented.

The Court delivered the following

JUDGMENT :—The question that arises for decision in this civil revision petition is whether Article 17-B of Schedule II of the Court-Fees Act applies to an appeal filed against the final decree in a suit for partition in respect of which court-fee under Article 17-B of Schedule II was charged.

The plaintiff is the petitioner. He instituted the suit for partition claiming an one-fourth share in the properties, but, as the plaint was incapable of valuation he paid a court-fee of Rs. 100 under Article 17-B of Schedule II of the Court-Fees Act. The preliminary decree for partition was passed and the plaintiff was given a fourth share in the suit properties. A commissioner was appointed for division of the properties and the final decree was passed in pursuance of the commissioner's report whereby it was directed that the parties were to pay and receive certain sums to make up the inequalities in the value of the properties allotted to the respective parties. The final decree provided that the plaintiff should receive a certain amount from the other parties to equalise the shares and he was also granted a decree for a specific amount in respect of his share of the profits. The plaintiff was not satisfied with this and filed an appeal A S. No. 85 of 1947, and paid a fixed court-fee of Rs. 100 provided under Article 17-B of Schedule II.

The Court-fee Examiner contended that inasmuch as a final decree had been passed and as specific sums were granted under the final decree and as the appellant claims a larger amount it cannot be said that the claim in the appeal is incapable of valuation and that therefore *ad valorem* court-fee upon such additional amount as the appellant claims should be paid. The learned District Judge agreed with the Court-fee Examiner holding that Article 17-B of Schedule II would not apply to the appeal and directed the appellant to pay *ad valorem* fee. As against the said order this revision petition is filed.

Article 17-B reads as follows :

"Plaint or memorandum of appeal *in every suit* where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act ".—

* C.R.P. No. 1914 of 1947. 13th October, 1949.

And if the plaint or memorandum of appeal has to be filed in a District Court or a Sub-Court a fixed fee of Rs. 100 is provided. It may be stated that this Article has been made applicable to a suit for partition of joint family properties by a Full Bench of this Court in *Ramaswami* v *Rangachari*[1] So far as the suit is concerned, it is a suit for partition by a member of the joint family of the joint family properties and for consequential reliefs, such as for division of the properties, for a share of profits, etc. If an appeal had been filed on the preliminary decree for partition where the shares of the respective parties have been declared it cannot be said that an appeal against the preliminary decree was one where it was possible to estimate at a money value the subject-matter in dispute. But, after a final decree is passed that contention is not available since the final decree has fixed 'the amount which the plaintiff had to receive as and by way of equalisation of shares and also the amount which he is entitled to get as and for his share of profits, and, if he appeals in order to get larger amounts he must necessarily mention in the appeal memorandum the additional amount which he claims, and, it is therefore clear that that additional amount have a money value and *prima facie* Article 17-B would not be applicable on the ground that it is not possible to estimate at a money value the subject-matter in dispute If the language of Article 17-B is examined it will be seen that on the plaint or memorandum of appeal *in every suit* where it is not possible to estimate at a money value the subject-matter in dispute fixed court-fee only will be payable. This is an appeal arising in a suit where it is not possible to estimate at a money value the subject-matter in dispute as it is a partition suit between members of a joint family and which has been held to be one coming under this Article. Since the appeal arises in the suit, Article 17-B would be applicable to the appeal as well.

Article 1 of Schedule I provides that in respect of a plaint or memorandum of appeal (not otherwise provided for in this Act) *ad valorem* court-fee given in column 3 should be paid But since it has been held that in respect of a suit for partition Article 17-B is the provision that is applicable, Article 1 of Schedule I cannot be made applicable since it is otherwise provided for in this Act under Article 17-B. Since there is a specific provision under Article 17-B of Schedule II for this class of suits Article 1 of Schedule I is not applicable and *ad valorem* court-fee cannot be charged.

The subject-matter of the appeal is the amount which the plaintiff is entitled to receive for equalisation of the shares, *i e*, owelty payable to him on partition, as also the amount of share of profits consequent on his being declared entitled to a share in the profits The payment of owelty and of share of profits arise by reason of the effect of the partition and declaration of the right of being entitled to a share and are ordinary incidents in a suit for partition. It cannot be said that they are outside the scope of a partition suit as in a partition suit, the plaint has been held to be one incapable of valuation even though there are additional prayers, besides asking for division, such as for share of profits, accounts, receiver, etc., which otherwise have to be valued independently under the Court-Fees Act if they are not included in a suit for partition. I am therefore of opinion that in any view the appeal against either a preliminary or a final decree, arising out of a suit for partition, must be treated as one incapable of valuation and Article 17-B of Schedule II is the only Article that would be applicable.

In *Jyoti Prasad Singha Deo* v *Jogendra Ram Ray*[2], it was held that in a suit for partition of joint family property the court-fee payable would be a fixed court-fee of Rs. 15 and it did not matter whether the ground of attack was one with reference to the allotment of specific portion of immoveable or moveable property or whether it was the question of costs. In that case the subject-matter of the appeal was about the question of the costs of the commission amounting to about Rs. 1,573-5-9, and, that was an appeal against the final decree in a partition suit.

1. (1940) 1 M L J 32 : I L R. 1940 Mad. 259.
2. (1928) I.L.R. 56 Cal. 188.

In *Jyotibati Chaudhurain* v *Lakshmeshwar Prasad Chowdhri*[1], the question arose as to the amount of the court-fee payable on the appeal in a suit for partition brought by the plaintiffs against the Karta of a joint family. There was a decree for partition of the immoveable properties and also a decree against the Karta for a sum of Rs. 60,426-1-11 1/8, and, the Karta appellant paid a court-fee of Rs 15 for the appeal. But the Court-fee Examiner demanded a deficit court-fee of Rs. 1,860. It was held that the fixed court-fee that was paid was proper, that it was not a suit for accounts in which that expression was used in section 7 (iv) of the Court-Fees Act and that the Karta's accounting is merely a part of the proceedings in the partition of the estate A Full Bench of the Lahore High Court in *Diwan Chand* v. *Dhani Ram*[2] held that though it was an appeal from a preliminary decree a fixed court-fee was payable and not *ad valorem* court-fee.

The learned Government Pleader referred to a decision of Kunhi Raman, J, on a stamp reference in Stamp Register No 4063 of 1945, where the learned Judge agreed with the view taken in *Diwan Chand* v *Dhani Ram*[2], and also observed that the practice in this Court is also in accordance with that decision, *i e*, payment of a fixed court-fee under Article 17-B of Schedule II of the Court-Fees Act. It appears to me that the only correct and reasonable view to take irrespective of the fact whether the appeal is against a preliminary or a final decree is if the appeal arises in a suit for partition the court-fee payable will be the fee provided for under Article 17-B of Schedule II of the Court-Fees Act.

In the result the revision is allowed The order of the learned District Judge is set aside and I hold the court-fee paid by the petitioner already is the proper court-fee for the appeal. No order as to costs.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. P V RAJAMANNAR, *Chief Justice* AND MR. JUSTICE CHANDRA REDDI

R. Venkatesachary and others *Petitioners**

v

The Judge, Court of Small Causes, Madras and another . *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XV of 1946)—Portions of building let separately—Landlord can file an application for obtaining possession of entire house for his occupation.

Though the definition of a building in the Madras Buildings (Lease and Rent Control) Act includes a portion of the building, it does not mean that the owner of a house, portions of which have been let separately, cannot file an application for obtaining possession of the entire house as a building. What is sufficient for the landlord is not the real question, but whether he requires the entire building *bona fide* for his occupation

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in H R. A No 14 of 1949 on the file of the Court of Small Causes, Madras (H. R. C No. 5063 of 1948, Rent Controller, Madras) and to quash the order therein, dated 18th April, 1949.

V. V Devanathan for Petitioners.

G. Chandrasekhara Sastri and *G. Venkatesayya* for 2nd Respondent.

The Court made the following

ORDER.—There is no error of jurisdiction or an apparent error of law on the face of the record. The appellate tribunal has found that the landlord required the entire house for his occupation. Though the definition of a building in the Act includes a portion of a building, it does not mean that the owner of a house,

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1. (1929) I L.R 8 Pat. 818. 2. I.L.R. (1941) Lah. 234 (F B.).

* C.M.P. No. 3985 of 1949. 13th October, 1949.

portions of which have been let separately, cannot file an application for obtaining possession of the entire house as a building. What is sufficient for the landlord is not the real question, but whether he requires the entire building *bona fide* for his occupation The finding that he requires it in this case is a finding of fact. The application is therefore dismissed with costs

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE VISWANATHA SASTRY

Puzhavakath Madathil Gopala Pattar's son Subramanya Iyer and another .. *Appellants**

v

Puzhavakath Madathil Gopala Pattar's son Lakshmana Ayyar and others .. *Respondents.*

Partition—Properties in Indian State and British India—Jurisdiction of British Indian Court to interfere with partition decreed by Court in Indian State

A partition deed in a joint Hindu family provided for the division of the moveable and immoveable properties both in India and Cochin State By the final decree passed by the Cochin High Court the partition deed was held to be admissible in evidence and it also dealt with the equalization of the shares so far as the Cochin properties were concerned

On a question being raised in the Indian Courts, whether one of the parties to the partition deed could raise the question that on account of the default of the opposite party the properties allotted to his share in the Cochin State were sold in execution of the mortgage decree and that he is entitled to be compensated for the same in the division of the properties to be effected in India, the lower Courts held that the question regarding the compensation could be gone into in the suit in India even though the said claim related to properties situate in Cochin State On second appeal,

Held, the Courts in what was then British India had no jurisdiction to direct or decree a partition of properties situate in the State of Cochin The adjustment of the shares of the several parties with reference to the Cochin properties properly fell within the scope of the partition suit filed in the Cochin Court and has been finally decided by that Court It is not open to this Court to go behind the judgment of the Cochin Court or enquire into any alleged inequality or any right to compensation in respect of the division of the Cochin properties.

Rajangam Iyer v. *Rajangam Iyer*, (1922) 44 M L.J 745 L.R 50 I.A 132 : I L.R 46 Mad 373 (P C), followed

Appeals against the decree of the District Court of South Malabar in A S. No 118 of 1941, preferred against the decree of the Court of the Subordinate Judge of Ottapalam in O S. No. 8 of 1938

S. A. No. 1699 *of* 1946.

K. V. Srinivasa Aiyar for Appellants.

K. P. Ramakrishna Aiyar and *C. K. Viswanatha Aiyar* for Respondents

S A. No 2118 *of* 1946.

C. K Viswanatha Aiyar for Appellant.

K V. Srinivasa Aiyar and *K. P Ramakrishna Aiyar* for Respondents

The Court delivered the following

JUDGMENT —In order to understand the contentions of the several parties in these two second appeals the earlier history of these litigations has to be set out in brief outline. The suit of which these two second appeals arise was instituted as early as 12th February, 1937, by the plaintiff, the youngest of five brothers, against his elder brothers for a partition of the family properties some of which are situated in India and some in Cochin State The family was of a humble origin but later on, through the exertions of some of the brothers, acquired considerable landed properties There was also a lucrative Coffee Hotel business carried on at Trichinopoly by some of the brothers Misunderstandings arose between the brothers which resulted in a demand for partition by one of them on 8th September, 1936 All the brothers then met together and after some deliberation settled their disputes in a way. On 15th September, 1936, they entered into an

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*S. A. Nos. 1699 and 2118 of 1946. 11th February, 1949.

agreement evidenced by Exhibit XX to divide the properties in the manner set out therein. All of them signed the document presumably in token of their consent to its terms. Under Exhibit XX the present first defendant, the eldest brother, got for his share certain lands situated in Cochin State which was subject to an encumbrance of Rs. 3,000 and certain lands and a house situated in Ottapalam. To the share of the second brother, the present second defendant, was allotted the Coffee Hotel business in Trichinopoly known as "Bheema Central Lunch Home" with all its moveables and also certain lands and the family houses in Ottapalam. The next two brothers, defendants 3 and 4 were allotted another Coffee Hotel in Trichinopoli known as the "Central Cafe" with all its moveables but with the liability to redeem a pair of a diamond ear-rings which had been pledged for Rs. 2,500, apparently for the purposes of the business, and hand it back to the first defendant. The plaintiff, the last of the brothers, was allotted a building and the remaining lands in Cochin State together with a sum of Rs. 1,000 agreed to be paid to him for the value of certain jewels. The plaintiff was saddled with a liability to pay off a mortgage for Rs. 2,500 outstanding on the lands allotted to him in Cochin State. No provision was made in Exhibit XX for the division of the moveables mentioned in Schedule V of the plaint or the outstandings specified in Schedule C. Exhibit XX was left unregistered It was however followed up by Exhibit II, dated 19th September, 1936, signed by all the five brothers by which in accordance with the terms embodied in Exhibit XX, the Coffee Hotel known as "The Bheema Central Lunch Home" with all its moveables valued at Rs. 4,500 was transferred absolutely to the second defendant and the Coffee Hotel known as the "Central Cafe" with all its moveables valued at Rs. 10,000 was transferred to defendants 3 and 4 absolutely. With regard to the remaining properties which were agreed under Exhibit XX to be divided among the brothers, Exhibit II, recited that since the brothers were not in possession of the exact description, survey numbers and other details of the properties they would draw up a formal document later on. There was an unsuccessful attempt on the part of the first defendant to modify the stipulations in Exhibit XX and also some considerable delay in implementing the terms of Exhibit XX by delivery of the properties allotted to the plaintiff which led to his present suit for partition from which these appeals have arisen.

The suit was numbered as O.S No. 8 of 1938, and decided by the Subordinate Judge of Ottapalam who held that Exhibit XX was not a final partition but only a tentative arrangement between the parties as regards partition; that it was inadmissible in evidence for want of registration; and allotments made under Exhibit XX were unequal in value. He therefore decreed a general partition holding, however, that effect must be given to Exhibits XX and II to this extent, namely, that the "Bheema Central Lunch Home" should be allotted to the share of the second defendant and the "Central Cafe" to the share of the defendants 3 and 4. He also passed a preliminary decree with reference to the moveable properties and silver vessels of the family, the value of the silver vessels being fixed at Rs. 600 in the decree. He also directed that the entire family should pay the first defendant a sum of Rs 2,500 for the value of his diamond ear-rings and a sum of Rs. 1,000 to the plaintiff for ornaments. Against this decision of the Subordinate Judge, there was an appeal and a cross appeal to the District Judge of South Malabar who held that Exhibit XX was a valid and operative partition; that there was no satisfactory evidence to show that the partition was grossly unfair; that even if there was some inequality in the partition, the same had been accepted by all the brothers; and that the decree given by the Subordinate Judge for partition of the immoveable properties ignoring Exhibit XX should be set aside. He fixed the value of the silver vessels to be divided among the brothers at Rs. 1,200 and confirmed the decree of the Subordinate Judge with respect to other moveables and outstandings. The judgment of the District Judge was appealed against to the High Court in Second Appeal No. 1000 of 1943 at the instance of defendants 3 and 4 who felt that the value of the property allotted to them was far too low when compared with the value of the property allotted to the first and second

defendants, a matter on which the Subordinate Judge had expressed himself in their favour. The plaintiff and the first defendant each filed a memorandum of cross-objections in the High Court.

I now turn to another litigation between the same parties in the Courts of the Cochin State The youngest of the five brothers as plaintiff instituted O.S No. 120 of 1112 (M E) for partition of the family properties situated in the Cochin State in the District Court of Trichur A decree for partition of the Cochin properties was passed by the District Judge who held that Exhibit XX being unregistered was inadmissible in evidence to affect immoveable properties There was an appeal A S No 115 of 1116 (M E) to the Chief Court of Cochin which finally decided that Exhibit XX was a valid and operative partition and a decree for partition of the Cochin properties on the basis of Exhibit XX was passed. One of the items of the Cochin property that had been allotted to the plaintiff under Exhibit XX was subject to a prior encumbrance of Rs. 2,500 and it had been sold away in execution of a decree obtained by the encumbrancer during the pendency of the partition suit The plaintiff claimed that he was entitled to be compensated for the loss of this item by his brothers, especially the first defendant due to whose manoeuvres, it was alleged, that the encumbrancer had brought the property to sale and the plaintiff had been deprived of all means of redeeming the property. The Chief Court of Cochin, however, held that the property had been lost to the family without any fault or negligence on the part of any body and there was therefore no ground for making the other brothers pay any compensation to the plaintiff in respect of the loss of the property by the Court sale. Thus ended the litigation regarding the partition of the Cochin properties.

I now return to Second Appeal No. 1000 of 1943, and the memorandum of cross-objections filed therein Pending the second appeal, four of the brothers, defendants 1 to 4 filed a memorandum of compromise into this Court on 28th August, 1944, and on the same day a decree was passed in terms of the memorandum as between the parties to it The youngest brother, the plaintiff in the action, was not a party to the compromise Since the decision of the present appeal turns upon the effect to be given to the memorandum of compromise, I set out its terms hereunder :—

"Memorandum of agreement between defendants 1, 2, 3 and 4

(1) The decree of the lower appellate Court as regards the allotment of properties to these parties is to stand so far as they are concerned

(2) The defendants 3 and 4 give up their claim for the silver vessels referred to in para (2) of the lower appellate Court decree—defendant 1 gives up his claim for the earring Rs 2,500, decreed to him in para V of first Court decree and confirmed by lower appellate Court

(3) Each party to bear his own costs throughout

(4) In other respects the decree of the lower appellate Court will stand . . "

As the plaintiff was not a party to the compromise or the decree which followed upon it, the second appeal was heard and decided on the merits as regards the plaintiff by Somayya, J , on 8th September, 1944 The controversy in the present second appeal has turned upon the effect of the compromise set out above in the light of the judgment of Somayya, J The admissibility of the unregistered arrangement Exhibit XX for the purpose of affecting the immoveable properties dealt with thereunder was the subject of a sharp difference of opinion between the two lower Courts and was debated again before Somayya, J , who, however, did not give a decision on the question, for reasons which may be set out in his own words —

"The admissibility in evidence of Ex XX which was not registered has been very much canvassed, but in view of further investigation it is not necessary to decide this question We find that most of the valuable British Indian properties covered by Ex XX, namely, the Trichinopoly Coffee Hotels, have been the subject of Ex II, a registered deed and that all the Cochin properties have been divided by the decrees of the Cochin Courts The properties which will be affected by the argument that Ex XX is inadmissible are these —

(1) A paddy field allotted to the first defendant, (unnecessary description omitted)

(2) A house allotted to the second defendant

(3) Certain dry fields allotted to defendants 3 and 4 The parties have agreed that, if possible, the properties just mentioned as having been allotted to the first defendant, second defendant and

defendants 3 and 4 may be allotted to their share. Even taking that Ex. XX is admissible in evidence, it does not say that the inequalities in value were not to be adjusted later on The view of the trial Court appears to be right and the appellate Court has really given no reasons for coming to a different conclusion. I hold that the inequalities in the value of the properties allotted must be adjusted."

Dealing with the plaintiff's claim for compensation or adjustment in respect of the Cochin properties Somayya, J, observed as follows —

"His (plaintiff's) grievance, therefore, is that owing to the default of the first defendant he has lost a major portion of the property that was allotted to him under Ex XX. If this property had been situated in British India, the rights and liabilities of the parties could be adjusted, but we do not know whether this grievance of the plaintiff, which appears to be the real grievance, was also the subject of decision by the Cochin Courts and we do not know how the Cochin Courts have dealt with the question

As regards the division of the Cochin properties, the parties are bound by the decree of the Courts of Cochin to which they were all parties. We have further to see whether, as regards the Cochin properties, the Courts have adjusted the inequalities, if any, in the properties allotted to the various sharers."

The decretal portion of the judgment was in these terms :—

"The decree of the lower appellate Court is modified to the extent indicated above and the appeal remanded for disposal according to law in the light of the above observations The compromise between the defendants *inter se* will stand"

After the remand, defendants 3 and 4 contended before the lower appellate Court that the inequalities in the value of immoveable properties allotted to the parties under Exhibit XX should be enquired into and adjusted. The learned District Judge, at the further hearing, negatived this contention and held that it was only as regards the plaintiff, the difference between the value of the immoveable properties actually allotted to him and his legitimate one-fifth share had to be adjusted He held that the compromise filed in this Court precluded any consideration of the alleged inequality *inter se* among the defendants. Against this part of the judgment of the learned District Judge, defendants 3 and 4 have preferred Second Appeal No. 1699 of 1946. The learned District Judge further held that the plaintiff had to be compensated for the loss of a portion of the Cochin property allotted to him under Exhibit XX as a result of the Execution sale, following a mortgage decree as already stated Against this part of the judgment of the lower appellate Court, the first defendant has preferred Second Appeal No. 2118 of 1946. The learned District Judge also held that the value of the silver vessels must be fixed at Rs. 600 and not at Rs. 1,200 as fixed by his predecessor. He gave no direction as regards the plaintiff's claim for mesne profits which had been allowed by the Sub-Court but disallowed by the District Judge on the previous occasion In respect of these two matters the plaintiff has preferred a memorandum of cross-objections in Second Appeal No 2118 of 1946

[Then his Lordship dealt with S. A. No. 1699 of 1946 which has been omitted as not necessary for the purpose of the report.]

I now proceed to consider Second Appeal No. 2118 of 1946. The lower appellate Court held that the plaintiff was entitled to be compensated for the loss of a portion of the property allotted to him by Exhibit XX in the Cochin State by reason of the Court sale which followed a decree in a suit to enforce a mortgage on the property. Mr K P. Ramakrishna Iyer for the plaintiff respondent states that though the plaintiff was bound to pay Rs 2,500 charged on the property allotted to him in Cochin, the property was lost as a result of a Court sale because the plaintiff had not been put in possession of funds by the first defendant for averting the sale. He states that the real value of the property lost by the Court sale was Rs. 5,000 judged by its annual income of 400 paras of paddy and the plaintiff was entitled to be compensated for the sum of Rs. 2,500 being the difference between the real value of the property and the amount realised at the Court sale or the amount of the encumbrance He further contends that the judgment of Somayya, J., compels me so to hold I am unable to agree with this contention The original and appellate judgments of the Cochin Courts which have become final and binding between the parties as regards the partition of the properties in the Cochin State which were not before Somayya, J, and which have since been exhibited, clearly decided, that the plaintiff failed to discharge an encumbrance subject to which

alone he had taken the property, that its loss at the Court sale was not attributable to any negligence or fraud on the part of any body and that in effecting a partition of the Cochin properties according to the terms of Exhibit XX, the plaintiff was not entitled to any compensation in respect of the loss of a portion of the property allotted to him by reason of the Court sale. The Courts, in what was then British India, had no jurisdiction to direct or decree a partition of properties situate in the State of Cochin—see *Rajangam Aiyar* v *Rajangam Aiyar*[1]. The adjustment of the shares of the several parties with reference to the Cochin properties properly fell within the scope of the partition suit filed in the Cochin Court and has been finally decided by that Court. It is not open to this Court to go behind the judgment of the Cochin Court or enquire into any alleged inequality or any right to compensation in respect of the division of the Cochin properties. I do not consider that Somayya, J, decided that this Court was bound to decide the question as regards the inequality in the value of the properties situate in the Cochin State and partitioned by the Cochin Courts

His Lordship said —

"As regards the division of the Cochin properties, the parties are bound by the decree of the Courts of Cochin to which they were all parties We have further to see whether as regards the Cochin properties, the Courts have adjusted the inequalities, if any, in the properties allotted to the various sharers The proper course under these circumstances seems to me to direct the lower appellate Court to receive the records in the Cochin Court and then adjust the inequalities. if any"

I hold that the Cochin Courts have definitely and finally adjudicated upon the alleged inequality in value or the right to compensation arising out of the partition of the Cochin properties adversely to the plaintiff, that that adjudication is binding on the parties and further that it is not a matter falling within the jurisdiction of this Court It follows from the above reasoning that S A No 2118 of 1946 must be allowed with the costs of the first defendant payable by the plaintiff.

[The memorandum of objections in this second appeal was then dealt with and allowed partially]

No leave in any of the cases

S. A No. 2118 *of* 1946 *allowed. S A. No* 1699 *of* 1946 *dismissed.*

V. P S

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR P V. RAJAMANNAR, *Chief Justice* AND MR JUSTICE MACK

The Kandan Textile, Ltd. *Petitioner* *

v.

The Industrial Tribunal I, Madras and others . *Respondents*

Certiorari—*Competency of High Court to issue writ to quash award of an Industrial Tribunal under the Industrial Disputes Act after its award had been declared by Government under section* 15 *of the Act to be binding —Industrial Disputes Act (XIV of* 1947), *section* 10 (1) (c)—*Reference of dispute to a Tribunal—When justified—" Industrial dispute "—Dispute if should be between employer and the majority of workmen*

It cannot be said that a writ *of certiorari* cannot be issued to quash the award made by an Industrial Tribunal under the Industrial Disputes Act after the Government had under section 15 of the Act declared the award to be binding on the employer and employees

Ponnambala Desikar v *H R E Board, Madras,* (1941) 2 M L J 175 I L R 1941 Mad 807, relied on

The Government before it makes an order under section 10 (1) (*c*) of the Industrial Disputes Act must be satisfied that the Industrial dispute which is being referred for adjudication exists or is apprehended, and the Government should have material before it to form an opinion that an industrial dispute exists or is apprehended It is incumbent upon the Government to apply its mind to the relevant material placed before it before making an order under section 10 (1) (*c*) of the Act

It cannot be said that simply because some individual or organization addressed a communication to the Government saying that there was an industrial dispute between the employer and the workmen of a concern, the Government would be justified in passing an order referring the matters to a Tribunal for adjudication without being satisfied on the material placed before them that the disputes did exist or were apprehended

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1 (1922) 44 M.L J. 745 : L R 50 I A 132 . I L.R 46 Mad 373 (P C)

* C. M P No 3894 of 1949 26th August, 1949

Ramayya Pantulu v *Kutty and Rao (Engineer), Ltd* (1949) 1 M L J 231 (232), followed

Where the authority of the particular union of workers (which made the complaint to the Government), to represent any worker is not proved, there is no dispute between the employer and the workers and a reference by the Government on the basis of such a complaint would be bad

Per *Rajamannar, C J*—I must suggest that the intention of the Legislature may be expressed in a more clear and unambiguous language than it is at present, to decide whether an industrial dispute between an employee or employees on the one side and the employer on the other side is an "industrial dispute" which could be referred to a Tribunal for determination even when a substantial section of the entire establishment does not take up his or their cause

Per *Mack, J*—Great caution should be exercised by Government before referring any point for determination to a Tribunal, in arriving at a decision, whether it is in law an industrial dispute or not Nothing can be more calculated to undermine the morale and discipline of labour than illegal and unnecessary references which put a premium on mischievous insubordination and discourage and undermine the loyalty of workmen who in the concern obviously are quite contented, and "have no interest" in the re-instatement of the other workmen

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in the matter of the industrial dispute between the workers and management of the Kandan extiles, Ltd., before the Industrial Tribunal (I), Madras and the award therein, dated 23rd May, 1949, and quash the same.

V K Thiruvenkatachari and *G Vasanta Pai* for Petitioner

The Advocate-General (*K. Rajah Aiyar*) instructed by the Government Solicitor,

S Viswanathan and *V Srinivasan* for Respondents

The Court made the following

ORDER : *The Chief Justice*—This application is made by the Kandan Textiles, Limited, for the issue of a writ of *certiorari* to call for the records in the matter of the industrial dispute between the workers and the management of the Kandan Textiles, Limited, before the Industrial Tribunal I, Madras and the award therein, dated 23rd May, 1949 and to quash the same

The applicant company is the proprietor of a small weaving mill located in Tiruvottiyur, Madras, employing 60 looms and about 200 workers On 21st January, 1948, one R. M Sundaram one of the workmen in the mill was dismissed by the management on the ground that he was responsible for the loss of a flexible shaft He made attempts through the Labour Conciliation Officer to get himself re-instated but did not succeed in his attempt. On 23rd August, 1948, the boiler in the mills broke down and the mills were closed from 24th August, 1948, till 11th October, 1948 On the intervention of the Labour Authorities, 14 days' wages were paid to practically all the workers On 12th October, 1948, the mill reopened Most of the workmen who had been working in the mill on the date of the closure were taken in, but 48 of them were left out. The mills were not working at their full strength of three shifts On 28th October, 1948, the management put up a notice of having a third shift on and from 3rd November, 1948. On 13th November, 1948, 21 of the workers who had been left out resumed duty. They were asked by the manager of the mills to work on looms other than those which had been allotted to them prior to the closure of the mills, but they declined to do so, and thereupon the manager asked them to leave the mills A notice was put up at the mills informing the workers that their services were dispensed with as they had refused to accept the allocation of looms made by the manager. On 20th November, 1948, seven more workers of whom one was a jobber and the rest were weavers were called back to duty and new looms were allotted to the six weavers They too declined to work on the new looms and were dismissed. Six of the weavers who had been in service of the mills before the boiler broke down were not called back at all. Two of the workmen who had been jobbers before the closure were entertained again not as jobbers but only as weavers

There are in existence two rival unions of the workmen of the mills. The Kandan Textiles Labour Union, evidently sponsored by the management, was formed in June, 1947 and it is common ground that the majority of the workmen are members

of this union. On 17th March, 1948, this union made an application for registration under the Trade Union Act, but for reasons which need not be discussed here it was registered only on 24th December, 1948. The other union is the Kandan Weaving Workers' Union An application for the registration of this union was made on 7th October, 1948, long after the application for registration made by the first union, but it was registered on 18th October, 1948.

It may be mentioned that Sundaram who had been dismissed in January, 1948, purports to be its secretary, and one Sreenivasan who is not a workman of the mills, its president As regards this latter union, the Tribunal has found that it is not known when exactly it was formed and no particulars of its membership or of the election of the office bearers are available The Tribunal was of the opinion that its members are fewer than that of the other union The capacity of this union to represent the general body of workers or any section of the workmen was questioned by the applicant before the Tribunal

The president of the union appears to have been addressing letters to the Commissioner of Labour from time to time, but it was admitted by its counsel appearing before us that the union never addressed any communication to the management complaining against any action on their part On 4th December, 1948, the president of this union addressed a letter to the Secretary to the Government (Ex Y) giving a list of disputes existing between the management and the workers of the mills and praying for a reference to a Tribunal under the Industrial Disputes Act (XIV of 1947) On 8th December, 1948, the Government of Madras passed an order directing the Industrial Tribunal having its place of residence at Madras to adjudicate on an industrial dispute between the workers and the management of the Kandan Textiles, Limited, in respect of 11 matters mentioned in an annexure to the order The material portion of the order is as follows —

"The Commissioner of Labour, Madras, has reported that an Industrial Dispute has arisen between the workers and the managements of the Kandan Textiles, Limited, Madras, in respect of the matters mentioned in the annexure, that the parties to the dispute are unable to arrive at an amicable settlement and recommends that the dispute may be referred to the Industrial Tribunal, Madras, for adjudication under section 10 (1) (c) of the Industrial Disputes Act, 1947"

The annexure contained the following eleven items :—

"(1) Whether any retrenchment is necessary and if so how should the retrenchment be effected ,

(2) Whether temporary workers who had put in more than six months service should be made permanent ,

(3) Whether Badli system should be abolished ,

(4) Whether the customary bonus has been paid, withheld and what bonus should be paid to the workers ,

(5) What leave privileges, casual, sick and festival holidays should be given to the workers,

(6) Whether the 48 workers who are non-employed at present are entitled for their wages from 12-10-1948 till the date of employment ;

(7) Whether the Union Secretary, Sri R M Sundaram, should be re-instated ,

(8) Whether the Badli workers are entitled for the notice wages as per orders of the Commissioner of Labour

(9) Whether the workers are entitled to the refund of their contribution of Rs 2 each contributed towards the erection of the statue of Mahatmaji within the company compound and annual celebrations as detailed in the petition dated 24th August, 1948, addressed to the Commissioner of Labour ,

(10) Whether the management is justified in departing from the usual practice and directing the weavers to change over looms ,

(11) Whether the Workers' Union registered under the Trade Union Act should be recognised by the management of the Kandan Textiles, if so, on what conditions"

The order made specific reference to two letters from the Commissioner of Labour, Madras, dated 29th October, 1948, and 2nd December, 1948, presumably containing the report of the Commissioner of Labour, Madras, mentioned in the text of the order

In pursuance of this order the Industrial Tribunal after notice to the management, to the Kandan Weaving Workers' Union and the Kandan Textiles Labour Union held an enquiry and made an award on 23rd May, 1949 On 2nd June, 1949, the Government declared that the said award shall be binding on the management of the Kandan Textiles, Limited, Madras, and the workers employed therein and directed that the said award shall come into operation on the 2nd June, 1949 and remain in operation for a period of one year. It is to quash this order that the present application has been filed

Before dealing with the grounds on which the applicant prays for this relief it is convenient to briefly dispose of a preliminary objection raised on behalf of the respondents that a writ of *certiorari* cannot be issued in this case because the Government had under section 15 of the Act declared the award to be binding and it is not competent for this Court to issue a writ of *certiorari* against an Act of the Governor This objection must be overruled on the authority of the ruling in *Ponnambala Desikar* v. *Hindu Religious Endowments Board, Madras*[1]. In that case the Madras Hindu Religious Endowments Board notified certain temples under Chapter VI-A of the Madras Hindu Religious Endowments Act, 1926. In accordance with the decision of the Board, the Government declared the temples to be subject to the provisions of the Chapter It was contended that this Court could not issue a writ of *certiorari* to quash the order of the Board, because of the bar contained in the provisions of section 306 of the Government of India Act, 1935, but the contention was rejected.

Leach, C.J , observed as follows —

' In the first place, the petitioner does not ask for the issue of a writ against the Government, but against the Board, which is no part of the Government In the second place, if the Board has abused its powers the Court has power to quash the Board's orders on which the notification is based and, if the basis of the notification is illegal, the notification is illegal "

In view of this decision, the learned Advocate-General did not seriously press this objection as to the maintainability of this application

The main grounds on which learned counsel for the petitioner sought to have the award of the Tribunal quashed were

(i) that there was no industrial dispute in existence between the employer and the workmen

(ii) that the reference to the Tribunal made by the Government by their order of the 8th December, 1948, was invalid, because *ex facie* the Government had before it no material to arrive at a conclusion that the matters mentioned in the annexure to the order were matters in dispute between the workmen and the management

In developing both these grounds, several interesting questions relating to the construction of the provisions of the Act were raised on which we heard the arguments of the counsel on behalf of the petitioner and the contesting respondent, *viz* , the Kandan Textiles Workers' Union and also the learned Advocate-General who represented the Government Many of these questions are *res integra*

We have no hesitation in holding that the petitioner must succeed on the second ground that the order of the Government referring to the Tribunal eleven matters set out in the annexure to the order is bad. The order purports to have been passed in exercise of the power conferred by section 10 (1) (*c*) of the Act which runs thus :

" 10 (1) If any industrial dispute exists or is apprehended, the appropriate Government may, by order in writing,—

* * * * *

(*c*) refer the dispute to a Tribunal for adjudication "

Obviously, the Government before it makes an order under this provision must

1 (1941) 2 M L J 175 I L.R 1941 Mad 807

be satisfied that the industrial dispute which is being referred for adjudication exists or is apprehended, and the Government should have material before it to form an opinion that an industrial dispute exists or is apprehended. This position was conceded by the learned Advocate-General On the face of the order it is made abundantly clear that the Government passed the order on and accepting the recommendation made by the Commissioner of Labour and the reference to the two letters from him indicates that the recommendation is contained in these two letters. It is now admitted before us by counsel for the contesting respondent and by the learned Advocate-General that none of the eleven matters mentioned in the annexure to the order is to be found in the said two letters of the Commissioner of Labour to the Government The letter dated 29th October, 1948 (and the other letter, dated 2nd December, 1948, carries us no further) refers to a dispute as to the principle of seniority not being accepted by the management in taking back the workers after the mills reopened in October, 1948. This question of seniority is not admittedly one of the items of dispute set out in the annexure. Evidently what happened was that the list of eleven matters contained in the letter addressed by the President of the Kandan Workers' Union to the Secretary to the Government on 4th December, 1948, was copied *verbatim* as an annexure to the Government Order. It is not suggested—and it would be idle to suggest—that the Government called for a report from the Commissioner of Labour to ascertain whether those matters were really in dispute and that they acted on such report. The learned Advocate-General did not—and could not—contend that simply because some individual or organization addressed a communication to the Government saying that there was an industrial dispute between the employer and the workmen of a concern, the Government would be justified in passing an order referring the matters to a Tribunal for adjudication without being satisfied on the material placed before them that the disputes did exist or were apprehended. It is incumbent upon the Government to apply its mind to the relevant material placed before it before deciding that an industrial dispute exists or is apprehended and making an order under section 10 (1) of the Act With great respect I agree with the following observations of the learned Judges who decided the case in *Ramayya Pantulu* v. *Kutty and Rao (Engineer), Ltd.*[1] :

"When a notification is issued and a reference made to a Tribunal, the Government must have in mind some dispute that has actually happened or one that is likely to arise from circumstances known to the Government * * * It seems to us, on a fair reading of section 10, that the Government must have reason to believe that in a particular business a definite dispute is known to exist or is apprehended by reason of demands and discussions taking place amongst the workers and management. * * It seems to us from the general purport of the Act, that a responsibility lay upon the Government of considering the existence and the nature of a dispute and to exercise their mind and decide whether it is necessary to refer that dispute to a Tribunal for an award "

Taking the present case, if the Government had considered the truth of the existence of a dispute and had exercised their mind on the material placed before them, they would have certainly come to the conclusion that the items set out in the annexure to their order were not matters of dispute, and there was no material before them that a dispute existed as to them Most of these items had nothing to do with the case of the dismissed and non-employed workmen The fifth item is What leave privileges, casual, sick and festival holidays, should be given to the workers? Now, there was nothing before the Government on which they could have decided that a dispute existed as regards these matters. In fact, at the inquiry before the Tribunal the contesting respondent before us, namely, the Kandan Weaving Workers' Union did not press items 3, 5, 8, 9 and 11 The management did not raise any dispute as regards item 2. In these circumstances I have no hesitation in holding that the reference made by the Government in this case was neither competent nor valid.

Moreover, there is no evidence appearing on the face of the award from which the conclusion can be drawn that an industrial dispute existed on the date of the order of reference It is true that one R. M Sundaram was dismissed in January

1. (1948) 1 M L.J 231 (232)

1948, and other workmen were dismissed or discharged in November, 1948, and some of the workmen who had been employed before the closure of the mills were not re-employed after the mills reopened But there is no clear evidence that there was a dispute between the management and the workers within the meaning of the Act There is no evidence that either the aggrieved workers or the other workers on their behalf ever made a demand on the managment for re-instatement and that the demand was refused by the employer As pointed out in the judgment of the Federal Court in *Western India Automobile Association* v *Industrial Tribunal, Bombay*[1] :

> "Demand as to re-instatement may arise in several ways It may be a demand of the workmen in service that unless the dismissed workmen are re-instated, they will strike work It may be a demand of the workmen on strike refusing to resume work unless persons victimised are put back in service or it may be a demand of the dismissed employees themselves "

There is no evidence of a demand in any of these several ways. No doubt the president of the Kandan Weaving Workers' Union was addressing letters to the Commissioner of Labour from time to time, but admittedly he never addressed any letter to the management In the absence of any definite particulars as to the membership of this union, and its representative character, and in the absence of anything to show that it was decided by the workmen members of this union by resolution or otherwise to take up the cause of the aggrieved workmen and in the absence of evidence to show that the aggrieved workmen put forward the president of this union as their representative and spokesman, it is impossible to hold in law that an industrial dispute existed between the employer and the workmen to enable the Government to make an order under section 10 (1) of the Act. In one place the Tribunal says that while this union cannot represent the majority of the workers who are members of the Kandan Textiles Labour Union who have no dispute with the management, it can represent Sundaram and other aggrieved workers, because, it is not denied that these 36 workers are members of the latter union. Surely, this is not a matter in the knowledge of the petitioner to expect a specific denial from him If no particulars were furnished even to the Tribunal as regards the membership of this union and its proceedings, it follows that the petitioner was not in a position to make any assertion In our opinion, it was incumbent on the union by production of the relevant records to positively establish the fact that the union is entitled to represent and that it is, as a matter of fact, representing these 36 aggrieved workers The Tribunal has sought support for its conclusion from the provisions of section 36 (1) of the Act which provides that a workman, who is a party to an industrial dispute shall be entitled to be represented in any proceedings under the Act by an officer of a registered trade union This provision has nothing whatever to do with the question whether there is an industrial dispute within the meaning of the Act We have only before us the letters addressed by the president of the union who, as already mentioned, is not himself a workman in the mills, and there is nothing on record to show that he has been authorised by the resolution or other proceeding of the union to represent the workers of the mills or any section thereof We are far from suggesting that the workmen who did not secure re-employment did not feel themselves aggrieved, but this circumstance alone cannot support a finding that an industrial dispute exists within the meaning of the Act A dismissed workman may feel himself aggrieved but may make no demand on the management, or after a demand and refusal may not pursue the matter further , in which case it would be wrong to say that an industrial dispute exists

The application before us can be disposed of in favour of the petitioner on these findings of ours, namely, that the reference by Government was bad and that it is not established that there is a dispute between the employer and the workers, because the authority of the Weaving Workers' Union to represent any worker has not been proved to exist

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1 (1949) F L J 154 at 159

Mr Thiruvenkatachariar, the learned advocate for the petitioner, has argued further that even assuming there is a dispute between the management and the 36 workers mentioned above such a dispute cannot be deemed to be an industrial dispute within the meaning of the Act According to his contention, before it can be held that an industrial dispute exists between the employer and the workmen, it must be established that there is a dispute between the employer and a majority of the workmen or the concerned section of the workmen as regards one of the matters mentioned in the definition of "industrial dispute" If, *A*, a workman, is dismissed and he demands re-instatement and his demand is refused by the employer, there may be an individual dispute between *A* and the employer, but such a dispute cannot be called an industrial dispute, unless the majority of the workers or a definite section of the workmen takes up his cause and makes it a common dispute So his arguments ran "Industrial dispute" according to section 2 (*k*) of the Act means—

"any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person"

Besides this definition, the following other provisions of the Act were also relied on by learned counsel in support of his contention —

"Section 10 (2) Where the parties to an industrial dispute apply in the prescribed manner' whether jointly or separately, for a reference of the dispute to a Board, Court or Tribunal, the appropriate Government, if satisfied that the persons applying, represent the majority of each party, shall make the reference accordingly"

' 18 A settlement arrived at in the course of conciliation proceedings under this Act or an award which is declared by the appropriate Government to be binding under sub-section (2) of section 15 shall be binding on —

(*a*) all parties to the industrial dispute,

(*b*) all other parties summoned to appear in the proceedings as parties to the dispute, unless the Board or Tribunal, as the case may be, records the opinion that they were so summoned without proper cause,

(*c*) where a party referred to in clause (*a*) or clause (*b*) is an employer, his heirs, successors or assigns in respect of the establishment to which the dispute relates,

(*d*) where a party referred to in clause (*a*) or clause (*b*) is composed of workmen, all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part"

I must confess that the language of the definition of "industrial dispute" is so wide that giving the words their ordinary meaning, even a dispute between an employer and one of the workmen or between one workman and another workman which is connected with one or other of the matters mentioned therein would fall within the definition But it was contended that in construing the definition, the objects of the Act and the scheme of the several provisions of the Act have to be taken into consideration A reference was made to the statement of objects and reasons published along with the Bill before it became law and reliance was placed on the following passage

"The power to refer disputes to Industrial Tribunals and enforce their awards is an essential corollary to the obligation that lies on the Government to secure conclusive determination of the disputes with a view to redressing the legitimate grievances of the parties thereto, such obligation arising from the imposition of restraints on the rights of strike and lock-out, which must remain inviolate, except where considerations of public interest override such rights"

From this passage learned counsel sought to draw the inference that it was only a dispute which otherwise would have resulted in a strike or lock-out which was intended to be referred to Industrial Tribunals for determination We, however, do not think it safe to construe the language, of the definition in the Act by something which might be implied from the statement of objects and reasons It has been often pointed out that in construing an enactment such statement of objects and reasons would be irrelevant Not infrequently the objects and reasons of a legislation as announced at the initial stage of a Bill do not coincide with the enactment when finally passed

Some assistance was sought by learned counsel from the provisions of section 10 (2) of the Act which provides that when the parties to a dispute apply for a reference, the Government must be satisfied that the persons applying represented the majority of such party before making a reference We do not think that this provision necessarily leads to the conclusion that there could be no industrial dispute unless the majority of workmen is ranged as one of the parties, and it must not be overlooked that in section 10 (1) of the Act there is no such condition which requires to be fulfilled before the Government makes an order referring a dispute to a Tribunal. The provisions of section 18 do provide food for thought The award is declared to be binding not only on all parties to the industrial dispute, but where a party is composed of workmen on all persons who were employed in the establishment or, part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part This undoubtedly suggests that something more than an individual dispute between a worker or a few workers and the employer is meant by an industrial dispute. It suggests that it must be a collective dispute, *i e*, a dispute between the employer on the one hand and the entire establishment or a part of the establishment on the other hand in which case it is reasonable to presume that at least a substantial number of the employees in the establishment as a whole or in the concerned part of the establishment should be at dispute

Reference was made to observations in cases decided in England in which the definition of "trade dispute" corresponds to the definition of "industrial dispute" in our Act In *National Association of Local Government Officers* v *Bolton Corporation*[1], legislation similar to the Industrial Disputes Act was described by Lord Wright as "dealing with collective bargain, trade practices and so forth" In Ex parte *Keable Press, Ltd* [2], a member of a trade union had formerly been employed by a newspaper which for a time ceased publication When it resumed publication, the newspaper applied to the Union for suitable workmen The Union sent the former employee in question, but the newspaper refused to accept him The Union insisted on his re-instatement and called a strike in consequence. It was contended that it was not a trade dispute since it was a dispute between the employers and the Union and not between the employers and their employees This contention was negatived, because there was evidence that the Union in insisting on the re-instatement of the workmen in question was acting on behalf of or with the approval of its members who were all workmen There could be no better proof of the existence of a dispute in relation to the re-instatement of the employee than the fact that the men came out on strike, because he had not been re-instated. Mr Thiruvenkatachari relying on this decision contended that merely because the union raised a dispute of its own accord, it could not be said that there was an industrial dispute It was only when the workmen back up the Union by supporting its demands for re-instatement that it can be said that a dispute existed In the case before us, there is nothing to indicate that the demands of the Union in the communication addressed to the Government were ever adopted by the workers. This decision is certainly authority for the position that there could be an industrial dispute over the re-instatement of a single individual worker But that dispute had been converted into a collective dispute by the Union acting on behalf of the workmen in general and by the workmen backing up the Union by obeying the call to come out on strike The question whether in the absence of these circumstances, an individual dispute could be treated as an industrial dispute did not arise for decision On the other hand assuming that in its origin the dispute was not a trade dispute, it was decided that it could become a trade dispute in its later stages (*vide* also per Lord Parmoor in *Larkin* v. *Long*[3].)

There are observations in the well-known case of *Conway* v. *Wade*[4], which were pressed into service by counsel on both sides Counsel for the petitioner relied upon the following dicta of Lord Loreburn, L C. :

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1 (1943) A C 166
2 (1943) All E. R 633
3 (1915) A C. 814 at 845.
4 (1909) A C. 506

"If this section is to apply there must be a dispute, however the subject-matter of it be defined. A mere personal quarrel or a gambling or an agitation will not suffice. It must be something fairly definite and of real substance"

For the contesting respondent the following passage from Lord Atkinson's speech was relied on—

"In order that a dispute may be a trade dispute at all, a workman must be a party to it on each side, or a workman on one side and an employer on the other "

In the context in which these words occur, we do not think that they meant anything more than that there could not be a trade dispute when one of the parties was an outsider, neither an employer nor a workman and when he had no authority from the Trade Union body to act as he did. In the same case Lord Shaw said

"But I cannot see my way to hold that 'trade dispute' necessarily includes accordingly every case of personal difference between any one workman and one or more of his fellows It is true that after a certain stage even such a dispute, although originally grounded it may be, upon personal animosity, may come to be a subject in which sides are taken, and may develop into a situation of a general aspect containing the characteristics of trade dispute, but *until* it reaches that stage I cannot hold that a trade dispute necessarily exists"

None of the English decisions cited have any direct bearing on the question in issue before us

The observations in the Australian cases are even less helpful because there is no definition of an industrial dispute which was construed in those cases In *Jumbunna Coal Mine, No Liability* v. *Victorian Coal Miners' Association*[1], Griffith, C J., said

"An industrial dispute exists where a considerable number of employees engaged in some branch of industry make common cause in demanding from or refusing to their employers (whether one or more) some change in the conditions of employment which is denied to them or asked of them"

In *Federated Saw Mill & Co Employees of Australasia* v *James Moore and Sea Proprietary, Ltd*[2], the same learned Judge said

"The word 'industrial' as used in section 51 (xxxv) points, I think, to the nature or quality of the disputes, and denotes, two qualities which distinguished them from ordinary private disputes between individuals, namely, (1) that the dispute relates to industrial matters, and (2) that on one side at least of the dispute the disputants are a body of men acting collectively and not individually"

In the judgment of Isacs, J, in *George Hudson, Ltd* v *Australian Timber Workers' Union*[3], the difference between an industrial dispute and an individual dispute is well drawn The learned Judge observed—

"The very nature of an 'industrial dispute' as distinguished from an individual dispute is to obtain new industrial conditions, not merely for the specific individuals then working from the specific individuals then employing them, and not for the moment only, but for the class of employees from the class of employers limited by the ambit of disturbance or dislocation of public services which has arisen or which might arise if the demand were not acceded to and observed *for a period really indefinite* It is a battle by the claimants not for themselves alone, and not as against the respondents alone but by the claimants as far as they represent their class, against the respondents so far as they represent their class"

As already observed, these observations only give expression to what is generally understood by an industrial dispute and they were not on any specific language of any enactment

In the judgment of the Federal Court in *Western India Automobile Association* v. *Industrial Tribunal, Bombay*[4], delivered by Mahajan, J., there are certain general observations which were not strictly necessary for the decision of the case before the Court, but they are entitled to great weight After pointing out that,

"'Non-employment', is the negative of 'employment' and would mean that disputes of workmen out of service with their employers are within the ambit of the definition"

the learned Judge went on to give four illustrations to elucidate the point of which the third is as follows:—

1 (1908) 6 C L R 309 at 332
2 8 C L R 465 at 488
3 32 C L R 413 at 441
4 (1949) F L J 154

"An employer may dismiss a man, or decline to employ him This matter raises a dispute as to non-employment"

Difficult questions arise when the only parties to a dispute are the employer on the one hand and certain dismissed employees on the other hand If the dismissal is the origin of the dispute, it is doubtful if the dismissed workman could be deemed to be a workman within the meaning of the Act,—*see* definition of "workman" in section 2 (*s*) of the Act Of course, if there was an industrial dispute and during that dispute a workman is discharged, he may be treated as a workman for the purposes of proceedings under the Act But if there was no preceding industrial dispute and the dispute started with the dismissal, it can be contended with great force that the dismissed workman cannot be held to be a workman within the meaning of the Act As we have already mentioned, in the view we take as to the validity of the order of reference made by the Government, all these questions need not be finally decided I must, however, suggest that the intention of the Legislature may be expressed in a more clear and unambiguous language than it is at present ; to decide whether an individual dispute between an employee or employees on the one side and the employer on the other side is an industrial dispute which could be referred to a Tribunal for determination even when a substantial section of the entire establishment or a recognised part of the establishment does not take up his or their cause

As we have held that the order of reference made by the Government is invalid, it follows that the proceedings of the Industrial Tribunal in pursuance of that order are without jurisdiction They and the award of the Tribunal in which they culminated must be and are hereby quashed. There will be no order as to costs of this application

Mack J—I am in complete agreement with My Lord, the Chief Justice and would add a few observations The Industrial Disputes Act was never intended to provide a machinery for redress by a dismissed workman or even by a group of workmen who may be simultaneously punished or dismissed They cannot by joining in a demand for re-instatement create an industrial dispute after their dismissal If such a dismissal however even of an individual workman is taken up by a Workers' Union or a substantial body of workmen who continue in employment and espouse his cause then an industrial dispute may arise.

The definition of "industrial dispute" in section 2 (*k*) of the Act has to be gleaned from the scope and context of the whole Act, as interpreted by decisions to which the learned Chief Justice has referred Under section 10 (2) of the Act which provides for a reference to a Court or Tribunal on the application of the parties to an industrial dispute the Government if satisfied that the persons applying represent the *majority of each party* shall make the reference accordingly. Section 33 of the Act protects a workman from discharge, dismissal or punishment during the pendency of proceedings before a Tribunal except for misconduct not connected with the dispute The framers of the Act were very careful to provide for the maintenance of discipline and order amongst the workmen during an industrial dispute and never intended the Act to be misused as a lever by individual disgruntled workers discharged, dismissed or punished for misconduct. The employer retains under the Act, therefore, the right to dismiss, discharge or punish a workman for misconduct, or disobedience to orders unconnected with an industrial dispute pending before a Tribunal

It is extremely difficult to follow how in this case the dismissal of R M. Sundaram in January, 1948, an isolated case of disciplinary action not taken up then and there by the other workmen could have been made the subject-matter of an industrial dispute specifically referred by Government to the Tribunal on 8th December, 1948

The Government's reference to the Tribunal though it purports to be under section 10 (1) which gives Government a discretion to so refer if an industrial dispute exists or is apprehended is really a hybrid one under sections 10 (1) and

10 (2). The only documents read in the Government Order issuing the reference were two letters from the Commissioner of Labour The only industrial dispute envisaged in these letters was the insistence of the management on a right to take back the remaining twenty-seven workers in order of proficiency and not of seniority This may have been in law an industrial dispute brought as it was to the notice of the Government by one of its responsible officers, which would have justified a reference to a Tribunal of a dispute of a very limited scope But the astonishing feature of this reference is that the annexure to the Government Order which lays down the points of dispute for determination omits the very one reported by the Commissioner for Labour, but reproduces verbatim no less than eleven points of dispute for determination as set out in a letter of the President of the Kandan Weaving Workers' Union, dated the 4th December, 1948 The Government's reference on the basis of this letter, therefore, saddles on the Tribunal an enquiry of an extremely wide scope which could not but have caused it great embarrassment, one being whether R M. Sundaram dismissed in January, 1948, should not be re-instated and another being what leave privileges casual, sick and festival holidays should be given to the workers and so on

I come now to the Kandan Weaving Workers' Union who alone pressed the demands of the workers before the Tribunal. The great majority of the 200 employees belonged to the Kandan Textiles Labour Union sponsored by the management. There was some delay in its registration which was only effected on 24th December, 1948 But as the Tribunal has observed there was ample documentary evidence to show that it was in fact formed in June, 1947, and that office-bearers were elected in January, 1948 (*vide* Exhibits I, I (*a*) and II). Its first president was examined as M W 5 and one Ellappa Mudaliar, M W. 4, a jobber in this mill was its first secretary At the enquiry before the Tribunal the *locus standi* of the rival union, the Kandan Weaving Workers' Union to represent the general body of workers was challenged and made the subject of a separate Additional Issue. The Tribunal found this issue in favour of the rival union, it would appear merely on the ground that it too had been registered under the Trade Unions Act and could therefore represent the workers under section 36, clause (1) of the Industrial Disputes Act But the Tribunal at the same time committed itself to other findings with which we are in complete agreement When examined in the light of the materials on record they show that the Kandan Weaving Workers' Union was a mere bogus affair which had no legitimate origin and in fact no real existence at all. The Tribunal observed that there was absolutely no evidence adduced before them to show that this Union was in existence prior to August, 1948, when it appeared for the first time in letter head correspondence with the Government Though its *locus standi* as a Union was challenged, neither the President, nor the Secretary, the dismissed Sundaram was able to produce any minute book or document showing that a meeting of the workers at which they were elected was held or any record in fact showing the origin or existence of the Union Reliance was placed solely on the certificate of registration under the Trade Unions Act, from 18th October, 1948 According to the written statement filed before the Tribunal this Union was formed on 7th June, 1948 In the application for registration the Union is said to have come into existence at a General Body Meeting held on the 6th of July. In the evidence before the Tribunal an attempt was even made to show that this Union was started before Sundaram's dismissal in January 1948. Registration of an Union under the Indian Trade Unions Act is not conclusive proof of its real existence It may raise a presumption to this effect Certain formalities appear to have been complied with before the Registrar who without calling for further information under section 7 (1) of the Trade Unions Act directed registration considering that requirements under sections 5 and 6 had been satisfied. In view of the inability of this Union when its *locus standi* was directly challenged before the Tribunal to produce any documentary evidence even of its inaugural meeting, it is a reasonable inference that had the Registrar called for such information it would not have been forthcoming before him and the Union would not have been registered. Everything therefore points to the Kandan Weaving

Workers' Union being an artificial and bogus creation by the dismissed Sundaram with the assistance and connivance of Srinivasan, the alleged first president who is said to be a member of the Tamil Nad Congress Committee. In the circumstances the so-called Kandan Weaving Workers' Union was not a Union of Workmen in fact and it had clearly no *locus standi* to represent any workers The entire reference of disputes listed by this Union in a letter addressed to Government signed by this President is clearly for this reason also bad in law and unsustainable Unions of this kind can be created by mere letter-heads and self-designations Registrars of Unions and societies would be well advised to use very freely the discretionary power vested in them under section 7 of the Trade Unions Act and other corresponding provisions of other Acts regulating the registration of associations of other kinds

Perhaps the strongest indictment on the "Kandan Weaving Workers' Union" comes from the lips of two witnesses this Union examined before the Tribunal. They are still working obviously in contentment with the remaining workmen in these mills They are W W 1 and W W 2 who while they said in chief-examination that they belonged to both Unions, in cross-examination said quite clearly and unambiguously that they were not interested in the re-instatement of any of the workers The inference is obvious that the great majority of workmen have no grievance at all against the management with no interest in the re-instatement of Sundaram and other discharged workers sent away for disobedience to orders and other causes

This reference by Government is a very unfortunate one, bad in law and worse in its effects on labour in general, creating as it does industrial disputes where none existed and referring them in the widest terms to an industrial Tribunal which has really no option but to go into each matter set out in the reference as being an industrial dispute. The greatest caution should be exercised by Government before referring any point for determination to a Tribunal, in arriving at a decision, whether it is in law an industrial dispute or not. Nothing can be more calculated to undermine the morale and discipline of labour than illegal and unnecessary references of this kind which put a premium on mischievous insubordination and discourage and undermine the loyalty of the great majority of workmen who in this concern obviously are quite contented, and "have no interest" in the re-instatement of the other workmen including the dismissed Sundaram.

I agree that the entire award should, in the circumstances, be quashed

V S. — *Petition ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR JUSTICE PANCHAPAKESA AYYAR.

The Calicut Hosieries, Calicut and others . *Petitioners.**

Industrial Disputes Act (XIV of 1947), sections 23, 24 and 26 (2)—Reference of dispute to tribunal vague, general and so invalid—Lock-out by the management after such reference—If illegal and an offence—Madras Act (XII of 1949), section 5—Validating reference—If renders prior lock-out illegal

Where a reference by the Government to an Industrial Tribunal is too vague and general and invalid, "the lock-out" by the managment and directors of a firm involved in the dispute cannot be said to be illegal and their conviction under sections 23 and 24 of the Industrial Disputes Act, 1947, read with section 26 (2) will not be sustainable Madras Act XII of 1949, section 5 has not got the effect of making the lock-out illegal retrospectively by validating such references The fact that the lock-out was committed before the High Court decisions holding such general and vague references invalid will not make them liable

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of Sessions, South Malabar Division, Kozhikode, dated 4th September, 1948, and passed in Criminal Appeal No 46 of 1948, preferred against the judgment of the Court of the Sub-Divisional Magistrate of Kozhikode, dated 29th June, 1948, and passed in C C No 87 of 1948.

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* Crl R C No 1222 of 1948 (Crl R P No 1160 of 1948) — 13th October, 1949

B. V. Subramanyam for Petitioners.

The Assistant Public Prosecutor (*A S Sivakaminathan*) on behalf of the Crown.

The Court made the following

ORDER —This is a petition by the Calicut Hosieries Limited (accused 1) and three Directors of that firm (accused 2 to 4) for setting aside their convictions under sections 23 and 24 of the Industrial Disputes Act (XIV of 1947), read with section 26 (2) for having declared and carried on *an illegal lock-out* after a reference had been made by the Government of Madras to the Industrial Tribunal, Coimbatore, consisting of one person, *viz*, Sri C R Krishna Rao, for deciding *certain* industrial disputes between *certain* hosiery factories in the Province of Madras and the workmen employed therein, and a letter of the District Magistrate of Malabar to the accused drawing their attention to the fact that all disputes between hosiery employers and workers had been referred to the industrial tribunal, Coimbatore, and that the lock-out during the pendency of the reference was illegal and should be terminated. The first petitioner firm has been ultimately sentenced to pay a fine of Rs 1,000, and the directors of the firm (P. Ws 2 to 4) have been sentenced ultimately, by the appellate Court, to pay a fine of Rs 500 each.

I have perused the entire records, and heard the learned counsel for the petitioners and the learned Public Prosecutor *contra* The learned counsel for the petitioners urged that the reference in this case by the Government to the Tribunal was far too vague and general and was invalid under the rulings of Horwill and Rajagopalan, JJ, in *Ramayya Pantulu* v *Kutty and Rao (Engineer) Limited*[1] and of the Chief Justice and Mack, J, in *Kandan Textiles Ltd.* v *Industrial Tribunal I, Madras*[2], a similar case but unreported. The facts there being more or less identical with the facts here, it was urged that as the reference to the Industrial tribunal, Coimbatore, itself was illegal and void there could be no question of any *illegal lock-out* by these petitioners during the pendency of that reference (which is as if it were not, being void and of no effect), or of any offence committed by them under the Industrial Disputes Act. The learned Public Prosecutor while conceding that the rulings above have held such references, including a reference as in this case, to be illegal and void, and that the petitioners would have been entitled to an acquittal had the matters stood there, relied on section 5 of Madras Act XII of 1949 for urging that the reference to the tribunal held to be invalid by those two Bench judgments of this Court, has been validated thereby, even for making this lock-out *illegal.*

Section 5 runs as follows :

"Where before the commencement of this Act any Industrial Tribunal has been constituted by the Provincial Government under the said Act, all proceedings taken, all awards made, and all other acts and things done, whether before or after such commencement, by or before such Tribunal in connection with any industrial dispute, shall be deemed to be valid and shall not be called in question in any Court of law on the ground that the Tribunal was not constituted in accordance with the prevsions of the said Act or the dispute, to which the proceeding, award, act or thing relates, was not referred to the Tribunal in accordance with such provisions"

It is clear from section 5 that all acts and things done by or before such Tribunal in connection with any industrial dispute will be valid in spite of the previous void nature of the reference. In other words, if the tribunal had passed an award under the reference in *question* in this case, it will be binding on all the parties. The amendment itself was made to make such awards, rendered nugatory by the above decisions valid and binding, and not to create retrospective offences a thing unknown to our criminal law It is quite futile to argue that any person charged with an offence of illegal lock-out before the validating Act can be convicted and sentenced for it, where the reference was void before the validating Act. The second para of section 5 itself declares that no decision or order of a Court which became final before the commencement of this Act shall be invalidated because of section 5. That shows that there was no intention to declare the Bench decisions null and

1 (1949) 1 M L J 231

2 Since reported (1949) 2 M L J 789.

void and shows the clear intention of the Legislature not to make persons charged with offences before the validating Act liable for these offences because of the validating Act, if they would not be liable without resort to the provisions of the validating Act A criminal offence is a peculiar thing, and the law is very particular that only a person with the necessary *mens rea* or guilty knowledge at the time it was committed shall be convicted of a criminal offence and punished for it, except in very exceptional cases, of which this is not one To say that because a reference has been validated therefore a lock-out which was *legal* before the validating Act has become *illegal*, though it would certainly not have been illegal *but* for the validating Act, is to ask for too much on the side of the prosecution No Act is held to be retrospective regarding *Crimes* in any civilized country without the clearest words to that effect

The learned Public Prosecutor urged that this illegal lock-out was committed before the decisions of the two Benches, and so the petitioners cannot avail themselves of these decisions But it is obvious that Courts only *declare* the law, which is deemed to have existed always and that they cannot *create* a law when pronouncing judgments, much less *alter* it Thus a person declared illegitimate by a Court of law does not become illegitimate because of the decision of the Court on that same day, or by an act of the Court, but because he must be deemed to have been *always illegitimate* In the same way, it must be construed here that the reference in this case was illegal and void even when it was made and even before the Court's rulings were issued proving it to be illegal and void and making it easy for all men to see it in the light of the reasoning given in those judgments. That being so, it is clear to me that these petitioners ought not to have been convicted in this case, and that they ought to have been acquitted, in the circumstances stated above

I accordingly set aside the convictions and sentences on all the petitioners and direct the fines, if paid, to be refunded to them

K S ——— *Convictions set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE RAGHAVA RAO

Venkatarama Ayyangar *Appellant**

v

Thulasi Ammal .. *Respondent*

Guardians and Wards Act (VIII of 1890), section 25—Right of mother to recover custody of her daughter from the minor's paternal aunt's husband.

The refusal by a person to deliver the child to its natural guardian when asked to do so by the latter amounts in effect to a removal from his custody and the natural guardian can therefore apply under section 25 of the Guardians and Wards Act

Atchayya v *Kosaraju Narahari*, A I R 1929 Mad 81, relied on

The section is not limited in its operation to the power of the Court to enforce the guardian's right only in extreme cases of an actual leaving or removal of the ward from the guardian

Noshirwan v *Sharoshbanu*, (1933) I L R 58 Bom 724, relied on

The word guardian in the section is used in a wide sense and does not necessarily mean a guardian duly appointed or declared by the Court but includes a natural guardian or even a *de facto* guardian Accordingly the mother is entitled to apply for recovery of custody of her minor daughter from her paternal aunt's husband The preference expressed by a child of 13 or 14 is not entitled to much or any weight at all, especially where the minor's attitude is not a natural, *bona fide* and intelligent one

Rama Iyer v *Nataraja Iyer*, (1948) 1 M L J 125, relied on

Appeal against the order of the District Court of Tiruchirapalli dated the 17th day of February, 1949 and made in O P No. 38 of 1948.

K. V Srinivasa Aiyar for Appellant

S Amudachari for Respondent

* A. A O. No. 144 of 1949. 26th October, 1949.

The Court delivered the following :

JUDGMENT.—This appeal arises out of a petition by the mother of the minor, aged about 13, her natural guardian, under section 25 of the Guardians and Wards Act for recovery of her custody from her paternal aunt's husband. The petitioner succeeded in the Court below.

It is argued for the appellant that the mother does not satisfy the definition of "guardian" in section 4, sub-section (2) of the Guardians and Wards Act and that her petition under section 25 of the Act is not therefore maintainable. The point made is that she is not a person in truth and in fact having the care of the person of the minor because it is the paternal aunt and her husband that are actually having such care. It is also said that she is not a guardian appointed or declared as such. I do not agree. *Noshirwan* v. *Sheroshbanu*[1] supports my view. It is there held that the word "guardian" in the section is used in a wide sense and does not necessarily mean a guardian duly appointed or declared by the Court but includes a natural guardian or even a *de facto* guardian.

It is argued next that a *de jure* guardian, not proved at one time to have had the physical care or custody of the girl, is not entitled to apply under section 25 of the Act complaining of removal and asking for return of the ward to the applicant's custody. There again the same ruling is in point and adverse to the appellant inasmuch as it holds that the section is not limited in its operation to the power of the Court to enforce the guardian's right only in extreme cases of an actual leaving or removal of the ward from the guardian. As ruled by a Bench of this Court in *Atchayya* v. *Kosaraju Narahari*[2], the refusal by a person to deliver the child to its natural guardian when asked to do so by the latter amounts in effect to a removal from his custody and he can therefore apply under section 25 of the Act.

It is lastly argued that although the welfare of the child is the paramount factor for the consideration of the Court as made clear by section 25 itself, yet, in judging of that, the Court is bound to respect the volition expressed by the ward, which in this case is in favour of the appellant. On this aspect of the matter the learned District Judge observes in paragraph 3 of his order as follows :—

"The minor protests vehemently against being handed over to her mother and says that she would rather die than go to live with her mother whom she hates and detests. The reasons she gives for this unnatural attitude are sufficient to show that her present surroundings are most harmful to her welfare. Her aunt and uncle (the respondent and his wife) have told her that her mother poisoned her father and killed him and therefore she apprehends that her mother might poison her also. This *only* shows how the respondent and his wife have poisoned the mind of the girl against her own mother. The second reason given by the girl is a good reason for recovering her forthwith from the respondent's roof. That is, that she wants to marry her cousin (the respondent's son) in accordance with the dying wishes—no doubt conveyed to her by her aunt and uncle—of her father. This cousin lives in the same house as the minor girl and about a year or more ago the petitioner had to obtain an order under the Child Marriage Restraint Act to stop the marriage which the respondent was arranging to solemnise between the minor and his son."

After all, even assuming that a minor has a will of his own which must be respected in such a matter, the preference expressed by a boy or girl of 13 of 14 is not, as pointed out in *Rama Iyer* v. *Nataraja Aiyar*[3], entitled to much or any weight at all, especially where, as found here, the minor's attitude is not a natural, *bona fide*, and intelligent one, but one induced by the unwholesome persuasions of her paternal aunt and her husband. I accordingly dismiss this Civil Miscellaneous Appeal with costs.

K. S. *Appeal dismissed.*

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1. (1933) I.L.R. 58 Bom. 724.
2. A.I.R. 1929 Mad. 81.
3. (1948) 1 M.L.J. 125.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE HORWILL AND JUSTICE BALAKRISHNA AYYAR.

Vedakumpprath Pillai's son Muthu ... *Appellant**

v.

Kulathinkal Kuppan's son Narayanan and others ... *Respondents.*

*Hindu Law—Marriage—*Asura *form—Test—Malabar—Ezhuvas—Receipt of one sovereign by bride's father as* memmekanom—*If makes the marriage one in the* asura *form.*

Every marriage in which *memmekanom* is received by the bride's father need not necessarily be a marriage in the *asura* form. When that payment is made merely in order to conform to custom or out of respect for tradition, the marriage will not be one in the *asura* form. But when the payment is as a matter of actual fact and not mere form, a bride price, the marriage will be an *asura* marriage. When at the time of the marriage the father of the bride gives her property the value of which exceeds the amount of *memmekanom*, there is no room whatever for the application of the notion of "bride price."

On appeal under clause 15 of the Letters Patent from the judgment and decree of the Hon'ble Mr. Justice Patanjali Sastri, dated 25th November, 1947 and passed in S. A. No. 2272 of 1945, preferred to the High Court against the decree of the Court of the Subordinate Judge of Palghat in A. S. No. 117 of 1944, preferred against the decree of the Court of the District Munsif of Alathur in O. S. No. 362 of 1942.

K. Kuttikrishna Menon and *T. G. Raghavan* for Appellant.

C. S. Swaminathan and *D. A. Krishna Variar* for Respondents.

The Judgment of the Court was delivered by

Balakrishna Ayyar, J.—This appeal raises a question of Hindu Law of particular interest to the Ezhuva community in Malabar. This is how the question comes up. The properties which form the subject-matter of this litigation belonged to an Ezhuva woman called Kalu. She died issueless in 1936. Chathu, her husband, then took possession of the properties and subsequently sold them to the first defendant in the suit. The plaintiff is the brother of Kalu and he claimed that the marriage of Kalu to Chathu had been in the *asura* form, that he was therefore in law the real heir of Kalu and as such entitled to the properties. On this basis he sought to recover possession of the properties from the first defendant, the vendee from Chathu. The learned District Munsif who tried the suit and the learned Subordinate Judge on appeal took the view that the marriage of Kalu had been in the *asura* form and decreed the suit. In second appeal Patanjali Sastri, J., held that the marriage was not an *asura* marriage and allowed the appeal and set aside the decisions of the Courts below. This is a Letters Patent Appeal from the decision of Patanjali Sastri, J.

It is common ground that at the time Kalu was married, one sovereign was paid to her father as *memmekanom*. Both the District Munsif and the Subordinate Judge took the view that this payment was in the nature of "bride price" and they therefore decided that the marriage fell into the category of marriages described as "*asura*". But as indicated above Patanjali Sastri, J., took a different view.

One essential feature of an *asura* marriage, the feature which makes the form objectionable, is that the father of the bride receives a gratuity or fee for giving the girl in marriage. Ordinarily, it would be expected of every decent and respectable father when he selects a husband for his daughter to make his selection uninfluenced by any considerations other than the welfare of the girl. But when he receives a payment for his personal benefit, a very objectionable factor would influence his selection, and it is clearly this which the ancient law-givers took objection to and therefore relegated the form to the category we call "disapproved". When the father accepts money and allows his greed or avarice to sway his judgment, he thereby converts what is intended to be a sacrament into a commercial transaction.

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* L. P. Appeal No. 1 of 1948. 13th October, 1949.

Can we say in the present case that the payment of this one sovereign or *memmekanom* transformed the marriage into the *asura* form ? The expression *memmekanom* is really a compound of three words, "*mel*" meaning body, "*mel*" meaning on or over and *kanom* meaning that composite tenure of mortgage and lease peculiar to Malabar And the word *memmekanom* literally means a "kanom over the body" of the girl At page 152 of Logan's Manual of the Malabar District (1906 reprint) reference is made to the practice of slavery and the prices that slaves used to fetch —

"Women in some taluks (in 1841) fetched higher prices in order to *breed* slaves The average cost of a young male under ten years was about Rs 3-8-0, of a female somewhat less An infant ten months old was sold in a Court auction on 10th August, 1841, for Rs 1-10-6 independent of the price of its mother"

The amounts of *memmekanom* frequently varied, but 42 panams which is equivalent to Rs 10-8-0 was a sort of standard figure When we have regard to the prices which slaves were fetching, this amount might in the old days have been regarded by the parties to the transaction as analogous to the kanartham

But whatever the real nature of the custom in olden days, it is difficult to say that when to-day the father of a girl receives *memmekanom*, he is really "mortgaging" her. In most, though not necssarily in all cases, the payment has lost all its original significance and survives only as a ritualistic form ; it has become a ceremonial symbol devoid of any content or meaning or purpose In the present case, the evidence clearly shows that when Kalu was given in marriage, she was given stridhanam of very considerable properties It appears that the rent on the properties which it was agreed should be regarded as her *stridhanam* was 400 paras of paddy, which in 1920, the year in which Kalu was married, must have been equivalent to about Rs. 200 a year Now when a father gives such a large amount as stridhanam and receives one sovereign in compliance with traditional form, it would be very wrong to say that he had been selling or mortgaging the girl and that he received the sovereign from greed or love of gain

Every marriage in which *memmekanom* is received need not necessarily be a marriage in the *asura* form When that payment is made merely in order to conform to custom or out of respect for tradition, the marriage will not be one in the *asura* form But when the payment is as a matter of actual fact and not mere form, a bride price, the marriage will be an *asura* marriage It goes without saying that when at the time of the marriage the father gives the bride property the value of which exceeds the amount of *memmekanom*, there is no room whatever for the application of the notion of "bride price"

Mr Kuttikrishna Menon for the appellant argued that the marriage in the present case was neither in the *brahma* nor in the *asura* form, but that it was in a special or customary form and that the case should be remitted for ascertaining what the customary line of succession is in a case of this kind He referred to the decision in *Pattukkayil Chakkutti* v *K. Chandukutti*[1], where it was held

"We think the Makkatayam Thiyyas are governed by what is called the customary law and when a question arises as to what is the rule of law governing them on any particular matter, what we have to see is what is the rule of customary law obtaining amongst them in that matter and in cases which are not sufficiently covered by prior decisions the question will have to be determined with reference to the evidence in the case In the absence of any satisfactory evidence to show what exactly is the rule of the customary law on any particular point, the rule of Hindu Law on that point must, we think, be presumed and adopted to be the rule of the customary law obtaining amongst the community on that point The presumption is not that the Hindu Law as such is the law governing them in all matters , if that be the presumption a person who alleges a rule of customary law at variance with it will have to prove it as a custom in derogation of the law. The presumption is simply that the rule of Hindu Law is also the rule of the customary law obtaining amongst them, so that if any person alleges that the rule of customary law on any particular point is something different, the evidence that he adduces in support of his allegation ought not to be subjected to those well-known tests which are applied to the case of an alleged custom contrary to, or in derogation of, the law, but should be viewed simply as evidence adduced to show what is the rule of customary law itself The presumption therefore will be useful and will hold good only if satisfactory evidence is not forthcoming as to what is the rule of customary law"

1. (1927) 53 M.L J 368.

With these observations we are in respectful agreement But they do not take the appellant very far forward. Granting that in the present case, the marriage was in the customary or in a special form, and that the rule of devolution is different from that applicable to other Hindus, it is for the plaintiff to show what the order of devolution is according to the custom prevailing among Ezhuvas in Malabar. But he adduced no acceptable evidence in support of any special custom On the other hand he laid his case on the footing that the marriage of Kalu had been in the *asura* form ; that was his case and nothing else Therefore there can be no justification for remitting the matter for enquiry into something which does not arise from the pleadings.

In the course of his arguments Mr Kuttikrishna Menon referred to an unreported decision in S A. No 22 of 1922 on the file of this Court A reading of that decision shows that the plaintiff there admitted that the property devolved in a particular form and that admission was treated as evidence to show that the marriage had been in the *asura* form Besides, that judgment expressly stated that no question of law arose there The decision turned on the admissions made by the parties and is of no assistance here

We consider that the decision of Patanjali Sastri, J , was right and dismiss this appeal with costs of the first respondent

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESEET —MR JUSTICE SUBBA RAO AND MR. JUSTICE CHANDRA REDDI.

Nadiammai Achi and another . *Appellants**

v.

Mariappa Thevar *Respondent.*

Madras Agriculturists Relief Act (IV of 1938), *section* 5—*Construction*—" *Undivided Hindu family* "—*If synonymous with* " *joint family* "—*Assessment of divided family under section* 25-*A of the Income-tax Act XI of* 1922—*Relevancy*—*Divided member*—*If also assessed as member of association of individuals*

Section 5 of the Madras Agriculturists Relief Act has no application to the case of Hindu families divided in status The fact that a divided family is assessed by a fiction as an undivided Hindu family under section 25-A of the Indian Income-tax Act cannot affect the real status of the family Under section 5 of the Madras Act, the words " undivided Hindu family " are synonymous with the words "joint family " It is impossible to say that, when a family whether divided or undivided is assessed as a separate legal entity, a member thereof is also assessed as one of a group of persons Accordingly a member of a divided Hindu family is entitled to claim the benefits of the Agriculturists Relief Act

Appeal against the order of the District Court, West Tanjore, Tanjore, dated 8th April, 1946, in I.A. No. 299 of 1944, in O S. No 5 of 1934

R. Gopalaswami Aiyangar for Appellants.

G. R. Jagadisa Aiyar for Respondent

The Judgment of the Court was delivered by

Subba Rao, J.—This is an appeal against the order of the Court of the District Judge of West Tanjore scaling down the decree under section 19 of Madras Act IV of 1938 For appreciating the facts and the contentions of the parties the following genealogy may usefully be referred to :

Kayarohana
|
Ramalinga — Sabapathi
Ramalinga → Kayarohana, Subramanyam, *
Kayarohana → Mariappa Thevar (Respondent)
Sabapathi → Kasinatha Thevar.

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*A. A. O No. 476 of 1946. 17th August, 1949.

The branches of Ramalinga and Sabapathi had become divided in 1926 But in the partition certain immoveables and cash outstandings were left undivided and they were in the management of Ramalinga Ramalinga and his sons became divided between 1934 and 1936. In spite of the division Ramalinga continued to be in management of the assets not divided During the lifetime of Ramalinga he was assessed to income-tax in regard to the income of the property left undivided and after his death his son Kayarohana was also assessed in respect of the same income. After Kayarohana's death Subramania was assessed in the same manner Subsequently in O S No 3 of 1938, a partition suit filed in the District Court of West Tanjore, the undivided assets also were divided between the members of the family. The appellants obtained a decree in O S No 5 of 1934, against Mariappa Thevar and others Mariappa filed I A No 299 of 1944 for scaling down the decree under section 19 of Madras Act IV of 1938 The decree-holders relied upon section 5 of Act IV of 1938, and contended that as the family was assessed to income-tax the petitioner being a member of the family could not get the decree scaled down The learned Judge held that at the time when Kayarohana was assessed to income-tax as representing the undivided Hindu family the family was really disrupted and therefore section 5 had no application In that view he scaled down the decree as prayed for The decree-holders preferred the above appeal. The learned counsel for the appellants argued that section 5 of the Madras Agriculturists Relief Act, 1938, directly applies to the facts of this case Section 5 reads as follows

"Where an undivided Hindu family other than a Marumakatayam or aliyasantana tarwad or tavazhi is assessed to the taxes specified in provisos (A), (B) and (C) to section 3 (ii), or falls within the category of persons specified in proviso (D) to the same section, no person who was a member of the family on the 1st October, 1937, shall be deemed to be an agriculturist for the purposes of this Act except section 13"

The first contention of the learned advocate is that section 5 applies whether the Hindu family is joint or divided in status He argued that the Legislature intentionally used the words "undivided Hindu family" in contra-distinction to the well-known concept "the joint Hindu family" under the Hindu Law He reinforced his argument by referring us to section 25-A of the Indian Income-tax Act This argument not only ignores the principle underlying section 5 but also the meaning of the express words used therein Under Hindu Law a Hindu family is either undivided or divided and a division may be by metes and bounds or in status To describe a divided family either in status or by metes and bounds as an undivided Hindu family is a contradiction in terms. Further under the Act this disqualification is imposed upon a member of an undivided Hindu family as in law it is treated as one entity and a member thereof so long as he continues to be a member of the family has no separate or independent rights *de hors* the family towards third parties This conception of Hindu Law is recognised by section 3 (i) of the Act where a person is defined as including an undivided Hindu family. A decision of a Bench of this Court in *Venkatakutumba Rao* v *Veerabhadrudu*[1], supports this construction of the section In that case though a debtor had become divided from his uncle as the result of a partition suit decreed on 30th March, 1936, the uncle was assessed to income-tax in ignorance of such division as manager of a joint Hindu family for 1936-37 The learned Judges held,

"That under Madras Act IV of 1938, the family so assessed cannot be deemed to be a person after 30th March, 1936, and the divided member is not disentitled to the benefits of Madras Act IV of 1938"

It is suggested that there might have been a division by metes and bounds in that case, but we have called for the records in that appeal and satisfied ourselves that the question arose before there was any division by metes and bounds. Another decision of Wadsworth, J, in *Rajeswara Rao Garu* v. *Venkata Rayanim Garu*[2], bears out the said construction The question that arose in that case was

"Whether an undivided Hindu family in S 3 (i) of Madras Act IV of 1938 covers those joint families which have reunited as well as those joint families which never separated."

1. (1943) 1 M.L.J. 211   2. (1941) 2 M.L.J. 304.

The Courts below held that the words "undivided Hindu family" did not attract the reunited family as the word used is undivided but not joint The learned Judge rejected that distinction and relying upon the provisions of section 19 of the Act held that the word "undivided" was used in the sense of joint and therefore the reunited family also was covered by section 5. Mr Justice Wadsworth stated the principles at page 224 as follows

"The real question therefore is, what was the sense in which the Legislature used the words undivided Hindu family" in the definition of a person in section 3 (1) of the Act Clearly the reason for treating an undivided family as a person was not the historical origin of the family nor the future devolution of property on the death of the members of the family The real reason for treating the family as a unit was the way in which its property is held and its obligations are incurred jointly"

At page 225 the learned Judge proceeds to observe

"It seems to me that what the Legislature had in mind in treating an undivided Hindu family as a person, was the present undivided status of that family and not the historical origin of that status."

Applying these principles we agree with the learned Judge that under section 5 of the Act the words "undivided Hindu family" are synonymous with the words "joint family" The contention based upon section 25-A of the Indian Income-tax Act does not help the appellants Section 25-A of the Income-tax Act, XI of 1922, reads as follows

"Where, at the time of making an assessment under section 23, it is claimed by or on behalf of any member of a Hindu family hitherto (assessed as) undivided that a partition has taken place among the members of such family, the Income-tax Officer shall make such inquiry thereinto as he may think fit, and, if he is satisfied that the joint family property has been partitioned among the various members or groups of members in definite portions he shall record an order to that effect"

It is argued that section 25-A contemplates a division by metes and bounds and until it is done and proved to the satisfaction of the Income-tax Officer the undivided family is liable to be assessed under the Act; and therefore as section 5 refers to assessment under the Income-tax Act the words "undivided family" used in section 5 must be understood in the same sense as they are used in section 25-A of the Income-tax Act This argument offends against every rule of construction We cannot construe the words in section 5 of the Madras Agriculturists Relief Act with reference to the provisions of the Income-tax Act The foundation for the application of section 5 is that there should have been an undivided Hindu family and the fact that a divided family is assessed by a fiction as an undivided Hindu family under section 25-A of the Act cannot affect the real status of the family We, therefore, hold that section 5 has no application to the case of Hindu families divided in status

It is next contended that in regard to some immoveable properties and outstandings the family continued to be a joint Hindu family Partition may be either total or partial It may be open to the members of a joint family to sever an interest in respect of a part of the joint estate while retaining their status as joint family and holding the rest as the property of an undivided Hindu family Coparcenary may cease as to some of the properties and continue as to the rest It is settled law that when there has been a partition the presumption is that it is a complete one as to the parties and properties We are not satisfied on the facts before us that when the branches of Ramalinga and Sabapathi became divided in 1926 they intended to retain their joint family status in regard to some of the immoveables and cash outstandings It is more likely that there was a severance in status in regard to the entire family property and some of the items were continued to be held jointly for convenience The fact that they had a separate mess and lived separately and that in 1934 there was a partition *inter se* between Ramalinga and his three sons also indicates the same intention In our view the appellants on whom the burden lies did not put before us sufficient material to rebut the initial presumption of law In any view Exhibit P-1 the notice, dated 10th May, 1926, issued on behalf of T. S Kasinatha Thevar, son of Sabapathi Thevar to T.K. Ramalingam Pillai shows a clear and unambiguous declaration of the intention to divide in regard to the entire properties. It is stated in the letter,

" . . . Therefore you are bound to divide and deliver at once a one-third share at least in the family immoveable and moveable properties and outstandings which have not been divided according to the talk between you both and to pay the income derivable from the aforesaid one-third share "

We therefore hold on the evidence that there was a division in status among the members of the family in regard to the entire family estate

It was next contended by the learned advocate for the appellants that assuming there was a division in status when the joint family was assessed the petitioner also must be deemed to have been assessed as one of the divided members of the family and in support of his argument he relied upon the decision reported in *Venkatadri Somappa* v *Venkataswami Chetti*[1] That was a case of a partnership of which the person claiming relief under the Madras Agriculturists Relief Act was a partner. The learned Judges held that

" when the income of a partnership is assessed to tax what is really assessed is the income of the individual partners and therefore the applicant had undoubtedly been subjected to income-tax "

This decision in our view has no application to the facts of our case There is an essential distinction between a joint Hindu family divided in status and a partnership In the case of a joint family divided in status the family is assessed to the income-tax not as a group of persons but as one entity, whereas a partnership would be assessed as a group of persons This distinction in principle between the two classes of cases has been brought out succinctly in a decision reported in In re *Keshar Deo Chamaria*[2] The learned Judges have held that the members of a formerly undivided *Mitakshara* family after the passing of a preliminary decree for partition are not an association of individuals within the meaning of section 3 of the Act Whatever might be said in the case of an assessment on a group of persons it is impossible to say that, when a family whether divided or undivided is assessed as a separate legal entity, a member thereof is also assessed as one of a group of persons We therefore reject this argument also. But, there is another fact which really makes a decision on this point unnecessary Under Exhibit P-26 the family was assessed on 23rd November, 1937, for the year of assessment 1937-38 and under Exhibit P-27 the family was assessed on 15th September, 1938, for the year of assessment 1938-39 Section 3 (ii) (A) reads as follows

" Provided that a person shall not be deemed to be an ' agriculturist ' if he (A) has in both the financial years ending 31st March, 1938, been assessed to income-tax under the Indian Income-tax Act, 1922, or under the Income-tax laws of any Indian State, or foreign Government "

To come under this proviso the petitioner should have been assessed in both the financial years ending 31st March, 1938. But in this case the respondent's father had not been assessed in the first financial year, that is, between 31st March, 1936, and 1st April, 1937 and therefore proviso (A) has no application to this case.

For the foregoing reasons, we agree with the lower Court that the respondent is an agriculturist within the meaning of the Madras Agriculturists Relief Act and is entitled to have his debt scaled down therein. In the result the appeal is dismissed with costs

K S ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT .—MR JUSTICE VISWANATHA SASTRI

Muthu Nadar . *Appellant**

v

Chinnadorai Nadar and others . *Respondents.*

Hindu Law—Alienation—Joint family—Elder brother in fact the manager alienating family property for binding purpose —Minor brother, if bound

Where an elder brother was in fact the manager of the joint family and a debt for the discharge of which a sale was executed by him was one binding on the family it must be construed as

1. (1941) 1 M L J 782

2 I L.R. (1937) 2 Cal. 358.

* S. A. No 1283 of 1946. 25th July, 1949.

conveying the entire interest in the joint family property which the manager was capable of conveying to the alienee The transfer in such a case would be considered as having been entered into in the capacity in which the alienor could have conveyed the entire interest of the family property including that of a minor brother

Muthiah Chettiar v *Rayalu Aiyar, Nagaswami Iyer & Co*, (1943) 2 M L J 548 and *Ramakrishna Mudaliar* v *Manicka Mudaliar*, (1937) 1 M L J 587 at 593, relied on

Chandi Prasad Misir v *Balaji Misir*, (1930) I L R 53 All 427 and *Nandan Prasad* v *Abdul Aziz*, (1923) I L R 45 All 497, distinguished

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in A S No 65 of 1945, preferred against the decree of the Court of the District Munsif, Srivaikuntam, in O S No 391 of 1943

V Ramaswami Aiyar for Appellant

S. V Venugopalachariar for 1st Respondent

The Court delivered the following

JUDGMENT —This second appeal is preferred by the third defendant against the decree of the learned Subordinate Judge of Tuticorin in A S No 65 of 1945 The lower appellate Court granted a decree in favour of the plaintiff for partition and separate possession of 5/18 share in the B Schedule properties on payment of Rs. 225. The third defendant has preferred an appeal objecting to the decree for partition passed in favour of the plaintiff Defendants 1, 2 and 4 sail along with the third defendant though they have not preferred an appeal They have however been made respondents to the appeal and hence the case of defendants 1 to 4 falls to be considered in this second appeal

The plaintiff's father created a mortgage over his share of certain property on foot of which a suit, O S No 261 of 1926, was filed by the mortgagee On the 22nd July, 1930, a final decree was passed against the plaintiff's father for a sum of Rs 500. The plaintiff's father died in June, 1933 He left begind him two sons of whom the plaintiff is the younger, his elder brother being Anthiramudaya Nadar He also left a widow Vaduvathi Nadathi who is the fifth defendant in the suit From the suit register extract, Exhibit D-3, filed in the case it appears that the personal remedy on the mortgage had become barred and that two infructuous execution applications that had been filed by the decree-holder had been dismissed on 9th November, 1933, and 13th September, 1935 During the course of the execution proceedings the plaintiff and his elder brother were brought on record on 21st August, 1935, but the execution petition was allowed to be dismissed by the decree-holder. It does not appear that any amount was realised towards this decree as a result of the execution applications

On 22nd January, 1936, under Exhibit D-5 the plaintiff's elder brother and his mother sold the property which is the subject of this suit for a sum of Rs 400 of which Rs 390 was directed to be paid to discharge the decree in O S No 261 of 1926. On the 30th of April, 1936, this decree was assigned by the decree-holder to D W 4 in the case, the maternal uncle of defendants 1 to 4 On the 12th June, 1937, a sum of Rs 450 is stated to have been paid by the vendees to the assignee decree-holder and a discharge has been entered on the deed of assignment itself.

There was a partition suit, O S No 37 of 1931, on the file of the Sub-Court of Tuticorin, in which the present plaintiff was the 133rd defendant and his elder brother was the 132nd defendant The plaintiff was described as a minor represented by his elder brother as guardian *ad litem*

Defendants 1 to 4 in the present suit were impleaded as defendants 139 to 142 in O.S No. 37 of 1931 The suit was originally filed against the father of the plaintiff but as he died during its pendency his two sons were added as legal representatives in his place By the final decree passed in O S. No 37 of 1931 the plaint B schedule properties were allotted to the share of defendants 139 to 142 in the partition suit, they being defendants 1 to 4 in the present suit. The plaintiff brought the present suit, O S. No. 391 of 1943, on the file of the Court of the District Munsiff

of Srivaikuntam, for a 5/18 share of the property allotted at the partition to the present defendants 1 to 4 impugning the sale thereof by his elder brother and mother under Exhibit D-5, dated 22nd January, 1936 on several grounds The plaintiff alleges that his elder brother was a man of weak intellect and health incapable of taking proper care of the family affairs and properties He further says that the sale under Exhibit D-5 was effected by his elder brother and his mother for no consideration and ignoring his interest in the property though he was at that time an adult of 25 years of age His further contention is that his mother was not competent to represent him in connection with the sale transaction and therefore his interest in the property did not pass under Exhibit D-5.

The lower appellate Court found that Exhibit D-5 was a real sale supported by consideration and that the plaintiff and his elder brother were members of an undivided family It however passed a decree for a 5/18 share in favour of the plaintiff on payment of Rs 225 paid by defendants 1 to 4 for discharging the mortgage decree in O S No 261 of 1926, on the ground that Exhibit D-5 was inoperative to bind the plaintiff's interest In its opinion Exhibit D-5 having been executed by the mother of the plaintiff as his guardian it was impossible to hold that the plaintiff's elder brother executed the document as manager of the joint family so as to bind the plaintiff as well

The learned advocate for the appellant has raised two contentions in this appeal First he states that the sale deed Exhibit D-5 must, in the circumstances of the case, be held to be binding on the plaintiff and that the lower appellate Court has misdirected itself in law when it came to a contrary conclusion Secondly he contends that the claim of the plaintiff to a moiety of the B Schedule property is barred by *res judicata* by reason of the property having been allotted to the share of defendants 139 to 142 in O S No 37 of 1931, the present defendants 1 to 4. Reliance is placed for the appellant on *Muthiah Chettiar* v *Rayalu Aiyar Nagasami Iyer and Co* [1] and *Ramakrishna Mudaliar* v *Manicka Mudaliar*[2], and it is contended that as the plaintiff's elder brother was in fact the manager of the joint family, and the debt for the discharge of which the sale was executed was one binding on the family it must be construed as conveying the entire interest in the joint family property which the manager was capable of conveying to the alienee If the purpose for which the alienation was made was one which would be binding on the family and if the transferor was in fact the manager of the family even though the transferor purports to act on his own behalf and not as manager representing the junior members of the family still the transfer would be effective to convey the entire interest in the family property to the alienee. The transfer in such a case would be considered as having been entered into in the capacity in which the alienor could have conveyed the entire property The mere fact that the manager does not describe himself as manager or sets up an exclusive title to the properties conveyed is not such an assertion of a hostile claim in himself as against the other members of the family as would prevent the alienee from getting a title to the entire property if the purpose of the alienation was one binding on the family. In such a case the transferor might still be regarded as having entered into the transaction in the capacity in which he could bind the family In the present case a perusal of the sale deed, Exhibit D-5, shows that the property which was being conveyed thereunder was dealt with as joint family property The entire interest in the property was intended to be conveyed The plaintiff's elder brother did not assert any exclusive title in himself to the property adverse to or in denial of the rights of the plaintiff On the other hand he managed to describe the plaintiff as a minor represented by his mother as guardian in order that his interest also might be conveyed to the purchaser If the plaintiff's brother was not the manager of the joint family such a device would have been ineffective and the alienee would not have obtained the share of the plaintiff Further the inclusion of the mother as a party to the conveyance in her own right was apparently with a view to prevent

1. (1943) 2 M.L.J 548. 2 (1937) 1 M.L J 587 at 593.

her from setting up a claim for maintenance from and out of the joint family properties. The property being admittedly joint family property according to the finding of the lower appellate Court and the purpose being one which was binding on the joint family and the transferor also being a person who was in fact the manager of the joint family I see no obstacle to holding that the sale deed, Exhibit D-5 conveyed the entire interest of the family in the property sold notwithstanding the fact that the plaintiff was an adult member of the family and that a disingenuous attempt was made to represent him as a minor represented by his mother as guardian in the transaction Mr Venugopalachariar, the learned advocate for the respondent has referred me to a case in *Chandiprasad Misir* v *Balaji Misir*[1], for the principle that if a minor member of a joint Hindu family is impleaded as a party to the suit along with the manager it is incumbent upon the plaintiff to have a separate guardian *ad litem* appointed for the minor so as to represent him effectively in the suit If the plaintiff chooses to sue not the manager alone but also the minor members of the family individually, it is his duty to have a guardian *ad litem* appointed for the minors and he cannot rely upon the fact that the manager was a party and could represent the minor members of the family This decision is based mainly on the procedural law indicated in Order 32, Civil Procedure Code, and does not bear upon the question now under discussion The decision in *Nandan Prasad* v *Abdul Aziz*[2], was also cited to show that where a transfer is effected in denial of the rights of the minor members who are owners of the property transferred by a person who had no title at all to or any interest in the property, the transfer is ineffective to bind the interest of the minors even though the consideration had been applied in discharge of debts binding on the minors That is not a case where the transferor was the manager of a joint Hindu family authorised under circumstances recognized by Hindu law to represent the junior members of the family in transactions affecting family property It was the case of a total stranger claiming title to the property without any shadow of a legal right and purporting to dispose of the property as owner to the prejudice of the minors who were the persons found really entitled to the property I do not consider that the present case differs in substance or in principle from the two decisions of this Court to which reference has already been made I therefore consider that the learned Subordinate Judge came to an erroneous conclusion on this part of the case I hold that Exhibit D-5 was effective to convey the entire interest of the family including that of the plaintiff in the properties sold in favour of defendants 1 to 4.

Mr Venugopalachariar the learned advocate for the respondent who has preferred a memorandum of cross-objections argued that there were a number of suspicious circumstances in the case which throw doubt on the genuineness or the reality of the sale Exhibit D-5 and that the lower appellate Court has not come into close quarters with the evidence relating to this aspect of the case He pointed out that according to the suit register extract Exhibit D-3 the personal liability had become barred and no serious steps had been taken for the realisation of the decree amount in the mortgage suit beyond filing two execution applications which were however allowed to be dismissed He suggests that this indifference of the decree-holder and the long period during which the decree was allowed to remain unsatisfied suggest that there must have been substantial payments in reduction of the decree if not a discharge of the decree altogether He further states that there was no need to sell the family property under Exhibit D-5 for a sum of Rs 400 because all that the decree-holder could have done was merely to sell this item through Court and realise what he could out of the sale amount The sum of Rs 10 paid in cash at the time of Exhibit D-5 is a mere illusory payment designed to lend an air of reality to the sale These contentions are no doubt relevant and weighty but I am unable to see that the lower appellate Court erred in coming to the conclusion on the evidence that the decree in O S No 261 of 1926 had not been proved to have been discharged, the burden of proving such a discharge being on the plaintiff D W. 1, the decree-holder, and D W 4, the assignee

1 (1930) I.L.R. 53 All 427. 3. (1923) I.L.R. 45 All. 497.

thereof, both say that the decree had not been discharged during the lifetime of the plaintiff's father The suggestion of the plaintiff himself is that the decree was discharged in 1933 shortly before the death of his father but there is no acceptable evidence of such a payment. In these circumstances it cannot be held that Exhibit D-5 was unsupported by consideration or that it was a mere nominal or sham transaction On my findings it follows that the decree of the lower appellate Court is incorrect and that it should be reversed. I therefore allow the appeal and dismiss the memorandum of objections with costs, in the appeal. There will be no order as to costs in the memorandum of cross-objections As regards the costs in the Courts below I do not interfere with the order of the lower appellate Court that each party should bear his own costs in these Courts. The plaintiff's suit is hereby dismissed

No leave

K S *Appeal allowed and memorandum of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR JUSTICE GOVINDA MENON AND MR JUSTICE BASHEER AHMED SAYEED.

Velavala Subbayya *Appellant**

v

Gazula Bapayya and others .. *Respondents.*

Civil Procedure Code (V of 1908), *Order* 9, *rule* 13—*Sufficient cause—Application for restoration within an hour of* ex parte *decree—Circumstances not proving* mala fide *or negligence or misconduct of defendant—Fit case for setting aside* ex parte *decree*

Where a defendant in a suit wanted an adjournment of the case owing to personal inconvenience and the lower Court did not feel there was justification for the adjournment application and proceeded with the trial and finding neither the defendant nor his witnesses in Court passed an *ex parte* decree against him, but within an hour or so an application was made by him for setting aside the *ex parte* decree and for restoration of the suit,

Held, that the words 'sufficient cause' in Order 9, rule 13 are sufficiently elastic to cover a case of such kind In the absence of any kind of *mala fides* or negligence or misconduct on the part of the defendant who had come to Court with his application for restoration within an hour of the passing of the *ex parte* decree it would be wrong to deny him justice

Arunachala Ayar v *Subbaramiah*, (1922) 43 M.L J 632 I L R 46 Mad 60 referred to

Appeal against the order of the Court of the Subordinate Judge of Tenali, dated 7th December, 1948, in I A. No 877 of 1948, in O. S No. 69 of 1947.

P. Satyanarayana Raju and *P. Ramachandra Raju* for Appellant

P. V Chalapathi Rao for Respondents.

The Judgment of the Court was delivered by

Govinda Menon, J—We are of opinion that the order of the lower court is, on the face of it, unjustifiable and could not be supported This appeal arises out of an application to set aside an *ex parte* decree passed on 13th July, 1948 by the Subordinate Judge, Tenali, in O S No 69 of 1947 on his file The appellant here was the first defendant before the lower court in which the suit was filed on 9th October, 1947 It is unnecessary for us to consider the stages or the progress of the litigation between that date and 11th July, 1948. On the 11th respondent-plaintiff asked for an adjournment of the suit by means of a written application. The appellant-defendant, not only did not demur to the adjournment but consented to have the adjournment as prayed for by the plaintiff When that application came up on 12th July, 1948, the learned Subordinate Judge found no sufficient reason for granting the postponement asked for and the same was rejected. In the meanwhile on 12th July, 1948, the appellant wrote a letter and sent it through

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* A. A. O. No. 29 of 1949. 1st September, 1949.

P. W. 3 to his counsel in Tenali to the effect that on account of his father's Sradha ceremony he could not attend court on 13th July, 1948 and prayed that an adjournment of two days may be granted The counsel accordingly filed a written application and the same came on for hearing on the 13th itself apparently earlier in the day when the learned Judge would be disposing of Miscellaneous applications At that time the plaintiff's counsel did not oppose the request of the defendant for the postponement and must have agreed to the postponement. Despite the agreement of the parties, the learned Subordinate Judge did not find it just to grant the adjournment and rejected that application as well. Probably a little later in the date, nearly an hour later, or more or less about that time, the suit was called on for hearing and since the defendant or his witnesses were absent the suit was decreed *ex parte*

At about 1 p m the appellant reached Tenali and proceeded to his counsel and on the same date itself filed an application for setting aside the *ex parte* decree, whose rejection caused the above appeal

The learned Judge found that the evidence on behalf of the appellant, namely, that of himself, examined as P. W 1, that of his Purohit, P. W 2 and that of the carrier of the letter, P W 3 cannot be accepted The learned Subordinate Judge was impressed with the testimony of R W 1 and accepting this solitary evidence of R W 1 and rejecting that of the plaintiff's witnesses, found that there was no justifiable or sufficient cause for the absence of the defendant when the case was called on for hearing and therefore refused to set aside the *ex parte* decree The learned Judge has given various reasons why he did not accept the testimony of P W 1 He says, if as a matter of fact, P W. 1 had his father's ceremony on the 13th, the definite date should have been mentioned in the letter and moreover the ceremony itself would not have taken more than a few minutes, and therefore, it would have been possible for him to attend Court in time The learned Judge did not believe the evidence of P. W 2 or that of P W 3 We are not satisfied that the action of the learned Judge in summarily rejecting the evidence of these witnesses would be justified Mr P V Chalapathi Rao, for the respondent, invites our attention to Order 9 rule 13 and contends that "sufficient cause" within the meaning of that rule has not been proved to the satisfaction of the court and as the trial court did not derive satisfaction, this court could not in appeal interfere He also argued that the facts and circumstances indicate that there was misconduct or gross negligence on the part of the defendant and that was the reason why he did not attend court on 13th July, 1948 The observations of Sir Walter Salis Schwabe, C. J, in *R. A Arunachala Aiyar, v C Subbaramiah*[1], were also relied upon

Having given the matter our serious consideration it seems to us that none of the reasons on which the learned Judge relies for refusing to set aside the *ex parte* decree are valid ones It may be that the appellant would not have stated in his letter the exact date when his father's ceremony took place. Mere absence of the exact date from the letter, by itself, cannot show that the letter was a fabricated one or got up for the purpose of this case That such could not be the case is proved by the fact that the advocate himself got the letter on the 13th and proceeded to file the application on that basis If the evidence of R W. 1 to the effect that the appellant reached Tenali at about 10 a m is correct, there is no reason explained as to why the appellant should keep out from his lawyer and Court till 1 P M, till the suit has been decreed *ex parte*. After all, as one of us pointed out in the course of the arguments, the delay was only an hour inasmuch as the time that elapsed between the passing of the *ex parte* decree and the filing of the application for restoration could not have been more than an hour. It is difficult for us to impute any kind of *mala fides*, negligence or misconduct on the part of the defendant who came to Court within an hour of passing this decree, without more justifiable materials being placed before the Court. In these

1. (1922) 43 M.L J. 632. I.L.R. 46 Mad. 60.

circumstances we are of opinion that the learned Judge was wrong in refusing to set aside the *ex parte* decree. The words "sufficient cause" in Order 9, rule 13, Civil Procedure Code are sufficiently elastic to cover a case of this kind and in our opinion the lower Court would have been well advised in having restored the suit and made the defendant pay the day's costs of the plaintiff, if the plaintiff had opposed the adjournment But as matters stood the plaintiff himself wanted an adjournment He did not oppose the adjournment application and such being the case, even the panacea by way of costs the plaintiff could not be entitled to.

In these circumstances we set aside the decision of the lower Court and direct that O S No 69 of 1947 be restored to file to its original number in the Court of the Subordinate Judge of Tenali and be disposed of after trial on its merits. The appeal is accordingly allowed Each party will bear his costs in this appeal

K C ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE CHANDRA REDDI

Shah Shantilal and Co *Petitioners**

v.

T. E Shiborwalla . *Respondent*

*Limitation Act (IX of 1908), Article 164—Substituted service—*Ex parte *decree—Personal knowledge of the passing of the decree whether provides starting point for limitation*

In a suit by the plaintiff against the defendant (petitioner) living in Bombay for recovery of moneys for goods sold, summons was issued and was not served till 14th August, 1948, when the Court ordered substituted service On 26th August, the Court passed an *ex parte* decree against the defendant The defendant filed a petition to set aside the *ex parte* decree on 27th September, 1947, alleging that he came to know of the decree only on the 5th of September On the question whether application was barred by Article 164 of the Limitation Act,

Held, that the application to set aside the order was barred by limitation under Article 164 of the first schedule of the Limitation Act

Substituted service is as effectual as if it has been made on the defendant personally Hence the want of knowledge of the defendant of the passing of the decree will not affect the running of the time for limitation

Narasimha Chetthar v *Balakrishna Chetti*, (1926) 52 M L J 512 and *Kesarchand Keshowji* v *Lakshmi Ravi*, (1917) 42 I C 611 followed

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Small Causes, Madras, dated 29th October, 1948 in M P. No 7466 of 1948 in Suit No. 1891 of 1948

Y Balakrishnayya for Petitioner

Subramanyam and *Rajagopal* for Respondent

The Court delivered the following

JUDGMENT —This is a revision petition filed by the defendant against the order of the Second Judge of the Court of Small Causes, Madras, dismissing an application to set aside an *ex parte* decree passed on 26th August, 1948. The plaintiff filed a suit against the defendant residing in Bombay for recovering a sum of Rs 636 being the amount due to him in respect of goods sold and delivered to the defendant The suit stood posted to 4th August, 1948 for hearing, and summons was taken out by the plaintiff but it was not served on the defendant till 2nd August, 1948 On that date the defendant seems to have sent a telegram to the office of the Registrar of the Court of Small Causes, requesting the Court to grant him time ; but this does not seem to have been brought to the notice of the Court on 4th August, 1948, to which date the case was fixed for hearing. Since the summons was not returned, it was directed that substituted service should

* C. R. P. No. 1639 of 1948. 15th September, 1949.

be effected upon the defendant, and the case was posted to 26th August, 1948, for final hearing As the defendant did not appear and contest the suit on that day a decree was passed *ex parte* for a sum of Rs 636-4-0

The defendant filed an application on 27th September, 1948, to set aside the *ex parte* decree on the ground that he had no knowledge of the decree till the 5th September, 1948 The learned Judge dismissed the application on the ground that the application was barred by limitation, as it was not filed within 30 days from the date of the decree Against this order the unsuccessful defendant has preferred this civil revision petition

Mr. Balakrishnayya, the learned counsel for the petitioner, contends that the view of the learned Judge that the application for setting aside the *ex parte* decree is barred by limitation under Article 164 of the Limitation Act is erroneous According to him the 30 days time prescribed under Article 164, Limitation Act applies not only to the date of the decree but also to the date of the knowledge of the defendant of the decree. Article 164, provides that the 30 days' period for filing an application to set aside a decree passed *ex parte* runs from the date of the decree, or where the summons was not duly served, when the applicant has knowledge of the decree. Admittedly by the time the application to set aside the *ex parte* decree was filed the 30 days time fixed under Article 164 had elapsed from the date of the passing of the decree The learned counsel for the petitioner states that since the petitioner had knowledge of the decree only on the 5th September, 1948, the petitioner was in time in filing the application for setting aside the *ex parte* decree on 27th September, 1948 It must be stated that the second part of the Article applies only when a defendant was not duly served with summons. In this case it is clear from the material on record that on 4th August, 1948, the first hearing date, substituted service was directed to be effected on the defendant by the Court.

It has been held in a number of cases that substituted service is as effectual as if it had been made on the defendant personally It was held by Madhavan Nair, J., in the case reported in *Narasimha Chettiar* v *Balakrishna Chetti*[1], that for purposes of Article 164 Limitation Act, a person on whom substituted service was effected must be held to have been duly served and that therefore time ran from the date of the decree, even though the defendant had no knowledge of the passing of the decree The learned Judge pointed out that under Order 5, rule 20, sub-rule (2) service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally To the same effect is the ruling of the Calcutta High Court in *Kesarchand Keshowji* v *Lakhamsi Raisi*[2], the head-note to the decision correctly represents the view of the learned Judges in that case. It runs thus,

> " The phrase ' duly served ' in Article 164 of the First Schedule of the Limitation Act is used in the same sense as in Order 5, rule 19, Civil Procedure Code In both places it means served in such a manner as to give the defendant information of the proceedings taken against him."

It is thus clear in the present case that the application filed by the petitioner for setting aside the *ex parte* decree was barred by limitation, the order of the lower Court is therefore correct

In these circumstances the civil revision petition is dismissed with costs.

K.C. *Petition dismissed.*

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1. (1926) 52 M.L.J 512.
2 (1917) 42 I C. 611.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE MACK

Kanumarla Polamma (died) and others *Petitioners**

v.

Dandaga Sooramma and others *Respondents*

Civil Procedure Code (V of 1908), Section 151—Compromise decree—Compromise set aside in a subsequent suit on ground of fraud—Application by plaintiff in original suit to restore it to file—Such restoration if and when can be ordered—Power of Court under section 151, Civil Procedure Code

Petitioner (plaintiff) in a suit to recover properties from her mother (first defendant), her sister (second defendant) and her sister's husband (third defendant) on the basis of a settlement deed had her suit decreed in terms of a compromise Then the third defendant brought another suit to set aside the compromise on the score of its having been fraudulently substituted for the real compromise and it was set aside in appeal on grounds of fraud The petitioner herein filed an application under section 151 of the Civil Procedure Code to restore to file the original suit by her to recover her properties

Held, that the petition had to be dismissed by the Court. The Civil Procedure Code makes no provision for any such application before the trial Court to restore a suit to file which has been decreed on the basis of subsequent findings in another suit Section 151, Civil Procedure Code gives the Court inherent powers to make orders as may be necessary for the ends of justice, and can scarcely be invoked by the present petitioner who has been found guilty of a fraud on the Court. Had the position been reversed and had the plaintiff sued to set aside a fraudulent compromise decree filed into Court by defendants, one which was detrimental to her rights in the suit, it would be manifestly inequitable to say that the plaintiff would have no right to have her original suit retried Consequential relief arising out of her suit to set aside the compromise decree on the ground of fraud could have been asked for in that suit either in the shape of damages or by a prayer for retrial of the original suit That being not the procedure adopted here it would be improper to restore the original suit to file

Arumuga Goundan v. *Peria Vanjappa Goundan*, (1923) 46 M L J 348 and *Manoharlal* v *Jadunath Singh*, (1906) 16 M L J. 291 L R 33 I A 128 I L R 28 All 585 (P C) distinguished

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsiff, Markapur dated 5th July, 1947, in I A No 272 of 1947 in O. S No 640 of 1941.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Petitioner.

P V Chalapathi Rao and *D V Reddi Pantulu* for Respondents

The Court delivered the following

JUDGMENT —The facts of this case are rather unusual The petitioner is the plaintiff who sued her mother as the 1st defendant, her sister as the 2nd defendant and her sister's husband as defendant 3 to recover property on the basis of a settlement deed executed by her mother The suit O S No 640 of 1941 was resisted by the third defendant who claimed full rights as an illatom son-in-law The suit was decreed in terms of a compromise Ex. D-2, dated 20th November, 1942, filed into Court on that date The plaintiff and the third defendant, presumably with their lawyers, were present and signed it The third defendant filed O. S. No. 81 of 1943, on the file of the District Munsiff's Court of Markapur to set aside this comrpomise on the ground that the real compromise, copy of which he produced, Ex P-4, entered into by all the parties on 14th November, 1942, had been suppressed and that this compromise, Ex. D-2, which was filed into Court was fraudulently substituted That suit was dismissed, but the third defendant who is the contesting respondent succeeded in A S. No 54 of 1946 in having the compromise set aside on the ground of fraud, by the learned Subordinate Judge of Kurnool. Differing from the learned District Munsiff, he found that the petitioner and her henchmen

> " had forged the name of P W 3 as an attestor in the original of Exhibit D-2 in addition to the fraud played against the plaintiff ",

the plaintiff in the context of that judgment being the contesting respondent. The learned Subordinate Judge set aside the compromise decree in O. S No. 640 of 1941 on the file of the District Munsiff's Court of Markapur, on a finding of fraud

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*C. R. P. No. 1841 of 1947. 15th September, 1949.

which is binding on all the parties The petitioner filed an application under section 151 of the Civil Procedure Code before the District Munsiff to restore O S. No. 640 of 1941, to file This revision is filed against his order of dismissal

I am quite unable to follow on what principles either of law or justice, such a petition could have succeeded The Civil Procedure Code makes no provision for any such application before the trial Court to restore a suit to file which has been decreed on the basis of subsequent findings in another suit Section 151, Civil Procedure Code, gives the Court inherent powers to makes orders as may be necessary for the ends of justice, and can scarcely be invoked by the present petitioner who has been found guitly of a fraud on the court. My attention has been drawn to a decision by Spencer, J , in *Arumuga Goundan* v *Peria Vanjiappa Goundan*[1] in which a decree against minors not validly represented by guardian was held in a subsequent suit, to be not binding on them Subsequent to this finding, the court which passed the prior decree restored the suit to file under section 151, Civil Procedure Code and proceeded to try the suit after making the minor a properly represented party to this suit Following a decision of the Privy Council in *Manoharlal* v. *Jadunath Singh*[2], the District Munsiff's Order was set aside and the parties remitted to their original rights In the Privy Council decision, a suit was filed to set aside a compromise on the ground that one of the defendants was a minor and that leave of the court to ener into it had not been obtained The resulting decree which their Lordships considered in the appeal was a very wide one directing the compromises and decrees in the suit to be set aside in their entirety and further more went on to declare that the result would be that those suits would " have to be decided afresh. " It was held that it would be quite sufficient if there is a declaration that the compromises and decrees are not binding upon the minor and that he is remitted to his original rights That decision is not directly in point here though the decision lends support to the position that when a compromise decree in a suit is set aside in a subsequent suit, the court that first tried the suit had no powers to restore that suit to file and proceed with its trial There is no decision on all fours with the present case, as I said the facts being somewhat peculiar and the astonishing feature about them being, how such a fraud was perpetrated on the court in the presence of lawyers and the parties if the compromise petition was read out, as it should have been in *extenso*, in court The learned Subordinate Judge in dealing with the compromise, Ex D-2, however made the following observations

> " Even trained lawyers have not been able to follow the terms of the compromise mentioned in Exhibit D-2 and so it is no wonder that an illiterate man like the plaintiff was not able to discover the fraud when the compromise was read out in open Court "

This compromise is not before me nor have even the learned advocates on both sides who have argued before me perused it It is not impossible for such a fraud in a compromise drawn up by unauthorised legal advisers in the village to have been perepetrated on the learned advocates and the court, with the former doing no real acting work and concentrating mainly on forensic argument The learned Subordinate Judge has also described the terms of the compromise which he set aside as being meaningless It is difficult to follow why the trial court allowed this meaningless compromise to become a decree I cannot too strongly emphasise the need for not only the advocates on both sides but also the trial court reading through carefully, the terms of a compromise before making it a decree of the court, for obvious reasons Compromise decrees which have to be executed, should be in the clearest terms, free from ambiguity, which the executing court can easily understand and carry out So far as the present petition is concerned, there is only one disposal to give it and that is dismissal. Had the position been reversed and had the plaintiff sued to set aside a fraudulent compromise decree filed into court by defendants, one which was detrimental to her rights in the suit, it would be manifestly inequitable to say that the plaintiff would have no right to have

1. (1923) 46 M L J. 348
2. (1906) 16 M.L.J. 291 . L.R. 33 I.A. 128 : I L.R. 28 All.585 (P C).

her original suit retried Consequential relief arising out of her suit to set aside the compromise decree on the round of fraud could have been asked for in that suit either in the shape of damages or by a prayer for retrial of her original suit. In such a case, I think it would have been quite competent for the second court to grant this relief and in this way, the original suit could legally have been restored to file With these observations, the petition is dismissed with costs.

K. C. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR. JUSTICE PANCHAPAKESA AYYAR.

Ponnuswami . *Petitioner**

Penal Code (XLV of 1860), *Section* 304-*A, Considerations for conviction under—Contributory negligence on the part of the deceased—If relevant*

The main thing for consideration in a criminal case, under section 304-A of the Penal Code, is whether the accused in the case has caused the death of any person by doing any rash and negligent act not amounting to culpable homicide Once that is proved, the little contributory negligence on the part of the victim is irrelevant except for the purpose of sentence Contributory negligence, in the strict sense of the term, has no place in Criminal Law

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of Session, Chingleput division, in C A. 56 of 1948 preferred against the order of the Court of the Additional 1st class Magistrate, Saidapet, in C C. No. 302 of 1947.

S. Rangaswami Aiyangar for Petitioner

The Assistant Public Prosecutor (*A. S Sivakaminathan*) for the Crown.

The Court made the following

ORDER.—This is a petition to interfere in revision with the conviction of the Petitioner under section 304-A, Indian Penal Code and the sentence of six months simple imprisonment awarded on him.

The facts are briefly these The petitioner was a lorry driver On 10th October, 1947, at about 6-45 P M. on the road between Tambaram and Vandalur, he was driving his lorry, M S P 3163, at a fast and dangerous pace. He was taking furniture to a school He wanted to overtake three bullock carts heavily laden with hay, and, with that object, first swerved swiftly to the right and then quickly to the left, with the inevitable consequence that the deceased, a man aged 30 going along the road in the opposite direction, and a bit tipsy, got knocked down and killed. Both the lower Courts, after exhaustive discussion of the evidence, have come to the conclusion that the petitioner was certainly guilty of rash and negligent driving, and brought about the death of the deceased by such driving, and especially the swift turn to the right and then to the left in an attempt to overtake the three heavily laden bullock carts I see no reason to differ from their conclusion

The learned counsel for the petitioner urged that the petitioner should not have been convicted as the deceased was under the influence of some intoxicant and was walking along tipsily and had brought the accident on himself and was guilty of contributory negligence, and that if the deceased had not been tipsy, and staggered unexpectedly two feet towards the lorry, he would not have been hit and killed. I cannot agree Constributory negligence, in the strict sense of the term, has no place in *criminal law* If the petitioner was not guilty of negligence, he would certainly not be liable under section 304-A, Indian Penal Code The fact that the the victim also contributed a little by his negligence is absolutely immaterial when there is ample proof that the petitioner had brought about the accident by his

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*Cr. R. C. No. 1064 of 1948. 19th October, 1949.
(Cr. R. P. No. 1004 of 1948).

own negligence and rash driving, and attempt to overtake at that point. He could and should have avoided the accident by his care and caution.

The road was straight at that point, as even D. W. 2's evidence showed, and the petitioner and D. W. 2 saw the deceased tipsy and staggering along in the opposite direction. Suppose a little child stands in the middle of the road and contributes to the accident, its negligence will be of no avail So too, this drunkard's. The main thing for consideration in a criminal case, under section 304-A, Indian Penal Code, is whether the accused in the case has caused the death of any person by doing any rash or negligent act not amounting to culpable homicide. Once that is proved, the little contributory negligence on the part of the victim and the accused's good military record are irrelevant except for the purpose of sentence. Driving a lorry in peace times rashly in the country side knocking down and killing a civilian, is not to be judged, by the same standard, as driving an armoured car against the enemy in war and killing an enemy.

It was next urged that both the lower Courts had used the sketch of the road which was not quite correct. But their conclusions were based not merely on a perusal of the sketch but also on a discussion of the entire evidence, including the evidence of D W. 2 Nor was the sketch proved to be wrong in material particulars or to have contributed to any wrong conclusion.

I, therefore, confirm the conviction of the appellant But taking all the circumstances into consideration, and the petitioner's good military record, I reduce the sentence, after hearing the learned Public Prosecutor also on the point, to the period of imprisonment already undergone (about 21 days) and a fine of Rs. 50, or, in default, further simple imprisonment for two months. Time for payment of the fine till 11 A M. on 15th December, 1949 The lower Court will take steps to realise the fine only after the time fixed now has expired.

V. S. — *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PANCHAPAKESA AYYAR.

Senapathi Mudaliar .. *Petitioner**

v.

Deivanai Ammal .. *Respondent*

Criminal Procedure Code (V of 1898), Section 488—Application by first wife for maintenance—Offer by husband to take back first wife after he has married again

Where a person marries a second wife and the first wife applies for separate maintenance, any offer by the husband to take her back and treat her well cannot be taken to be sincere and an order for separate maintenance is quite justified

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying that the High Court will be pleased to revise the order of the Court of the Additional First Class Magistrate, Chingleput, dated 5th April, 1949, in M. C No. 5 of 1949.

T. V. Srinivasachari for Petitioner.

P. Krishnamachari for Respondent.

N. T. Raghunathan for the Public Prosecutor (*V. L. Ethiraj*) for the Crown

The Court made the following

ORDER —There is no doubt whatever that the order awarding separate maintenance to the respondent, the petitioner's first wife, was correct and proper. The petitioner has married again and his offer to take the respondent back and treat her well cannot be taken to be sincere. Even if he takes her back, he will only make her an unpaid cook and maid of all work for himself and his second

*Cr. R. C. No. 796 of 1949. (Cr. R. P. No. 734 of 1949). 27th October, 1949.

wife, an intolerable position and one to which no Court should drive a married woman.

The next question is about the quantum of maintenance awarded. After carefully considering all the circumstances, I reduce it to Rs. 12-8-0 a month as the petitioner has to maintain another wife, married before the Anti-Poligamy Act and provide for children by her, out of his income of Rs. 40 a month, whereas children of his by the respondent are now highly improbable.

V.S. *Petition dismissed. Amount of maintenance reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT.—MR JUSTICE MACK.

Veeramreddi Subbarami Reddi *alias* Balakrishna Reddi .. *Petitioner**

v

Veeramreddi Sankaramma .. *Respondent.*

Civil Procedure Code (V of 1908), Order 23, rule 3—Application by widow of plaintiff in suit for partition against his sons, his brother and his son—Right to sue, if survives to widow.

On the death of a plaintiff in a suit for partition by him against his own sons, his brother and his son, his widow applied to be added as his legal representative and to continue the suit asking the share to which she is entitled under the Hindu Women's Property Act. On a contention that the plaintiff's right to sue does not survive to the widow,

Held There is no legal impediment to the widow being added as legal representative of her husband and to ask for the share to which she is entitled in law on the death of her husband in the same suit which he instituted during his life time In a suit for partition such as this it is sometimes difficult to pick out particular members of a family as legal representatives of a deceased plaintiff. The additional criterion is in such a case to whom the right to sue survives The husband's right to file the partition suit survives to his widow.

Petition under section 115 of Act V of 1908, praying that the High Court will be pleased to revise the decree and order of the Subordinate Judge's Court, Nellore, in I A. No. 686 of 1948, in O. S No 112 of 1947, dated 17th September, 1948.

V. Vedantachari and *T. Rangaswamy Aiyangar* for Petitioner

K. S. Champakesa Aiyangar and *K. C Srinivasan* for Respondents.

The Court delivered the following

JUDGMENT—The petitioner in Interlocutory Application No. 686 of 1948 in O. S. No 112 of 1947 on the file of the Subordinate Judge's Court, Nellore, is the widow of the plaintiff who died after filing a suit against his two sons, his brother and his son. He had two wives one of whom was the mother of the first defendant and the petitioner who is the mother of the second defendant. On his death the surviving widow applied to be added as his legal representative and to continue the suit asking for the share to which she is, admittedly, entitled under the Hindu Women's Property Act.

The learned Subordinate Judge quite rightly in my opinion allowed her petition to be added as her late husband's legal representative. The learned advocate for one of the sons opposes on the ground that the legal representatives of the deceased are his sons and that if the petitioner is added as a plaintiff the character of the suit will change Under Order XXII, rule 3, Civil Procedure Code, the legal representative of the deceased plaintiff must be added in the event of a sole surviving plaintiff dying and the right to sue surviving. The point which arises is, does the husband's right to sue survive to anybody? Mr. Vedantachari argues that it does not; that the suit must abate and that the widow must claim her relief of partition in a separate suit I am quite unable to agree and can see no legal impediment to the widow being added as legal representative of her husband and to ask for the share to which she is entitled in law on the death of her husband in the same suit which he instituted during his lifetime.

*C. R. P. No. 1790 of 1948. 10th August, 1949.

There appears to be no necessity to drive his widow to a separate suit on which fresh court-fee is payable In a suit for partition such as this it is sometimes difficult to pick out particular members of a family as legal representatives of a deceased plaintiff. The additional criterion is in such a case to whom the right to sue survives In this case, there can, in my view, be no doubt that the husband's right to file this partition suit survives to his widow, for it must be remembered that he has filed this partition suit against his own sons who would otherwise be his legal representatives.

The petition is dismissed with costs.

V. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR JUSTICE RAGHAVA RAO.

Messrs Golden Knitting Co, Devangapuram, Tirupur *Appellant**

v.

Messrs Mural Traders (India) in Sind Market, Karachi *Respondent.*

Jurisdiction—Execution—Decree of Court of Small Causes at Karachi passed prior to the 15th August, 1947—Transmission for execution to Court in Dominion of India after that date—Competency of the latter Court to execute it.

Where a decree passed by a Court of Small Causes at Karachi in the Dominion of Pakistan prior to the 15th August, 1947, is transmitted by that Court for execution to a Court in the Dominion of India after that date, that Court has no power to execute it After the " appointed day " under the Indian Independence Act, the Judgment of the Court at Karachi passed before then becomes a foreign Judgment in respect of which execution could only be had if the territory in which the decree in question was passed has become, by an arrangement between the two Dominions, a reciprocating territory within the meaning of Section 44-A of the Civil Procedure Code

Dominion of India v *Hira Lal,* (1949) 53 C W N 817, followed and applied

Appeal against the order of the District Court, Coimbatore, dated 29th January, 1948, in E. P. No. 21 of 1947, in S. C. S. No 80 of 1947, Small Cause Court, Karachi.

S. Sitarama Aiyar and *S. Rajarama Iyer* for Appellant

C. Pattabhiraman and *R. Ramasubbu Iyer* for Respondent.

The Court delivered the following

JUDGMENT —The question in this case is whether the District Court of Coimbatore in the Dominion of India has power to execute, after the 15th August, 1947, a decree passed by the Court of Small Causes at Karachi in the Dominion of Pakistan prior to that date and transmitted for execution after that date by that court to the District Court of Coimbatore The learned District Judge in the Court below held that he had the power The learned District Judge is obviously wrong. After the appointed day the judgment of the Court at Karachi passed before then became a foreign judgment in respect of which execution could only be had if the territory in which the decree in question was passed has become, by an arrangement between the two Dominions, a reciprocating territory within the meaning of section 44-A of the Civil Procedure Code. The precise point now arising for decision has been decided by a Bench of the High Court of Calcutta composed of Mookerjee and Chunder, JJ, in a case reported in *Dominion of India* v. *Hiralal*[1]. It has been, after a careful consideration of the relevant provisions of the Indian Independence Act and the Code of Civil Procedure, there ruled that in circumstances like those of the present case there could be no execution had at the hands of the Court in the Dominion of India I consider that ruling to be perfectly correct and I accordingly apply it to the present case. The civil miscellaneous appeal is accordingly allowed with costs throughout.

V. S. ——— *Appeal allowed.*

*A. A. O. No. 96 of 1948. 26th October, 1949.

1. (1949) 53 C.W.N. 817.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT —MR JUSTICE KRISHNASWAMI NAYUDU.

T. A. Menon . *Petitioner.**

v.

K. B. Parvathi Ammal . *Respondent.*

Madras Marumakkattayam Act (XXII of 1933), Sections 6 and 7 (1)—Marriage celebrated at a place in West Bengal—Petition for dissolution in Court within whose jurisdiction the respondent had a permanent dwelling —Jurisdiction —Practice—Subordinate Court of one Province—If can order stay of suit pending between the parties in a Court subordinate to another High Court of a different Province.

Although a marriage was celebrated in a place outside the jurisdiction of the Court, if the respondent has a permanent dwelling within the local limits of the jurisdiction of the Court a petition for dissolution of the marriage under the Madras Marumakkattayam Act can be presented in such Court It will be enough for this purpose if it is shown that the respondent has a tarwad or paternal home or his own home within the jurisdiction of the Court in which the petition is filed. Actual residence at the time need not be shown

Where a petitioner for dissolution of marriage alleges that a valid marriage with the customary ceremonies was performed, the factum of such ceremonies must be proved and in the absence of such proof it cannot be said that a valid marriage under the Act was performed to entitle the petitioner to claim dissolution

It is doubtful whether an order under Order 39, rule 2 of the Civil Procedure Code issued against a party would be binding on a District Munsif subject to the jurisdiction of another High Court situated in a different Province so as to compel him to stay further trial of a petition for dissolution Such an order is no bar to the continuance of the trial of the petition for dissolution

Petition under section 115 of Act of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Palghat, dated 8th September, 1948, and made in O P. No. 111 of 1947.

V Ramaswami Aiyar, M V Ganapathi and *P. C Sarangapani* for Petitioner.

V Rajagopalachari and *A Achuthan Nambiar* for Respondent.

The Court delivered the following

JUDGMENT —This revision petition raises among others, an important question of jurisdiction for a petition under section 6, of the Madras Marumakkattayam Act (XXII of 1933) The petitioner is the husband The respondent is the wife. They are persons governed by the Marumakkattayam law of inheritance They were married on the 22nd March, 1941. The marriage was celebrated at Behala, in West Bengal The husband is a member of the Indian Civil Service permanently employed in West Bengal The parties entered into a deed of dissolution of marriage on the 10th October, 1947, the validity of which is however not admitted by the petitioner On the 6th January, 1948, the husband filed Title Suit No 10 of 1948 on the file of the Third Court of Munsif of Alipore, 24 Parganas, against his wife and mother-in-law for restitution of conjugal rights and for a decree declaring that the deed of dissolution of marriage dated 10th October, 1947, was obtained fraudulently and was not binding on the parties to it. The wife filed a suit in the Madras City Civil Court, O S No 61 of 1948, for a declaration that the deed of dissolution was valid and binding on her husband, the petitioner She filed an application in the High Court of Calcutta for transfer of the Title Suit No 10 of 1948, from the Third Court of Munsif, Alipore, 24 Parganas, to the City Civil Court, Madras, and by an order of the High Court, dated 14th July, 1948, the said application was dismissed The wife filed O P. No 111 of 1947, in the District Munsif's Court of Palghat under Section 6 of the Madras Marumakkattayam Act for dissolution of the marriage and the husband applied to the District Munsif of Alipore for an injunction restraining the wife from proceeding with O P No 111 of 1947. An order of injunction was passed by the Munsif of Alipore restraining the wife from proceeding with her petition for dissolution in the Court of the District Munsif

*C. R. P. No. 1349 of 1948. 5th October, 1949.

of Palghat. This order of injunction was received by the District Munsif of Palghat with a request not to proceed with the trial of O.P. No. 111 of 1947. This was received by the District Munsif on the 30th August, 1948. The learned District Munsif proceeded with the trial on the wife's petition for dissolution and passed an order on the 8th September, 1948, dissolving the marriage

The main contention of the learned counsel for the petitioner-husband is that the District Munsif of Palghat had no jurisdiction to entertain the petition The wife alleges in her petition that the marriage was solemnised at Calcutta but that the husband had a permanent dwelling in Ellapully village within the jurisdiction of the District Munsif's Court of Palghat If in fact he had a permanent dwelling within the jurisdiction of the Madras District Munsif's Court, then certainly the petition is maintainable. Section 7 (1) (i) of the Act reads as follows:—

> "A husband or wife may present a petition for dissolution of the marriage if the place where the marriage was contracted or the respondent has a permanent dwelling or actually and voluntarily resides or carries on business or personally works for gain, at the time the petition is presented, is situated within the local limits of the jurisdiction of the Court of a District Munsif in such Court"

The question of the place of marriage does not arise here as it is admittedly outside the jurisdiction of the District Munsif's Court of Palghat But the relevant portion of the section for consideration would be whether the husband had a *permanent dwelling or actually and voluntarily resided* within the jurisdiction of the Court. There is no decision that has been placed before me interpreting the meaning of these words with reference to this Act but the jurisdictional provisions in other enactments have been cited before me where the same words or similar words occur. Section 20 of the Civil Procedure Code gives jurisdiction to the Court to try a suit under Clause (*a*) if the defendant or each of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voulntarily resides, or carries on business or personally works for gain Explanation I says that where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence. Under clause 12 of the Letters Patent, jurisdiction is vested in the High Court if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits In *Mahomad Shujfi* v. *Laldin Abdulla*[1], it is stated that the meaning to be given to the word 'residence' in legislative enactments depends upon the intention of the Legislature in framing the particular provision in which the word is used and residence intended in section 380 of the Civil Procedure Code (Act X of 1877) is residence under such circumstances as would afford a reasonable probability that the plaintiff would be forthcoming when the suit was decided. It is observed by Sargent, J, that

> "an attempt has occasionally been made to draw a distinction between the meaning of the words "dwell" and "reside" but they appear to me to express the same idea, the only difference being that they are, perhaps, in ordinary usage, applied to different classes of society Neither expression, however, necessarily implies a permanent state of things".

In *Shri Goswami* v. *Shri Govardhan Lalji*[2], which was a case under clause 12 of the Letters Patent, the learned Judge observed that the Legislature often employs the word "residence" in different senses and that whether it is used in a particular section in a narrow or more extended meaning is to be determined according to what the Court believes to have been the intention of the Legislature in framing the provision in which the word occurs. The learned Judge also proceeds to state that the residence contemplated by the Letters Patent must be of a more or less permanent character of such a nature as to show that the High Court, in which a defendant is sued, is his natural forum; and that the defendant coming to Bombay for the purpose for which he came, and staying for the period for which he stayed, was not on that account, liable to be used in the High Court in respect of a cause of action which did not arise within the local limits of its jurisdiction. It is also observed therein that there is no distinction between "residing" and

1. (1878) I.L.R. 3 Bom. 227.　　2. (1890) I.L.R. 14 Bom. 541.

"dwelling" used in its ordinary signification excepting that "dwell" is of Saxon origin and "reside" is imported into the English language from the Latin and that to "dwell" would mean to "reside".

Levene v. *Inland Revenue Commissioners*[1], has also been cited. It was a case under the Income-tax Act and their Lordships had to construe the words "resident" and "ordinarily resident". There they recognised two residences for purposes of jurisdiction and held that a man may have two homes, one in London and the other in the country. In that case he was held to reside in both places and to be chargeable with tax.

In *Bhagat Singh Bugga* v *Dewan Jaghir Sawhney*[2], where an application under section 10 of the Civil Procedure Code was considered, the learned Judge observes that "residence" is not identical with ownership and it means the place where a person eats, drinks and sleeps, or where his family or his servants, eat, drink and sleep ; of which however there was no evidence in that case and the learned Judge held that the *animus revertendi* is not sufficient. So in construing the language of the provisions of section 20 of the Civil Procedure Code and clause 12 of the Letters Patent, actual residence at the time of the institution of the suit as pointed out in *Bhagat Singh Bugga* v *Dewan Jaghir Sawhney*[2], that is the place where a man eats, drinks or sleeps, would be necessary to confer jurisdiction, whether the word used is "dwell" or "actually and voluntarily resides". The words "permanent dwelling" are not found in these enactments excepting under Explanation 1 of section 20, Civil Procedure Code, where it is provided that where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action for the purpose of conferring jurisdiction But the permanent dwelling referred to in Explanation 1 in my opinion is synonymous with the idea conveyed by the words "actually and voluntarily resides" in clause (*a*) of section 20, Civil Procedure Code, *i e*, place of permanent residence at the time of the institution of the suit. The temporary residence referred to in Explanation 1 is a place where a man casually visits, stays for some time and returns to his permanent place of residence

In *Sitanath Bhadra* v *Jatindra Nath Sircar*[3], Explanation 1 to section 20, Civil Procedure Code, was relied upon to give jurisdiction to the place of permanent residence even though the defendant carried on business in Calcutta and lived there with his family. It was held that that fact did not oust the jurisdiction of the Gopalganj Court within the jurisdiction of which the defendant had a permanent residence. The words "permanent dwelling" in Explanation 1 to section 20, Civil Procedure Code, have been construed to mean "permanent residence".

A case under section 62 of the Lunacy Act arose in *Muhammad Ibrahim* v. *Abdul Hafeez Sahib*[4], where the word 'residing' occurring in that section was considered. It was held that where an alleged lunatic had his permanent residence where his parental home exists and where his family permanently resides, the District Court having jurisdiction over that place can entertain an application for directing judicial inquisition under section 62 of the Lunacy Act The removal of the lunatic whether by legal means or otherwise to the Mysore State and the residence of the alleged lunatic there might constitute temporary residence, but that would not put an end to the legal residence which the alleged lunatic already possessed and the District Court concerned would not cease to have jurisdiction over the matter and that the place where he has been removed to may constitute temporary residence Even though the alleged lunatic did not actually and voluntarily reside at the time of the institution of the proceedings at Tanjore where he had a personal home and where his family permanently resided it was held that he resided within the jurisdiction of the District Munsif's Court of Tanjore The learned Judges held that the parental home or the place where the family permanently resides is legal residence which would confer jurisdiction on the Court within the juris-

1 (1928) A C 217 (P C.).
2. I.L.R. (1941) 1 Cal. 490.
3. (1930) I.L R. 57 Cal. 65.
4. (1949) 2 M.L.J. 114.

diction of which that home exists The language in section 7 of the Act appears to me to be rather unique The words "permanent dwelling" or "actually and voluntarily resides" have not been founded in any other enactment excepting in a similar enactment, i e, The Aliyasanthana Act (XIX of 1949) The decisions placed before me only construed the jurisdictional provisions in enactments such as the Civil Procedure Code, the Lunacy Act, the Indian Income-tax Act and other enactments, but not under the Marumakkattayam Act (XXII of 1933), or even under Act XIX of 1949

The provisions relating to marriage and dissolution in the Marumakkattayam Act of 1933 have been taken subject to certain modification, from the earlier Act of 1896 where the same language occurs as regards jurisdiction As pointed out by the learned Judges in *Muhammad Shuffi* v. *Laldin Abdulla*[1], and *Shri Goswami* v. *Shri Govardhan Lalji*[2], it has to be found whether the words "permanent dwelling" are used in particular sense only from the intention of the Legislature in framing the provision in which the words occur This Act appears to confer upon a member to whom the Marumakkattayam law applies absolute right to divorce provided that he proves certain formal conditions as to the validity of the marriage, etc, and one has to consider the life and custom of this particular community in ascertaining what would have been the intention of the Legislature in using this language in this enactment If the meaning of the words "permanent dwelling" is to be taken as "permanent residence" as in *Sitanath Bhadra* v *Jatinthra Nath Sirkar*[3], the words "actually or voluntarily resides" would also mean "permanent residence" in the sense of being the place where a man actually sleeps, eats, or drinks, as found in *Bhagat Singh Bugga* v *Dewan Jaghir Sawhney*[4] It could not have been intended that the two sets of words should convey the same meaning or the same idea It cannot be ignored that the members of this community have been very advanced and enterprising and most of them have left their family and tarwad houses to places outside Malabar even to other Provinces and some even to foreign territories and settled there for the purpose of their business or other avocations. It could not have been the intention of the Legislature in such cases that a wife who had been married under the Act should be compelled to seek the husband wherever he may be in order to file a petition for dissolution. I do not think a right which has been granted under the Act could have been intended to be taken away by imposing a restriction on the person who wants to take advantage of it. It is therefore necessary to consider whether the words "permanent dwelling" should not be given a special meaning with reference to the particular community to which the legislation is intended to apply. The petition for dissolution may be filed in a place where the respondent actually and voluntarily resides It may be within the jurisdiction of the Court or outside it But it would be sufficient if the petitioner had a permanent dwelling within the jurisdiction, i e, if his tarwad house or parental home was situated within the jurisdiction of the Court However, it should be noted that the words "permanent dwelling" do not signify mere ownership of property in the native village. It must be shown that he had a permanent dwelling in the sense that it was his tarwad house or personal home or his own house where he resided at some time and which will be available to him if he desired to go and live there. No question of *animus revertendi* would arise in this case since it would be open to any respondent to say as a defence to the petition that he has no intention of reverting back to his native home Therefore it will be enough to satisfy the requirements if it is shown that he has a tarwad house or parental home or his own house within the jurisdiction of the Court in which the petition is filed. To construe otherwise would, in my opinion, be to ignore the meaning intended to be given by the Legislature in framing the enactment

I have now to consider whether the finding of the learned District Munsif that the petitioner had a permanent residence at Elupalli is supported by any evidence and whether that finding should stand. The allegation in the petition

1. (1879) I L.R 3 Bom. 227.
2. (1890) I.L.R. 14 Bom. 541.
3. (1930) I L R 57 Cal. 65.
4. I.L.R. (1941) 1 Cal. 490.

is that he had a permanent dwelling in Elupalli. But the learned District Munsif goes further and gives a finding that the respondent had a permanent residence in Elupalli Actual residence at the time need not be shown as pointed out before and it is sufficient if he had a parental home or a tarwad house. The petitioner has not been examined but there are some documents filed in the case which show that the respondent described himself as belonging to the Pirayiri amsom in Palghat taluk and that he was also a party to proceedings for obtaining succession certificate to the properties of his father in Elupalli in 1943 In addition there are certain statements of the petitioner in his counter which are relied upon by the counsel for the respondent as showing that he had a tarwad or parental house within the jurisdiction of the Court where he resided prior to his leaving for Calcutta on service. The petitioner states in his counter that his father built a house in Elupalli and by a will left him a share in this house and other properties, that on the death of his father in 1943 he relinquished permanently all his claims to the whole patrimony in favour of his mother ; and that since 1937 he has no permanent dwelling outside Bengal , and that since 1937 he has at intervals of years merely visited at most for a few days at a time his mother wherever she used to be staying at the time whether at Elupalli, Palghat town or elsewhere and that beyond this he has severed all connection with the house at Elupalli There is also his statement in the petition in title suit No 10 of 1948, that he was a native of Elupalli village Ordinarily I should think that such evidence would not be sufficient proof of the allegation in the petition that the respondent had a permanent dwelling in Elupalli but in the exercise of revisional jurisdiction, I am not inclined to interfere with this finding of fact of the learned District Munsif which is supported by some evidence and based on the inference from the statements made by the respondent himself in his counter and other documents That there was a house in Elupalli in which he had an interest and that till 1937 he had a permanent dwelling in Elupalli is clear from the evidence He says that he has relinquished all his claims to the whole partrimony in favour of his mother about which there is absolutely no evidence and therefore I do not think that the finding of the learned District Munsif that the petitioner had a permanent dwelling, though he wrongly puts it as a permanent residence, is such a finding as to be interfered with in revision I hold that the petition for dissolution was maintainable within the jurisdiction of the District Munsif of Palghat.

Another contention raised by the counsel for the petitioner is that the learned District Munsif acted with material irregularity in proceeding with the hearing of the petition after receiving a request from the Munsif of Alipore not to proceed with the trial of the petition in pursuance of an order of interim injunction issued by him to the respondent restraining her from proceeding with the trial of the suit which it is admitted was ordered under Order XXXIX, rules 1 and 2 of the Civil Procedure Code Reliance was placed for this contention on *Mungle Chand* v *Gopal Ram*[1], *A Milton & Co* v *Ojha Automobile Engineering Co*[2] and *Fazlur Rahman Sarkar* v *Atal Behary Ghosh*[3] Those were all decisions where the High Court in the exercise of its extraordinary jurisdiction issued an order of injunction against a party not residing within the jurisdiction of the High Court with a request to the Court which tried the suit not to proceed with the trial of the suit. There is difference of opinion among the Judges of the Calcutta High Court themselves, Gentle, J , holding one view in *Binjraj Maherwia* v *Ramnivasdas Jalan*[4], and the other Judges holding a different view in the cases cited by the counsel for the petitioner. However no such order has been issued by the High Court of Calcutta It is doubtful whether an order under Order 39, rule 2, issued against a party would be binding on a District Munsif subject to the jurisdiction of another High Court situated in a different province so as to compel him to stay further trial of the petition The question was considered though a finding has not been given in

1. (1907) I L R. 34 Cal 101
2. (1930) I.L.R. 57 Cal. 1280.
3. I.L R. 1940 (2) Cal 203.
4. A.I.R. 1943 Cal. 89.

Periakaruppan Chettiar v *Ramaswami Chettiar*[1]. The learned Judges decided that case on the merits but pointed out that the cases relied upon were all cases where an order of injunction was issued under Order 39, rules 1 and 2 and not under the equity jurisdiction inherited by the High Court from the old Supreme Courts and that there was no case in which it was held that a Subordinate Court can exercise such power I think in this case the order of the Munsif's Court of Alipore was no bar to the continuance of the trial of the petition.

But the more substantial objection raised by Mr Ramaswamy Aiyar is that the order of dissolution cannot stand in view of the fact that no valid marriage under the Act has been proved. Section 6 of the Act states that a marriage valid under section 4 may be dissolved by a registered instrument of dissolution executed by the parties thereto or by an order of dissolution as provided under the Act. Here we have a petition for dissolution of marriage and it is only in respect of a marriage valid under section 4 of the Act that an order of dissolution could be passed Section 9 makes it clear that on the motion of the petitioner made not earlier than six months after the service of the copy aforesaid, if the petition is not withdrawn in the meantime the Court, shall, on being satisfied after such inquiry as it thinks fit *that a marriage which is valid under* section 4 *was contracted* between the parties, by order in writing declare the marriage dissolved. So the fundamental fact which has to be proved by the respondent to entitle her for an order for dissolution would be that there was a marriage which was valid under section 4 Section 4 (1) (*b*) (ii) states that the conjugal union of a Marumakkattayi female with a male belonging to the same community as such female, which is the case here, shall be deemed for all purposes to be a legal marriage, that is a marriage valid under the Act, if the union was openly solemnised in accordance with the customary ceremonies, if any, prevailing in the community to which the parties belong or either of them belongs. In the petition it is alleged that the petitioner married the respondent on the 22nd March, 1941, and the marriage between them was solemnised at Calcutta in accordance with the customary ceremonies prevailing in the community to which the parties belong There is no evidence whatsoever as to the customary ceremonies or of the marriage The learned counsel for the respondent relies on a statement made by the petitioner in his counter affidavit in the petition for dissolution that the marriage was publicly conducted strictly in accordance with Hindu Brahmanic form of indissoluble marriage and not at all in accordance with the Marumakkattayam or any other law or custom and as such the incidents of Act XXII of 1933 have no application Counsel for the respondent stated that in fact there is no rule or stringent form of marriage pertaining to this community and it may be a sambandham which may be solemnised by exchange of mundus or clothes or exchange of betel leaves, etc. But the fact remains that certain customary ceremonies do' exist in the community when a marriage is performed. It may also be true that in fact no ceremonies exist or are required to be performed in some sections of the community and it will be sufficient to have an open solemnisation of the marriage without any ceremonies whatsoever. But the petitioner alleges specifically that there was not only open solemnisation but that it was done in accordance with the customary ceremonies prevailing in the community The use of the words " if any " in section 4 was made with some purpose and the framers of the Act were aware that in some cases there may not be any customary ceremonies required for a valid marriage But here the respondent having alleged that the customary ceremonies were gone through, should have proved the factum of such ceremonies having been performed and in the absence of such proof it could not be said that a valid marriage under the Act was performed

The learned District Munsif seems to think that to constitute a valid marriage under the Act, an open solemnisation would be sufficient It is no doubt not denied that there had been an open solemnization because the ceremonies were publicly conducted as admitted by the petitioner but it is specifically denied that it was not in accordance with Marumakkattayam law or custom but was in accord-

1. (1928) 27 L.W. 418.

ance with the Hindu Brahmanic form of indissoluble marriage. It is all the more necessary for the respondent to prove that the ceremonies conducted at the marriage were not in accordance with the Hindu Brahmanic form of indissoluble marriage but were according to the custom prevailing in the particular section of the community to which she and the petitioner belong The learned District Munsif while observing that the customary ceremony mentioned in the sub-clause to section 4 varies in each part of Malabar and in each family, states however that there is no prescribed customary ceremony for marriage in Malabar and that what is required is an open solemnization of marriage, no matter what customary ceremonies are followed. I think the learned District Munsif was referring to marriages in general in Malabar and not a marriage which is required to be performed in accordance with the Act to constitute a valid marriage under the Act. In view of the provisions of section 6 of the Act the District Munsif is in error in holding that no prescribed customary ceremony is necessary and an open solemnisation of the marriage would be sufficient to prove it as a valid marriage under section 4 of the Act I am therefore of opinion that it has not been proved by the respondent that the marriage was openly solemnised in accordance with the customary ceremonies, prevailing in the community Mr Rajagopalachari appearing for the respondent now asks that the petition may be remanded to the trial Court to enable his client to adduce evidence on the issue as to whether the marriage is valid under section 4 of the Act The order of the lower Court is set aside and I remand the petition to be heard on the question of the validity of the marriage and disposed of according to law, in the light of the observations made by me above The respondent will in any event pay the costs of this petition to the petitioner

Order set aside.

K. S *Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE SUBBA RAO AND MR JUSTICE SOMASUNDARAM

Palaniswami Goundan *Appellant**

v

Ramaswami Goundan and another *Respondents*

Limitation Act (IX of 1908), section 20 (2)—Scope and applicability—Conditions to be satisfied—Subsequent usufructuary mortgagee subrogated to rights of first mortgagee—Receipt of produce—If payment saving limitation for suit to enforce first mortgage—Suit by subrogee—Starting point for limitation.

When a person becomes subrogated to the rights of the mortgagee by redeeming a mortgage, he is in precisely the same position as the mortgagee and must, therefore, bring his suit for recovery of the amount paid by him within 12 years of the original mortgage

Kotappa v. *Raghavayya*; (1926) 52 M L J 532 . I L R. 50 Mad 626 and *Perumal Reddiar* v *Suppiah Thevar*, (1945) 1 M L.J 341, relied on

Where a mortgage has been discharged by the execution of a subsequent usufructuary mortgage and the usufructuary mortgagee has been subrogated to the rights under the first mortgage, the receipt of produce by the usufructuary mortgagee when the rights under the first mortgage were subsisting would directly come under the provisions of clause (2) of section 20 of the Limitation Act and should be deemed to be a payment for the purpose of sub-section (1) of section 20 To get the benefit of clause (2) of section 20 only two conditions need be satisfied One is that the person receiving the rents or produce must be a mortgagee and the other is that he should be in the possession of the land The intention of the mortgagee is irrelevant for the application of clause (2) of section 20 of the Limitation Act

Anpurna Kunwar v *Ram Padarthi*, (1926) I L.R 49 All 430, distinguished

Appeal under clause 15 of the Letters Patent against the Judgment and decree of the Honourable Mr Justice Wadsworth, dated 10th April, 1947 and passed in S. A No. 97 of 1946, preferred to the High Court against the decree of Court of the Subordinate Judge, Coimbatore, in A.S. No 102 of 1945 (O.S. No. 321 of 1943, District Munsif's Court, Tirupur)

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*L. P. A. No. 41 of 1947. 26th July, 1949.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Appellant.

K. V Ramachandra Aiyar for Respondent.

Judgment of the Court was delivered by

Subba Rao, J—This appeal raises two points of law, (1) whether the suit was maintainable and (2) whether it was barred by limitation

The facts of the case have been fully and accurately set out in judgments of the lower Courts and also in that of Wadsworth, J, in the second appeal. We need not restate them except to the extent necessary for appreciating the contentions of the parties One Sinnayya Goundan executed a mortgage deed, Exhibit P-1, dated 12th July, 1922, in favour of one Periya Goundan for a sum of Rs 500 On 24th June, 1924, the same Sinnayya Goundan executed a second mortgage deed in regard to the same property in favour of one Rama Boyan On 24th September, 1928, Sinnayya Goundan for himself and as guardian of his then minor sons executed a usufructuary mortgage in favour of Periya Goundan, that is, the mortgagee under Exhibit P-1 and also another by name Sinnammal for a sum of Rs 1,300 The consideration for the mortgage was made up of two items ; (1) a sum of Rs 650 due to Periya Goundan under Exhibit P-1 and (2) a sum of Rs 650 paid by Sinnammal to the mortgagor On 10th September, 1929, under Exhibit P-3 Periya Goundan assigned his half share of right in the mortgage dated 24th September, 1928, in favour of first plaintiff for a sum of Rs 650 Rama Boyan filed O S. No. 275 of 1940, in the file of the District Munsif's Court, Tirupur, to enforce his mortgage impleading Ramaswami and Chinnammal as defendants 3 and 4 Ramaswami and Chinnammal filed written statements setting up rights to priority by reason of their discharging, Exhibit P-1 by executing the usufrucuary mortgage deed, Exhibit P-2 Exhibit P-4 is the copy of the Judgment, dated 22nd August, 1941 in that suit The learned District Munsif found in their favour and gave a declaration that they were entitled to priority in respect of the principal amount covered by Exhibit P-1 In execution of the decree in that suit the mortgage properties were sold and purchased by the defendant subject to the prior mortgage dated 12th July, 1922, and he obtained possession on 14th April, 1943 Ramaswami and Chinnammal filed O S No. 321 of 1943, on the file of the Court of the District Munsif of Tirupur on 14th July, 1943 to enforce their mortgage rights under the mortgage deed, dated 12th July, 1922, against the auction-purchaser, Palaniswami Goundan in execution of the decree in O S No 275 of 1940 He was the sole defendant to the suit. He raised various contentions which are reflected in the following issues —

(1) Whether the suit is in time ?

(2) Whether both the plaintiffs are entitled to priority ?

(3) Whether the debt is wiped out by the enjoyment of the hypotheca by the plaintiffs ?

(4) To what reliefs are the plaintiffs entitled ?

The learned District Munsif rejected all the pleas of the defendant and decreed the suit as prayed for The learned Subordinate Judge on appeal held in favour of the plaintiffs on the question of limitation and also in regard to the plea under the Madras Agriculturists Relief Act but held that it was not competent for the plaintiffs to institute a suit as the mortgage deed, Exhibit P-1, was not assigned to them He allowed the appeal Wadsworth, J, in the second appeal preferred by the plaintiffs against the decree and Judgment of the learned Subordinate Judge held that the suit was not barred by limitation and that the plaintiffs were entitled to maintain the suit In the result he set aside the decree of the lower Court and decreed the suit with costs throughout The defendant has preferred the above Letters Patent appeal against the Judgments of Wadsworth, J

The learned counsel for the appellant raised again the two points which were argued by him before Wadsworth, J., without success. His first contention was that the first plaintiff could not maintain the suit as there was no assignment of the

prior mortgage, Exhibit P-1, in his favour, and that he could not maintain the suit on the Judgment in O S No 275 of 1940, because that Judgment merely declared a pre-existing priority and did not purport to create any charge This argument ignores the scope of the decision in O S No 275 of 1940, and the legal effect of the purchase by the defendant of the property subject to the rights of the parties declared in that suit. As we have already stated to that suit the present plaintiffs were impleaded as defendans 3 and 4 and the learned District Munsif declared the right to priority in favour of defendants 3 and 4 in respect of the principal amount of Rs 500, under Exhibit P-1 The relevant portion of the Judgment reads as follows —

" It is clear that defendants 3 and 4 are entitled to priority in respect of Exhibit P-1 The principal amount on Exhibit P-1 is Rs. 500 Defendants 3 and 4 are entitled to priority in respect of this principal amount "

The question of interest due under Exhibit P-1 was left open as the plaintiffs pleaded that the interest was wiped off under the Madras Agriculturists Relief Act. It is, therefore, manifest that the right of defendants 3 and 4 under Exhibit P-1 were declared in clear and unambiguous terms and defendant having purchased the property in execution of the decree subject to the rights so declared by the Judgment is now obviously precluded from questioning right of the plaintiffs to enforce their right under Exhibit P-1 Presumably for the same reason Mr Ramaswami Iyengar, the learned counsel for the appellant, had not seriously contended against the maintainability of the suit before Wadsworth, J , in the second appeal

The second contention of Mr Ramaswami Iyengar relates to the question of limitation He argued that the decree in O S No 275 of 1940 did not for the first time create a charge but only declared a pre-existing right If the suit was to be considered, indeed it was so conceived, as one to enforce the mortgage dated 12th July, 1922, as it was filed only on 14th July, 1943 it was clearly barred by limitation, under article 132 of the Limitation Act The question is whether the bar of limitation was saved by payments made within the meaning of section 20 (2) of the Limitation Act. Section 20, sub-section (2) of the Limitation Act reads as follows —

" Where the mortgaged land is in the possession of the mortgagee, the receipt of the rent or produce of such land shall be deemed to be a payment for the purpose of sub-section (1) "

It has been held in a decision reported in *Ramacharan* v *Nimai*[1], that section 20, clause (2) of the Limitation Act does not expressly refer to the intention of the party who receives rent or produce and that wherever the mortgage land is in the possession of the mortgagee, any such receipt of rent or produce of the land should be deemed to be a payment for the purpose of sub-section 1. It is enough, if the mortgaged lands were in the possession of the plaintiffs or their predecessors-in-interest when the rights under the mortgage deed, Exhibit P-1 were subsisting. It was, therefore, argued by the learned counsel for the respondent that when Periya Goundan was put in possession of the property under Exhibit P-2 there was not only his right as the usufructuary mortgagee under Exhibit P-2 but also his mortgage right under Exhibit P-1 was subsisting to enable him to claim priority over Rama Boyan, whereas Mr. Ramaswami Iyengar for the Appellant argued that Peria Goundan's possession could be referred only to the usufructuary mortgage under Exhibit P-2 and that though he might claim priority over Rama Boyan, the second mortgagee, his mortgage right under Exhibit P-1 was not subsisting as it had been discharged by the execution of the usufructuary mortgage. To resolve this conflict of arguments it may not be inappropriate to consider the scope of the decree in O S No 275 of 1940, its legal effect on the rights of the parties and the rights of the subrogee generally As we have already stated and it is not disputed by Mr Ramaswami Iyengar that the decree in O S. No. 275 of 1940, did not for the first time create any charge but that it declared a pre-existing right in favour of the plaintiffs under Exhibit P-1 The rights of a subrogee are fairly well settled so far as this Province is concerned They have been summarised succinctly and with lucidity by a well-known author in the following terms :—

1. (1921) 35 C.L J 58.

"The rights of the subrogee are identical with those of the mortgagee whose mortgage he discharges. He can therefore sue on the mortgage provided of course he does so within the period within which the mortgagee must have sued The limitation for the suit runs from the date when the mortgage money becomes due and not from the date of payment "

In *Kotappa* v. *Raghavayya*[1], the question for decision was whether the subrogee could enforce his right within 12 years from the date on which the suit on the hypothecation should have been brought or within 12 years from the date of payment. Madhavan Nair, J , as he then was, who delivered the leading judgment observes at page 635 :—

"A subsequent mortgagee has the right to pay off the prior mortgagee By making such payment he acquires in respect of the property all the rights and powers of the mortgagee when he has paid off One of such rights is this power to enforce his charge against the property subject to the law of limitation. If, therefore at the time when the subsequent mortgagee seeks to enforce the security by virtue of subrogation, a suit by the first mortgagee is barred by time the subsequent mortgagee's right is also barred "

Wallace, J , at page 631 puts the legal position in a different manner though to the same effect. He observes

"Thus the plaintiff's remedy was held to be a suit on his subrogated rights under the first mortgage charge So far as the first mortgagee was concerned, the charge was satisfied. So far as the mortgagor was concerned, the charge had only been transferred from the first mortgagee to the second mortgagee, who had now put himself in the proper legal position to enforce it "

The said principle was recognised by Horwill, J., in the decision reported in *Perumal Reddiar* v. *Suppiah Thevar*[2]. The learned Judge states the law tersely in the following words :—

"There can be no doubt that the law in Madras is that when a person becomes subrogated to the rights of the mortgagee by redeeming a mortgage, he is in precisely the same position as the mortgagee and must, therefore bring his suit for recovery of the amount paid by him within 12 years of the original mortgage "

Therefore though Exhibit P-1 had been discharged by execution of Exhibit P-2 the plaintiffs, who have been held by the decision in O S. No 275 of 1940, to have been subrogated to the rights of the mortgagee under Exhibit P-1, have the same rights which the mortgagee Periya Goundan had under Exhibit P-1. Applying this principle the position will be this. When Periya Goundan was in possession of the property under Exhibit P-2 he had two rights, his right as subrogee under Exhibit P-1 and his right as the usufructuary mortgagee under Exhibit P-2. As he received the produce when his rights under Exhibit P-1 were subsisting he would directly come under the provisions of clause (2) of section 20 of the Limitation Act But Mr Ramaswami Iyengar contended that he received the produce only in his capacity as the usufructuary mortgagee and he had never the intention of receiving the produce in his capacity as mortgagee under Exhibit P-1. We have already pointed out that the intention of the mortgagee is irrelevant for the application of clause (2), of section 20 of the Limitation Act. To get the benefit of that clause only two conditions need be satisfied. One is that the person receiving the rents or produce must be a mortgagee and the other is that he should be in the possession of the land. These two conditions are satisfied here in this case and it is conceded that if clause (2) of section 20 applies the suit is clearly within time

Mr. Ramaswami Iyengar strongly relied upon the decision reported in *Anpurna Kunwar* v. *Ram Padarath*[3]. In that case a suit was brought to enforce a simple mortgage of 15th March, 1898. The mortgage was for a sum of Rs. 13,200. On 1st November, 1898, the mortgagor executed a second mortgage of the same villages. On 4th May, 1900, the mortgagor executed a usufructuary mortgage in favour of the plaintiffs for a sum of Rs 17,712 due on the mortgage of 15th March, 1898, and the other items in all amounting to Rs 22,500 giving possession of the properties mortgaged. Under this the mortgagee was entitled to sue for the amount due to him only on dispossession and he would in that case be entitled to recover also from the property hypothecated under the bond of 15th March, 1898. The

1. (1926) 52 M.L J 532 : I L.R. 50 Mad. 626.
2. (1945) 1 M.L.J. 341.
3. (1926) I.L R. 49 All. 430.

plaintiffs were dispossessed of one of the villages mortgaged on 24th February, 1911. The plaintiffs filed the suit on 9th December, 1922. The suit was brought to enforce the mortgage dated, 15th March, 1898 It was held that the suit would be barred unless the produce or rents received by the plaintiffs in the capacity of the usufructuary mortgagees saved the bar of limitation within the meaning of clause (2) of section 20 of the Limitation Act. The learned Judges held that the usufruct of the two villages was given to satisfy the interest on the principal amount covered by the usufructuary mortgage and not the interest due on the prior mortgage, dated 15th March, 1898, and therefore that the suit was barred by limitation. If that decision meant to lay down the rule of law that the intention of the mortgagee was material in the application of clause (2) of section 20 of the Limitation Act, with great respect we are inclined to differ from those observations but that decision, in our view, may be sustained on the peculiar facts of that case As we have already pointed out, on the express terms of the usufructuary mortgage the plaintiffs' rights to enforce the mortgage of 15th March, 1898, would arise only after he was dispossessed Therefore he was in possession under the usufructuary mortgage and the rights under the first mortgage were in suspension as it were and therefore when they were in possession their rights under the simple mortgage of 15th March, 1898, were not subsisting In our view that decision cannot help the appellants in the present case The learned counsel for the respondent contended that as his rights under the usufructuary mortgage were defeated by reason of the decree in O.S No. 275 of 1940, filed by the second mortgagee his possession under the usufructuary mortgage must be deemed to have been possession under his first mortgage. This argument was founded upon the decision reported in *Doraiswami Naicken* v. *Periakaruppan Chettiar*[1] In that case the mortgagee had obtained possession under an invalid agreement for sale but as the sale was held to be invalid he was made accountable to rents and profits as if he were the mortgagee in possession. The learned Judges in applying section 20 of the Limitation Act observed :

> "The fact that his sale proved to be invalid could not vitiate his title as mortgagee and the rent and profits which he received must be in the circumstances be deemed to have been received by him as the mortgagee We may have thought that he was receiving them as the full owner of the property but as he did not in fact hold that position he could only have received them in the capacity actually held by him, namely, that of the mortgagee "

The learned counsel for the appellants pointed out that that principle could not be invoked in the present case as the usufructuary mortgage had not been held to be invalid and, therefore, the possession of the mortgagees was only under the usufructuary mortgage and could not be deemed to be possession under the earlier mortgage. It was argued that as the usufructuary mortgage was not frustrated and was wholly operative between the parties to the transaction the said principle had no application to the facts of the present case In the view we have taken it is not necessary to decide that point in this case and to give our final opinion on this contention

In the result the appeal fails and is dismissed with costs

K S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT —MR. JUSTICE HORWILL AND MR JUSTICE BALAKRISHNA AYYAR.

Gamoji Venkata Ramakrishnarao . *Appellant*

v.

Gullapalli Sambamurti . *Respondent*

Madras Agriculturists Relief Act (IV of 1938), *section* 19 *and Provincial Insolvency Act* (*V of* 1920), *sections* 37 *and* 43—*Application for scaling down decree debt—Adjudication of the applicant prior to* 1*st October,* 1937 *and annulment of such adjudication after* 22*nd March,* 1938—*Effect on ownership of property and on right to claim relief under Act IV of* 1938—*Failure to claim benefit under Act IV of* 1938 *in proceedings in execution of decree—Subsequent application for scaling down—If barred by principles of constructive* res judicata

1. (1941) 1 M L.J. 388 : I L.R. 1941 Mad 739.

*A. A. O. No. 270 of 1947. 24th August, 1949.

A judgment-debtor under a decree passed in a suit of 1933 was adjudicated insolvent on 16th April, 1937, but owing to his laches the adjudication was annulled on 5th March, 1941 He subsequently applied to scale down his debt under section 19 of the Madras Agriculturists Relief Act It was contended that as both on the relevant date referred to in the Act and on the date when the Act came into force, the property was vested in the Official Receiver, the applicant had no saleable interest in the property, and could not claim the relief under the Act and that he was barred by the principle of constructive *res judicata* from preferring the petition

Held, as the effect of the annulment of an adjudication is to bring about the same state of affairs as if there had never been an adjudication, the property should be deemed to have been the property of the insolvent applicant both on 1st October, 1937, the relevant date referred to in the Act and on 22nd March, 1938, when the Act came into force and therefore the provisions of Madras Act, IV of 1938 would apply

Venkataramayya v *Pundarikakshudu*, (1942) 1 M L J 491, distinguished

Ratnavelu Chettiar v *Franscicu Udayar*, (1945) 1 M L J 472, followed

Held further · It was not open to the insolvent by way of a counter to an execution application to claim that he was entitled to the benefits of Act IV of 1938 Further, the principle of constructive *res judicata* would not apply to the facts of the case

Appeal against the Order of the District Court of East Godavari at Rajahmundry, dated the 9th day of December, 1946, in I A No 125 of 1946, in O S. No. 32 of 1933

M. Appa Rao for Appellant

P Somasundaran and *P. Suryanarayana* for Respondent

The Judgment of the Court was delivered by

Horwill, J.—The appellant filed a petition in the Court of the District Judge of East Godavari, the order on which is under appeal, to scale down his debt under section 19 of Madras Act IV of 1938. Evidence was adduced ; and after hearing arguments, the learned Judge framed three points as arising for determination on the allegations in the petition and counter and on the evidence and arguments, They were .

(1) Whether the petitioner is barred by principles of *res judicata* from preferring the petition ?

(2) Whether the petitioner is entitled to the benefits of Act IV of 1938 ? and

(3) What is the amount which will be due if the decree is scaled down ?

On the first point the learned District Judge decided in favour of the appellant On the second point he held that the appellant was not possessed of any saleable interest in the property on the relevant dates, 1st October, 1937, and 22nd March, 1938, and that he was therefore not entitled to the benefits of Act IV of 1938. Because of this finding the petition had to be dismissed ; and so the learned District Judge did not consider the third question as to the extent to which the decree would have to be scaled down

The decree to be scaled down was passed in O S No. 32 of 1933. The appellant on his own application was adjudged an insolvent on 16th April, 1937 ; and on account of his own laches the adjudication was annulled on 5th March, 1941. The argument which appealed to the learned Judge was that both on 1st October, 1937, the relevant date referred to in Act IV of 1938, and on 22nd March, 1938, when the Madras Act IV of 1938 came into force, the property was vested in the Official Receiver ; for those dates were subsequent to the adjudication and prior to the annulment of the adjudication It is now well-settled law that the effect of the annulment of an adjudication is to bring about the same state of affairs as if the adjudication had never taken place The learned advocate for the appellant has cited to us *Ratnavelu Chettiar* v *Franciscu Udayar*[1], in which Somayya, J., held that a transaction which had taken place between the date of adjudication and the date of annulment without the permission of the Court was valid, because the annulment dated back to the date of adjudication. In that, he followed *Kothandaram Ravuth* v. *Murugesa Mudaliar*[2], in which on the Insolvency Act then in force

1. (1945) 1 M.L.J 472.

2. (1903) 13 M L.J. 372 , I.L.R. 27 Mad. 7.

the learned Judges held that the adjudication was null and void. After Somayya, J., had decided the above case, his decision came up for consideration by a Bench of this Court in *Periya* v. *Kondayya*[1]. There, the law bearing on the subject was considered in detail, and reference made not only to *Kothandaram Ravuth* v. *Murugesa Mudaliar*[2], but also to an earlier decision on which *Kothandaram Ravuth* v. *Murugesa Mudaliar*[2], was based, namely, *Ramaswami Kottadiar* v *Murugesa Mudali*[3]. It was pointed out that although at the time when *Ramaswami Kottadiar* v *Murugesa Mudali*[3] and *Kothandaram Ravuth* v *Murugesa Mudaliar*[2], were decided, the law governing insolvency was the Indian Insolvency Act 11 and 12, Victoria, 1848 ; yet despite some slight change in the wording, the law relating to the effect of the annulment of the adjudication remained the same In support of that conclusion three decisions of single Judges to that effect were referred to · *Lingappa* v. *Official Receiver, Bellary*[4], *Dharmasamarajayya* v. *Sankamma*[5], and *Ratnavelu Chettiar* v. *Franciscu Udayar*[6]. The judgment of Somayya, J , in particular was considered at some length ; and it was pointed out that his remarks that if the annulment did not have retrospective effect, there would be no need for the clause validating acts done by the Court or by the Receiver, for they would be valid, were very pertinent So there can be no doubt that the effect of the annulment of the adjudication on 5th March, 1941 was to bring about the same state of affairs as if there had never been an adjudication on 16th April, 1937, which means that on the relevant dates 1st October, 1937 and 22nd March, 1938 the property vested in the appellant.

The learned District Judge felt himself compelled to follow *Venkataramayya* v *Pundarikakshudu*[7] In that case, as in the present case, the relevant dates occurred during the period between the adjudication and the annulment of the adjudication ; but the learned Judge overlooked the distinction between that case and this in that there, upon the annulment of adjudication, it was ordered that the property should continue to vest in the Official Receiver. If it had revested in the insolvent, then the date on which the revesting would be deemed to have taken place would be the date on which the original order of adjudication was passed, which would, in effect, mean the wiping out of the intermediate period Where, however, at the time of the annulment of the adjudication, an order is passed continuing the property in the Official Receiver, no question arises of the revesting of the property in the insolvent , nor does the annulment of adjudication have the effect of putting the insolvent in the same position with regard to his property as he would have been in had he not been adjudicated an insolvent It is not therefore surprising that in the judgment of Wadsworth, J. who delivered the judgment in that case, we find only a passing reference to the effect of sections 37 and 43 The learned Judges almost entirely confined their consideration to an examination of section 21 of the Agriculturists Relief Act. They did not therefore consider what effect the annulment of adjudication would have upon the ownership of the property on the relevant dates *Venkataramayya* v *Pundarikatshudu*[7], is therefore easily distinguished , and we are bound by the other decisions above referred to. We therefore hold that the property must be deemed to have been the property of the insolvent on 1st October, 1937 and 22nd March, 1938, and that therefore the provisions of Madras Act IV of 1938 would apply.

Mr Somasundaram for the respondent seeks to support the dismissal of the application by contending that the learned District Judge was wrong in his finding on the first point. He contends that the appellant was barred from putting forward this plea in his application under section 19 , because he could and should have put it forward during the course of the earlier execution proceedings; and he therefore argues that the principle of constructive *res judicata* would therefore have to be

1. (1948) 1 M L.J 290 I L.R 1948 Mad. 872
2. (1903) 13 M L J. 372 I L R. 27 Mad. 7
3. (1897) 7 M L J 229 I L R. 20 Mad. 452 ,
4. (1937) 47 L.W. 366.
5. (1943) 1 M.L J. 166
6. (1945) 1 M L J. 472
7. (1942) 1 M.L J. 491.

applied. In executing a decree, the executing Court cannot go behind the decree and is bound to take steps for executing the decree for the sum for which the decree is passed. It was not open to the insolvent by way of a counter to claim that he was entitled to the benefits of Act IV of 1938. If he had done so, the Court would have directed him to separate proceedings under section 19, which would have to be taken, not in the executing Court, but in the Court which passed the decree. Mr. Somasundaram pointed out that the learned District Judge relied on *Ramaswami* v. *Ramaswami*[1], in which the learned Judges, following *Nagappa* v. *Annapoorani*[2], held that since an application under section 19 was a proceeding outside execution proceedings, the principal of *res judicata* would not apply. *Nagappa* v. *Annapoorani*[2], was overruled by *Adaikappa Chettiar* v. *Chandrasekhara Thevar*[3], which does not however help the respondent in any way. Even assuming that if there were points raised in the application under section 19 which could and should have been raised in the prior proceedings and if they were not, then the principle of *res judicata* would apply ; yet that principle would not apply to the facts of this case for the reasons already given.

It has finally been argued on behalf of the respondent that if these two points are found against the respondent, the respondent should be given an opportunity of pressing the points raised by him in paragraph 3 of his counter and showing for other reasons why the appellant would not be entitled to the benefits of the Act. There is no evidence of any value bearing on the points raised in paragraph 3 of the counter, and clearly no arguments were advanced on them or the learned Judge would have referred to them in his order. We have no doubt that these points were given up during the course of the arguments, if not before.

As we have pointed out in the opening paragraph, the learned Judge did not give a finding on question No. 3 of the questions framed by him for determination. The appeal is therefore allowed and I.A No 125 of 1946, remanded to the District Judge of Rajahmundry for disposal on the third question The costs of this appeal will abide the result and be provided for in the order of the lower Court.

K.C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT . MR. JUSTICE KRISHNASWAMI NAYUDU.

Penumetcha Annapurnamma . *Petitioner* *

v.

Polisetti Jagannadham . *Respondent.*

Limitation Act (IX of 1908) Article 182 (5)—Decree of Court of Small Causes—Execution application for issue of warrant of arrest—Returned as judgment-debtor not found—Order passed striking off—After eleven years another execution petition—Whether barred by limitation

The petitioner obtained a decree on 9th March, 1936 in a Court of Small Causes He filed an execution petition on 21st September, 1936 for issue of warrant of arrest of the judgment-debtor On 23rd September, 1936 an order for arrest was passed returnable on 20th October, 1936 On 21st October, 1936 the following order was passed : "Judgment-debtor not found for arrest. Struck off". After eleven years on 31st March, 1947, another application in execution of the decree was filed On the question whether it was barred by limitation,

Held, that the order made on 23rd September, 1936, was an order judicially and properly made, having been made under Order 21, rule 24, Civil Procedure Code and therefore a final Order. The present application in execution having been filed beyond three years of the date of the order on the previous application, it was clearly barred by limitation.

Jit Mal v. *Jwala Prasad*, (1898) I. L R 21 All 155, distinguished and commented upon.

To enable a decree-holder, who has filed an application for execution asking for arrest or attachment and which warrant has got returned as unexecuted, to revive his rights at any time, will be to nullify the effect of section 48, Civil Procedure Code

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1. A.I.R. 1945 Mad. 342.
2. I L.R. 1941 Mad. 261 (F.B.).
3. (1948) 1 M.L.J. 41 L R. 74 I.A. 264. I.L.R. 1948 Mad. 505 (P.C.).

*C. R. P. No. 133 of 1948. 18th October, 1949.

Petition under section 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the District Munsif Court, Narasapur, dated 16th October, 1947 in E A. Nil of 1947 in S C No. 54 of 1936.

V. Parthasarathi for Appellant.

G. Chandrasekhara Sastri for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition is against the order of the District Munsif of Narasapur dismissing the petitioner's application for execution as barred under article 182, clause 5 of the Indian Limitation Act

The petitioner obtained a decree in a Small Cause suit on 9th March, 1936. He filed an execution petition, E P No. 903 of 1936, on 21st September, 1936, for issue of a warrant for arrest of the judgment-debtor On 23rd September, 1936, an order for arrest was passed, returnable on 20th October 1916. On 21st October, 1936, the following order was passed by the learned District Munsiff of Narasapur :

"Judgment-debtor not found for arrest. Struck off"

The present E P was filed on 31st March, 1947, more than 11 years after the order referred to was passed on the previous E P. *Prima facie* the petition is barred under article 182, clause 5 of the Indian Limitation Act.

The learned counsel for the petitioner argues that the order made on 23rd September, 1936, in the terms referred to and the petition having been struck off, it is not a final order, that the E P No 903 of 1936 must be deemed to have been pending and the present execution petition is only a reminder to continue the proceedings in the previous petition and that therefore section 182, clause 5 of the Indian Limitation Act does not apply In support of this contention he relied on *Jitmal* v *Jwala Prasad*[1] In that case the decree was dated 2nd December, 1885, and after various infructuous applications for execution an application was filed on 4th August, 1897, for warrant of arrest of the judgment-debtor. The warrant for arrest was ordered, but, the peon that was sent to arrest the judgment-debtor reported that he concealed himself and in consequence the court struct off the execution application. On 29th November, 1897, the decree-holder again applied for the arrest of the judgment-debtor, but that application also was struck off on 20th February, 1898, without the arrest having been made. Against the order striking off the latter application the decree-holder appealed to the High Court where an objection was taken that the decree could no longer be executed having regard to section 230, Civil Procedure Code corresponding to section 48 of the present Code, and, it was held that the warrant of arrest issued on the decree-holder's application of 4th August, 1897, still subsisted and ought to be executed.

The learned counsel contends that the order made in the previous application, E. P. No. 903 of 1936, is in the same terms as the order that was under consideration in the decision cited by him. There also the judgment-debtor was not arrested and the execution application was struck off. The contention on behalf of the petitioner is that in effect the order of Court in E. P. No. 903 of 1936, dated 23rd September, 1936, and the process issued thereon has not become exhausted and that the application must therefore be deemed to be pending. Unless it could be shown that the disposal of the previous execution petition was for administrative or statistical purposes it cannot be said to be pending so as to enable the petitioner to take advantage of it and continue the proceedings by filing applications subsequently. The question, therefore, for decision is whether the order in the previous execution petition was made for administrative or statistical purposes or whether the execution petition has been judicially and properly disposed of so as to make it a final order What happened was the prayer asked for by the petitioner was granted, *i e*, for arrest, and, a process in pursuance of the order had been issued, which process the petitioner ssems to have taken advantage of and had the same

1. (1898) I.L.R. 21 All. 155.

executed, but, the judgment-debtor was not found and so the arrest could not be effected The fact that the words "struck off" are mentioned in the order would not make any difference Whether it is mentioned as "struck off" or "dismissed" the mere words would not decide the nature of the order and as to whether it is a final order or not One has to consider the substance of the order and not the mere form In this case the application in the previous execution petition was made under Order 21, rule 11, which provides for the filing of an execution petition and the arrest was asked for under section 55, Civil Procedure Code which is the general provision for arrest. A process was issued for execution of the decree by arrest under clause (1) of rule 24 of Order 21. It is provided that under clause (3) of rule 24 that in every such process a day shall be specified on or before which it shall be executed and a day shall be specified on or before which it shall be returned to court In this the specified date was 20th October, 1936. On that day which is the date within which the prcocess had to be executed and returned the court found that there was nothing more to be done as the process that was issued in pursuance of the prayer in the execution petition has exhausted itself and finally disposed of the application by striking it out It cannot be said therefore that it is not a judicial or proper disposal since nothing more was to be done The execution has become complete If the petitioner had then asked for extension of time for executing the process for arrest an order might have been made extending the time and the application would not then be said to have been disposed of I do not see any reason for holding the order under consideration as not being a final order as is mentioned under article 182, clause 5 of the Indian Limitation Act.

In the decision *Jitmal* v *Jwala Prasad*[1], cited by the learned counsel there were other circumstances which apparently weighed with the learned Judge There were a number of execution applications taken out by the decree-holder and it can be seen from the judgment that the ministerial officers of the court had not been co-operating with the decree-holder to effect the arrest ordered by the court The following observations of the learned Judges show to what extent they were influenced by such circumstances They observed in spite of the best efforts of the decree-holder he could not secure the arrest of the judgment-debtor purely on account of the conduct on the part of the ministerial officers and further stated,

> "When warrants of arrest were issued, the ministerial officers of the court sent to execute the warrants seem to have been seized with sudden blindness and incapacity to discover the whereabouts of this judgment-debtor."

And with reference to the application of 4th August, 1897 they observe :

> "As usual the peon reported that the judgment-debtor had concealed himself, and thereupon the court lost no time in striking off the case What impresses us in these proceedings is the singular want of sympathy exhibited by the court towards the decree-holders."

In appeal the learned Judges felt the difficulty arising out of the wording of section 230, Civil Procedure Code corresponding to section 48 of the present Code They stated that in view of section 230, Civil Procedure Code it would be impossible for them to grant the order, looking to the fact that upwards of twelve years have elapsed since the date of the decree sought to be enforced and that previous application for execution have been granted They thereupon called for a finding from the lower court whether the decree-holder could come under the exemption of the section and for a finding on the issue whether execution had been prevented by fraud or force of the judgment-debtor The finding submitted by the lower court was against the decree-holder but in spite of it the learned Judges held that the order issued on 4th August, 1897 had not yet been carried out and the application before them was merely ancillary to the previous application, and therefore the decree-holder was entitled to proceed with the execution

With great respect to the learned Judges I am unable to agree with the view taken as the acceptance of the view would, if carried to its logical conclusion, enable

1. (1898) I. L. R. 21 All. 155.

a decree-holder by merely filing an application for execution asking for arrest or attachment and getting the warrant returned as unexecuted, keep the decree alive for any length of time and thus nullify the effect of section 48, Civil Procedure Code Though in the case before me the period of twelve years had not elapsed the acceptance of the correctness of the decision would amount to the result stated above. I have no doubt that the order made in E P. No 903 of 1936, dated 23rd September, 1936 is an order judicially and properly made having been made under Order 21, rule 24 and therefore a final order, and the present application being filed beyond three years of the date of (the order on) the previous application it is clearly barred by limitation In the result, the revision petition is dismissed, but, in the circumstances there will be no order as to costs

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE GOVINDA MENON.

Kandaswami Naick *Appellant* *

v.

Ponnu Naick *alias* Veerappa Naick and others *Respondents.*

Madras Estates Land Act (I of 1908), Section 112—Absence of notice to ryot—Validity of sale—Defaulter, if should sue to set it aside—Service by affixture—When justified

The service of notice on the ryot is an imperative condition precedent to the Collector appointing an officer to conduct a sale for arrears of rent of under the Madras Estates Land Act. A sale held in the absence of such a notice is a nullity and there is no duty cast upon the defaulters to bring a suit to set it aside

Unless it is shown that reasonable and due diligence have been taken to serve the defaulter personally, affixture cannot be justified and it would not be service as contemplated by section 112 of the Estates Land Act

Rajitagiripathi v *Peda Kottayya,* (1933) 65 M L J. 675, and *Rameswaramayya* v. *Zamindar of Kalahasti,* (1939) 1 M L J 618, applied

Ramlalsahu v *Mt Ramia,* I L R (1947) Pat 340 (F B) distinguished

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Mathurai, in A S No 178 of 1945, preferred against the decree of the Court of the District Munsif of Sattur, in O S. No 140 of 1944.

K. Bashyam and *R. Ramasubbu Iyer* for Appellant.

R. Viswanathan and *T. R. Srinivasan* for Respondents

The Court delivered the following

JUDGMENT —The fifth defendant in the trial Court, who was a purchaser of the suit properties from the fourth defendant who, in his turn was again a purchaser from the third defendant, appeals to this Court aggrieved by the decision of the Subordinate Judge of Ramnad at Madura in A S No. 178 of 1945, on his file It is seen that the third defendant had purchased the tenancy rights in the properties at a private auction held by the manager of the Mannarkottai Zamin to which estate the land belonged, for arrears of rent due to the estate It is alleged that the plaintiffs who were the occupancy ryots under the Mannarkottai Zamin had defaulted in paying the rent and therefore for the realisation of the arrears of rent the tenancy rights had to be sold. The rent sale took place on 18th January, 1932 It was confirmed on 11th March, 1932, and a certificate issued in favour of the Zamindar who bought in the lands, on 30th April, 1933. After the estate purchased the occupancy rights, patta was sought to be granted to the person who bid for the largest amount at a private auction held on 18th September, 1933. The tenancy rights were purchased by the third defendant at that auction, and, as has already been mentioned, the title by devolution ended in the fifth defendant ultimately becoming the tenant. It is also found by both the lower

*S. A. No. 1095 of 1947. 7th October, 1949.

Courts that the present plaintiff had knowledge of the sale at least as early as 1935, though he took nearly eight years to file the present suit out of which this second appeal has arisen.

The suit by the plaintiffs was for recovery of possession of the properties on the footing that as there were no arrears of rent due from them to the estate the sale and all the subsequent proceedings were null and void. Paragraph 7 of the plaint recited various negative facts, *viz*, the absence of any arrears of rent, the absence of any notice under section 112 of the Estates Land Act, the absence of a sale under section 114 of the Act, the absence even of the fact that the Collector had issued an order directing the sale

The lower Courts have now found at a fact that the notice under section 112 which should have been served in accordance with the provisions of section 78 (2) of the same Act had not been properly served on the tenant It is found that the village munsif who went to serve the notice issued by the Collector under section 112 could not find the tenant at all. His wife when questioned was not able to give any specific information regarding the whereabouts and therefore the notice was affixed on the door of the house as well as on the property in dispute On the basis of this service the landlord applied to the Collector under section 114 of this Act for directing the sale of the property Under section 116 the Collector appointed an officer to conduct the sale which was held under section 117 with the result that the third defendant purchased the property.

The learned counsel for the appellant Mr. Bashyam raised various contentions regarding the validity of the sale and urged that the present suit for recovery of possession on the footing of the sale held on 18th September, 1933, cannot be maintained. It is urged that under section 114 of the Indian Evidence Act there is a presumption that judicial and official acts are properly done and in this case when the Collector after receiving an application under section 114, appointed an officer under section 116 of the Estates Land Act to conduct the sale it must be presumed that there was a proper notice served upon the defaulter as is statutorily laid down under section 112 The argument proceeds on the assumption that because the Collector himself was the authority to issue the notice to the defaulter intimating to him of the intention to sell the property and when later on the self-same Collector as a result of the issuing of notice has directed the sale it must be deemed that the previous notice on the defaulter had been served on him properly, otherwise the Collector would not have directed an officer to conduct the sale. There is a singular absence of evidence in this case as to whether in appointing an officer to conduct the sale the Collector really exercised his individual judgment and found that the notice has been properly served. In the absence of evidence to that effect I am not justified in presuming that section 114 of the Evidence Act can be sought in aid by the appellant for requesting the Court to presume that there has been a proper notice. I do not think that the mere fact of the Collector having appointed an officer to conduct the sale would by itself justify the inference by the Court that there has been a proper notice.

The next argument of the learned counsel is that proper steps had been taken to serve the notice upon the defaulter personally and since personal service was not feasible the service by affixture must be deemed to be sufficient. For this argument reliance is placed upon two decisions of this Court, *Chinna Nagi Reddi* v *Venkataramiah* and *Kamulammal* v *Chokkalingam Asari*[2] In the earlier of these cases Seshagiri Ayyar, J. and Napier, J, have held that when a property was sold for arrears of revenue under the Revenue Recovery Act without notice to the owner of the property and he came to know about the revenue sale only subsequently when the purchaser tried to get possession and thereafter brought a suit more than six months after the sale for possession the failure to give notice of the sale did not deprive the Collector of jurisdiction to effect the sale but was a mere irregularity because the sale was one that ought to have been set aside within six months. The principle underlying the case is that under the Revenue Recovery Act because there is a provision under section 12 for bringing a suit to set aside a revenue sale

within six months of its taking place the fact that such a sale took place without notice to the defaulter would not make it null and viod according to the learned Judges. It seems to me that the principles enunciated by learned Judges cannot be safely applied to the facts of the present case, as I shall show presently the decisions of this Court have held that the service of notice was an imperative condition precedent to the Collector appointing an officer to conduct that sale. I do not think that the decision in *Chinna Nagi Reddi* v. *Venkataramiah*[1], can be of any assistance in favour of the appellant.

The other case on which the learned counsel placed his reliance is *Kamulammal* v. *Chokkalingam Asari*[2]. Phillips, J, and Venkatasubba Rao, J, in their decision were of the view that a suit to set aside a revenue sale under the Madras Estates Land Act one year after expiration of thirty days after the sale is barred under article 12 (*b*) of the Limitation Act I do not find any observations in this case which can be availed of in favour of the appellant. The learned Judges have in fact followed the decision in *Karuppa Thevan* v. *Vasudeva Sastri*[3], as well as the decision in *Bhuban Mohan Moitra* v. *Grish Narain Moonshi*[4]. I am of opinion that for the principle sought to be adumbrated in the argument of the learned counsel these decisions cannot be of any assistance

On behalf of the respondents two decisions of this Court, *viz*, *Rajitagiripathi* v. *Pedakotayya*[5], and a more recent one of Wadsworth, J., in *Rameswaramayya* v *Zamindar of Kalahasti*[6], have been relied upon It seems to be that the decision in *Rajitagiripathi* v. *Pedakotayya*[5], is applicable to the facts of the present case. There it is held that notice to lawful ryot is such an important condition precedent to the holding of a sale under section 112 of the Madras Estates Land Act that the want of it must be regarded as making the sale a nullity. The Bench followed the decision of Ramesam, J., in *Kootoorlingam Pillai* v. *Sennappa Reddiar*[7]. It was further laid down by the learned Judges that where in a sale of a holding for arrears of rent personal service of notice was neither made nor attempted upon the defaulting ryot, but service by affixture was made, the statutory requirement as to notice had not been complied with, since the Estates Land Act contemplates service by affixture only when personal service cannot be effected after due and reasonable diligence.

It is unnecessary for me to discuss in any detail the questions that have been considered by the learned Judges, because, in my opinion, the present case to a very great extent resembles the decision of Curgenven and Sundaram Chetty, JJ, and I respectfully follow the observations of the learned Judges. The more recent and direct authority is the judgment of Wadsworth J., in *Rameswaramayya* v. *Zamindar of Kalahasti*[6]. Though the learned Judge did not in terms refer to the earlier decisions, *viz*, *Kootoorlingam Pillai* v *Sennappa Reddiar*[7], and *Rajitagiripathi* v. *Pedakotayya*[5], the reasoning of the learned Judge is in the same strain and according to him under section 112 of the Estates Land Act the expression "if personal service cannot be effected" means that personal service cannot be effected when reasonable attempts have been made to effect it. He further holds that to justify affixture there must be reasonable diligence on the part of the process-server and the mere temporary absence of the person to be served does not justify the affixture.

In the present case except the return of the village munsiff there is nothing to show that reasonable and due diligence have been taken to serve the defaulter personally. Both the lower Courts have come to the concurrent finding that there has not been such due and reasonable diligence and I am bound by that finding of fact Therefore it seems to me that on the facts now found there has been no service as is contemplated under section 112 of the Estates Land Act. Wadsworth, J., observes that where a proper notice of sale has not been given even the fact that the defaulter was aware of the sale at the time when it actually took place will

1 (1918) M W N 224
2. (1924) 45 M.L J 840
3. (1883) I L R. 6 Mad 148
4. (1910) 13 C.L J. 339.
5. (1933) 65 M L.J 675.
6 (1939) 1 M L J 618.
7 (1931) 61 M L J 203.

not be sufficient to validate the sale In the present case there is no evidence to show that prior to 1935 the defaulter was personally aware of the sale. If that is so the fact that he came to know of the sale about three years later in 1935 will not make it obligatory upon him to come to Court to set aside the sale The question is whether a sale held without notice under section 112 is a nullity or whether it is a voidable transaction which could be later on set aside by a suit The trend of the decisions of this Court adverted to by me above is to the effect that under the provisions of the Estates Land Act such a sale is a nullity and if the sale is a nullity there is no duty cast upon the defaulter to bring a suit to set it aside, for under the law it is impossible to set aside a transaction which is null and void. Therefore, the contention urged on behalf of the appellant that the respondent waited for nearly eight years before he brought the suit becomes pointless because the respondent could not bring a suit to set aside the sale but only bring a suit for possession of the property.

It is interesting to notice, as has been pointed out by Mr Viswanathan for the respondent, that in *Rajitagiripathi* v. *Pedakotayya*[1] the sale took place in 1915 and the actual suit out of which the decision there arose was only filed just before the expiry of twelve years, *i e*, 1927 I would therefore hold, agreeing with the lower Courts, that the sale is null and void.

Mr Bashyam then seeks to apply the principles enunciated in the Full Bench decisions in *Ramlalsahu* v *Mt Rama*[2], where the learned Judges held that where under Order 21, rule 22 (1) notice to a legal representative has not been properly served and a sale held in execution of a decree it would only be a voidable one and not a null transaction. The learned Judges have discussed in great detail the various decisions of the Patna High Court and have come to the conclusion they did, but in view of the decisions of this Court which hold that the sale under the Estates Land Act will be null and void if notice has not been properly served on the defaulter, I find it difficult to apply the observations of the learned Judges of the Patna High Court to the case under consideration.

There is one more circumstance which has to be considered and that is that this property has been mortgaged by the tenants to the second defendant for a sum of nearly Rs 1,000 and the rights in the same have been sold for an arrear of Rs. 10 and purchased by the estate itself for the trifling sum of Rs 9 and odd As is pointed out by Mr. Viswanathan, if the defaulter knew that a sale was to take place for the sum of Rs. 10 he would not have allowed it to take place because the property was certainly worth about Rs 1,000 and the fact that later on before he brought the suit he rendered a mortgage, is sufficient evidence to show of his absence of knowledge of the sale This is a material circumstance which if necessary could be taken into consideration to justify the *bona fides* of the respondent, but, in the view which I take following the decision of this Court on the legal aspect, I do not think I should rest my case on the circumstance mentioned by me above I am therefore of opinion that the lower Courts were correct in the decision arrived at and the second appeal fails and is dismissed with costs. No leave

V. S. *Appeal dismissed.*

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1. (1933) 65 M L J 675.

2 (1947) I L R. 26 Pat 340 (F.B).

[END OF (1949) II M.L.J.]

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[1949]

(1949) 1 M L J		62 L W.		1949 M.W.N		I L R. 1949 Mad.
1 (F B)	=	51	=	(1948) 853	=	377
50	=	115	=	(1949) 53		..
52	=	..	=	.		..
56	=	126	=	38		..
61	=	116	=	171 (1)		..
62	=	125	=	48		..
63	=	117	=	15		..
64	=	119	=	70		..
66	=	122	=	36		..
67	=		=	45		..
71	=		=	47		..
72	=	124	=	30		..
74	=		=	43		..
76	=	120	=	52		..
78	=	103	=	105		..
90	=	158	=	9		
94 (P C)	=	11	=	..		.
97 (P C)	=	14	=	.	=	487
101 (P C)	=	17	=	..		..
105 (P C)	=	61—747	=	1		..
107	=	62—146	=	67 (1)		..
108	=	..	=	33		..
110	=	161	=	2		.
112	=	100	=	325		..
116	=	156	=	34		.
119	=	131	=	72	=	924
128 (P C.)	=	25	=	83	=	675
134 (P C)	=	40	=	..		..
135 (P C)	=	41	=	..		..
143	=	.	=	8		..
144	=	..	=	29		..
145	=		=	12		.
147	=	118	=	67 (2)	=	804
149 (P C)	=	48	=	..		..
152	=		=	17		..
165 (P.C)	=	30	=	..		..
171	=		=	69		..
172 (P C)	=	35	=	.		..
177 (P C.)	=		=	..		..
179	=		=	145		..
181	=	.	=	122		..
182	=	148 (1)	=	172 (2)		..
183	=	147	=	92		..
184	=	..	=	124 (1)		..
185	=	.	=	141		..
187	=	150	=	127		..
189	=	148 (2)	=	147		..
191	=	143	=	90		..
194	=		=	149 (1)		..
195	=	165	=	88		..
196	=	..	=	124 (2)		..
198	=	.	=	284		..
199	=	..	=	89		..

(1949) 1 M L J	62 L W.	1949 M W.N.	I L.R. 1949 Mad
200	167	116	
207		..	..
209		155	..
213 (F C)			..
222 (P C)	. .	416	..
228	164	187	.
229		154	
231	192	143	
233	189	125	
235 (P C)			
240	151	158	..
245	195	295	763
248	163	140	.
249	212	.	904
258 (F B)	917	93	739
269	.	56	
280	191	135	..
282	198	186	..
283	140	131	..
286			
290	204	139	.
291	203	..	.
293	..	..	..
295	221	136	..
297	205	133	..
298	173	..	877
314	..	189	..
316	208	300	..
318	220	294	..
320	264	199	..
330	199	146	..
331	206	293	..
333 (F B.)	210	.	82
335 (F.C)	.	.	.
373	223	192	
376	.	257	
379	200	262	
382	231	138	
384		255	.
386		281	
387	258	182	843
389	260	149 (2)	.
393	.	259	.
395	246	173	..
398	.	260	.
400	233		849
412	226	188	..
417		215	.
419	245	261	
420	252	290	.
422		217	
425	251	213	
426	.	197	
428	253	252	.
432	.	219	
434	256		
436	.	195	
438	.	175	
445	287	323	.
447	311	327	..
448		223	
449	.	596	
452	.	220	.
455	283	207	..
456	249	298	..
459	309	227	..
462	276	224	..

(1949) 1 M L J		62 L W.		1949 M W.N.	I.L.R. 1949 Mad.
465	=	..	=	382	..
467	=	281	=	214	..
468	=	317	=	302	..
471	=	285	=	211	..
475	=		=	208	.
479	=	282	=	289	.
480	=	273	=	..	.
484	=		=	.	
486	=	315	=	292	.
488 (F B)	=	293	=	237	.
503	=	290	=		..
505 (P C)	=	374	=	402	..
508	=	370	=	591	..
511	=	291	=		..
513	=	385	=	285 (1)	..
514	=	316	=		..
515	=	313	=	609	..
518	=	288	=	235	..
520	=	279	=	.	..
522	=	386	=	236	
523	=	328	=	304	..
527	=	393	=	276	
528	=	307	=	274	.
530	=	322	=	229	..
536	=	395 (1)	=	..	..
537	=	336	=	611	..
538	=	372	=	287	..
540	=	380	=	..	..
542	=	360	=	338 (2)	..
545	=	320	=	..	..
547	=	332	=	..	..
550	=	335	=	..	..
552	=	381	=	272	..
554	=	394	=	448	..
556	=	379	=	590	..
557	=	377	=	384	..
558	=	378	=	397	
559 (F C)	=	.	=	.	..
565 (F C)	=	.	=	.	..
568 (F.C.)	=	403	=	.	..
579	=		=	285 (2)	
581	=	363	=	277	..
583	=	383	=	547	..
586	=	434	=	344	..
589	=	..	=	434	..
591	=	..	=	475	..
593 (F B)	=	337	=	265	.
600	=	398	=	450	..
602	=	387	=	341	..
605	=		=	250	..
608	=	402	=	435	..
610	=	400	=	278	..
612	=		=		.
615	=		=	381	.
616	=	365	=	308	..
620	=	..	=	336	..
622	=	.	=	383	..
623	=	395 (2)	=	168	..
627	=	415	=	217	..
628 (F C)	=	417	=	..	..
646	=	61—848	=	184	..
648	=	62—413	=	7	..
650	=		=	161	..
656	=	368	=	396	..
658	=	.	=	..	..
660	=	391	=	347	..
662	=	341	=	.. =	808

(1949) 2 M.L.J.		62 L.W.		1949 M.W.N.	I.L.R. 1949 Mad.
1 (P C)	=	579	=	.	..
6 (P C)	=		=	385	..
12	=	.	=	338 (1)	.
13	=	.	=	598	.
15	=	.	=	282	.
16	=	..	=	280	..
18 (F.C)	=		=	.	
20 (F C)	=		=	.	.
26 (F C)	=		=	.	
30 (P.C)	=	707	=	.	..
35 (P C)	=	563	=	365	.
44	=		=	349	
61	=	473	=	509	.
65	=	.	=	473	..
66	=	484	=		
70	=	465	=	..	
74	=	464	=	470	.
75	=	469	=	496	..
80 (P C)	=	439	=	627	..
84 (P C)	=	461	=	455	
88	=	635	=	424	.
104	=	.	=	465	
106	=		=	471	..
107	=	.	=	506	.
110	=		=	451	.
111	=		=	458	..
114	=	476	=	453	..
117	=	460	=	469	..
119 (P C)	=	.	=	398	..
124 (P C)	=	437	=	405	.
126	=	584	=	462	.
128	=		=	460	..
129	=	.	=	..	.
132	=	479	=	520	..
138	=		=	698	
139	=	.	=	.	.
142	=	.	=		..
143	=	493	=	472	
145	=		=	576	..
147	=	556	=	700	.
152	=		=	452	..
153	=		=	466	.
156	=	609	=	463	.
159	=		=	703	.
161 (P C)	=	444	=	407	..
171 (F B)	=	508	=	476	.
194 (P.C.)	=	664	=	444	..
199	=	597	=	612	..
217 (F B.)	=	539	=	527	..
235 (F B)	=	536	=	504	
239	=	576	=	593	.
243	=	..	=	.	
245	=	.	=	575	..
246	=	.	=	579 (2)	
247	=	..	=	574	.
249	=		=	525	
251	=	..	=	516	..
255	=	.	=	516	.
258	=	917	=	693	..
263	=	611	=	546	..
264 (P.C)	=		=	.	.
268	=	495	=	.	..
295	=		=	580	..
296	=	613	=	631	.
297	=	612	=	572	..
298	=	..	=	.	..
300	=	588	=	834	.
303	=	..	=	579 (1)	..
305	=	488	=	499	..
310	=	..	=	549	..
335	=	..	=	545	..

1949) 2 M.L J.		62 L W.		1949 M.W.N.	I.L.R. 1949 Mad
337	=	573	=	518	..
339	=	.	=	543	..
342	=	572	=	573	..
343	=	.	=	..	..
356	=		=		..
382	=	585	=	587	..
385	=	..	=	514	..
388	=	651	=	.	..
389	=	652	=	756	..
390	=	630	=	581	..
394	=		=	605	..
396	=	627	=	585	..
399	=	655 (1)	=		..
400	=	663	=	657	..
402	=	.	=	732	..
403	=		=	658	.
405	=	650	=	571	..
406	=	741	=	601	..
410	=	..	=	632	..
413	=	622	=	..	..
419	=		=	577	..
421	=	..	=	651	..
422	=	647	=	653	.
423	=	653	=	814	..
425	=	648	=	.	..
428	=	614	=	642	..
434	=	669	=	.	.
438	=	655 (2)	=	..	..
443	=	712	=	649	..
446	=	714	=	652	..
447 (P.C.)	=	560	=	755	..
449 (P.C.)	=	561	=	..	..
451	=	768	=	512	..
454	=	660	=	660	..
457	=	.	=	673	..
459	=	634	=	607	..
461 (P.C.)	=	677	=	437	.
466	=	715	=	654	..
469 (P.C.)	=	700	=	..	..
476 (F.C)	=	..	=	..	..
484 (P.C)	=	681	=	..	..
488 (P C)	=	672	=	420	..
493 (P.C.)	=	770	=	683	..
495 (P.C)	=	724	=	805	..
500 (P.C.)	=	684	=	..	..
517	=	..	=	678	..
520	=	745	=	..	..
524	=	759	=	808	..
525	=	773	=	..	..
532	=	.	=	..	..
534	=	766	=	666	..
536	=	731	=	671	..
539	=	762	=	674	..
543	=	..	=	680	..
544	=	..	=	634	..
552	=	803	=	688	..
553	=	751	=	681	..
555	=	750	=	682	..
556	=	749	=	665	..
557	=	760 (2)	=	..	..
558	=	761	=	840 (1)	..
559	=	760 (1)	=	844	..
560	=	..	=	..	..
566	=	..	=	810	..
568	=	722	=	663	..
571 (P.C.)	=	728	=	728	..
574 (P.C.)	=	733	=	..	..
582	=	752	=	..	..
591	=	783	=	..	..

1949) 2 M.L.J.		62 L.W.		1949 M.W.N.	I.L.R. 1949 Mad.
593	=	779	=	705	..
594	=	826	=	709	..
597	=	814	=	816	.
599	=	799	=	686	.
601	=	792	=	699	..
602	=	794	=	..	..
604	=	784	=	689	..
606	=	780	=	729 (2)	..
609	=	.	=	..	..
612	=	.	=	751	.
617	=	804	=	..	..
623	=	..	=	..	.
629	=	801	=	817	..
632	=	813	=	809	.
633	=	812	=	719	.
635	=	793	=	.	..
637	=	797	=	.	.
639	=	810	=	685	..
641	=	816	=	690	..
645	=	795	=	813	
647	=	847	=	711	.
655	=	.	=	729 (1)	.
657 (P.C.)	=	786	=	777	..
663	=		=	733	.
682	=	837	=	727	.
684	=	843	=	757	
688 (P.C.)	=	819	=	721	..
694	=	860	=	773	..
699	=	876	=	770	..
703	=	864	=	838	.
705	=	867	=	706	..
708 (P.C.)	=	840	=	..	..
711	=	..	=	831	..
716 (P.C)	=	829	=	..	..
722 (P.C.)	=	835	=	.	..
725	=	871	=	760	..
730	=	..	=	840 (2)	.
732	=	.	=	790	
735	=	.	=	796	
736	=		=		
738	=		=	798	
740	=	..	=	797	
741	=	..	=		
744	=	.	=		.
745	=	.	=		.
747	=	.	=	.	..
748	=	..	=		..
751	=	..	=	.	..
760 (P.C.)	=	855	=	783	..
764	=	..	=	799	.
767	=	.	=	837	..
768	=	..	=	801	
770	=	.	=	..	..
773	=	..	=	..	..
774	=	..	=	803	.
776	=	..	=	..	..
779	=	..	=	..	..
782	=	..	=	..	.
784	=		=	830	..
785	=	..	=	..	..
789	=		=	819	..
800	=	866	=	842	..
802	=	..	=	829	.
804	=	..	=	..	
806	=	..	=	..	.
809	=	..	=	..	..
813	=	..	=	..	..
815	=	..	=	..	..
817	=	..	=	..	..
819	=	..	=	..	..
82[illegible]	=	..	=	..	..

(1949) 2 M.L.J.		62 L.W.		(1949) M.W.N.	I.L.R. 1949 Mad.
821	=	..	=	..	..
822	=	..	=	..	..
823	=	..	=	764	..
829	=	..	=	792	..
833	=	..	=	..	..
836	=	..	=	..	..
839	=	..	=	787	..

1949 M.W.N		M L J		
1 (P.C)	=	(1949)	1	105
2	=	,,	1	110
4 (P C)	=	(1948)	2	468
7	=	(1949)	1	648
8	=	,,	1	143
9	=	,,	1	90
12	=	,,	1	145
14	=	(1948)	2	630
15	=	(1949)	1	63
16	=	(1948)	2	646
17	=	(1949)	1	152
27	=	(1948)	2	653
29	=	(1949)	1	144
30	=	,,	1	72
31	=	(1948)	2	628
33	=	(1949)	1	108
34	=	,,	1	116
36	=	,,	1	66
38	=	,,	1	56
42	=	(1948)	2	641
43	=	(1949)	1	74
45	=	,,	1	67
47	=	,,	1	71
48	=	,,	1	62
49	=	(1948)	2	648
50	=	,,	2	428
52	=	(1949)	1	76
53	=	,,	1	50
54	=	(1948)	2	574
56	=	(1949)	1	269
65	=	(1948)	2	473
67 (1)	=	(1949)	1	107
67 (2)	=	,,	1	147
69	=	,,	1	171
70	=	,,	1	64
71	=	(1948)	2	644
72	=	(1949)	1	119
81	=	(1948)	2	463
83 (P C.)	=	(1949)	1	128
88	=	,,	1	195
89	=	,,	1	199
90	=	,,	1	191
92	=	,,	1	183
93 (F.B)	=	,,	1	258
103	=	(1948)	2	649
105	=	(1949)	1	78
115	=	(1948)	2	642
116	=	(1949)	1	200
122	=	,,	1	181
124 (1)	=	,,	1	184
124 (2)	=	,,	1	196
125	=	,,	1	233
127	=	,,	1	187
128	=	(1948)	2	525
131	=	(1949)	1	283
133	=	,,	1	297
135	=	,,	1	280
136	=	,,	1	295
138	=	,,	1	382
139	=	,,	1	290
140	=	,,	1	248

1949 M W.N.		M.L.J.		
141	=	(1949)	1	185
143	=	,,	1	231
145	=	,,	1	179
146	=	,,	1	330
147	=	,,	1	189
149 (1)	=	,,	1	194
149 (2)	=	,,	1	389
153	=	,,	1	314
154	=	,,	1	229
155	=	,,	1	209
158	=	,,	1	240
161	=	,,	1	650
165	=	(1948)	2	202
168	=	(1949)	1	623
171 (1)	=	,,	1	61
171 (2)	=	(1948)	2	645
172 (1)	=	,,	1	652
172 (2)	=	(1949)	1	182
173	=	,,	1	395
175	=	,,	1	438
182	=	,,	1	387
184	=	,,	1	646
186	=	,,	1	282
187	=	,,	1	228
188	=	,,	[illegible]	412
192	=	,,	1	373
195	=	,,	1	436
197	=	,,	1	426
199	=	,,	1	320
207	=	,,	1	455
208	=	,,	1	475
211	=	,,	1	471
213	=	,,	1	425
214	=	,,	1	467
215	=	,,	1	417
217	=	,,	1	422
219	=	,,	1	432
220	=	,,	1	452
223	=	,,	1	448
224	=	,,	1	462
227	=	,,	1	459
229	=	,,	1	530
235	=	,,	1	518
236	=	,,	1	522
237 (F.B)	=	,,	1	488
250	=	,,	1	605
252	=	,,	1	428
255	=	,,	1	384
257	=	,,	1	376
259	=	,,	1	393
260	=	,,	1	398
261	=	,,	1	419
262	=	,,	1	379
265 (F B)	=	,,	1	593
272	=	,,	1	552
274	=	,,	1	528
276	=	,,	1	527
277	=	,,	1	581
278	=	,,	1	610
280	=	,,	2	16
281	=	,,	1	386
283	=	,,	2	15

1949 M.W N.		M.L.J.		
284	=	(1949)	1	198
285 (1)	=	"	1	513
285 (2)	=	"	1	579
287	=	"	1	538
289	=	"	1	479
290	=	"	1	420
292	=	"	1	486
293	=	"	1	331
294	=	"	1	318
295	=	"	1	245
298	=	"	1	456
300	=	"	1	316
302	=	"	1	468
304	=	"	1	523
308	=	"	1	616
311	=	(1948)	2	536
316 (P C)	=	..		
320 (P C)	=	.		.
323	=	(1949)	1	445
324	=	(1948)	2	625
325	=	(1949)	1	112
327	=	"	1	447
329	=	(1948)	2	559
336	=	(1949)	1	620
338 (1)	=	"	2	12
338 (2)	=	"	1	542
341	=	"	1	602
344	=	"	1	586
347	=	"	1	660
349	=	"	2	44
365 (P C)	=	"	2	35
373	=	(1948)	2	528
381	=	(1949)	1	615
382	=	"	1	465
383	=	"	1	622
384	=	"	1	557
385 (P C)	=	"	2	6
390 (P.C)	=		.	
396	=	"	1	656
397	=	"	1	558
398 (P.C.)	=	"	2	119
402 (P.C.)	=	"	1	505
405 (P.C.)	=	"	2	124
407 (P.C.)	=	"	1	161
416 (P.C.)	=	"	1	222
420 (P.C.)	=	"	2	488
424	=	"	2	88
434	=	"	1	589
435	=	"	1	608
437 (P.C.)	=	"	2	461
442 (P.C)	=	"		.
444 (P.C.)	=	"	2	194
448	=	"	1	554
450	=	"	1	600
451	=	"	2	110
452	=	"	2	152
453	=	"	2	114
455	=	"	2	84
458	=	"	2	111
460	=	"	2	128
462	=	"	2	126
463	=	"	2	156
465	=	"	2	104
466	=	"	2	153
469	=	"	2	117
470	=	"	2	74
471	=	"	2	106
472	=	"	2	143
473	=	"	2	65
475	=	"	1	591
476 (F.B.)	=	"	2	171

1949 M.W.N.		M.L.J.		
496	=	(1949)	2	75
499	=	"	2	305
504 (F.B.)	=	"	2	235
506	=	"	2	107
509	=	"	2	61
512	=	"	2	451
514	=	"	2	385
516	=	"	2	255
518	=	"	2	337
520	=	"	2	132
525	=	"	2	249
527 (F.B)	=	"	2	217
543	=	"	2	339
545	=	"	2	335
546	=	"	2	263
547	=	"	1	583
549	=	"	2	310
571	=	"	2	405
572	=	"	2	297
573	=	"	2	342
574	=	"	2	247
575	=	"	2	245
576	=	"	2	145
577	=	"	2	419
579 (1)	=	"	2	303
579 (2)	=	"	2	246
580	=	"	2	295
581	=	"	2	390
585	=	"	2	396
587	=	"	2	382
590	=	"	1	556
591	=	"	1	508
593	=	"	2	239
596	=	"	1	449
598	=	"	2	13
601	=	"	2	406
605	=	"	2	394
607	=	"	2	459
609	=	"	1	515
611	=	"	1	537
612	=	"	2	199
627 (P.C.)	=	"	2	80
631	=	"	2	296
632	=	"	2	410
634	=	"	2	544
642	=	"	2	428
649	=	"	2	443
651	=	"	2	421
652	=	"	2	446
653	=	"	2	422
654	=	"	2	466
657	=	"	2	400
658	=	"	2	403
660	=	"	2	454
663	=	"	2	568
665	=	"	2	556
666	=	"	2	534
667	=	"	2	520
671	=	"	2	536
673	=	"	2	457
674	=	"	2	539
678	=	"	2	517
680	=	"	2	543
681	=	"	2	553
682	=	"	2	555
683 (P.C)	=	"	2	493
685	=	"	2	639
686	=	"	2	599
688	=	"	2	552
689	=	"	2	604
690	=	"	2	641

1949 M.W.N			M.L.J.	
693	=	(1949)	2	258
698	=	"	2	138
699	=	"	2	601
700	=	"	2	147
703	=	"	2	159
705	=	"	2	593
706	=	"	2	705
709	=	"	2	594
711	=	"	2	647
719	=	"	2	633
721 (P C.)	=	"	2	688
727	=	"	2	682
729 (1)	=	"	2	655
729 (2)	=	"	2	606
732	=	"	2	402
733	=	"	2	663
751	=	"	2	612
755 (P.C)	=	"	2	447
756	=	"	2	389
757	=	"	2	684
760	=	"	2	725
764	=	"	2	823
770	=	"	2	699
773	=	"	2	694
777 (P C.)	=	"	2	657
783 (P.C.)	=	"	2	760
787	=	"	2	839

1949 M W.N.			M.L.J.	
790	=	(1949)	2	732
792	=	"	2	829
796	=	"	2	735
797	=	"	2	740
798	=	"	2	738
799	=	"	2	764
801	=	"	2	768
803	=	"	2	774
805 (P.C.)	=	"	2	495
808	=	"	2	524
809	=	"	2	632
810	=	"	2	566
813	=	"	2	645
814	=	"	2	423
816	=	"	2	597
817	=	"	2	629
819	=	"	2	789
829	=	"	2	802
830	=	"	2	784
831	=	"	2	711
834	=	"	2	300
837	=	"	2	767
838	=	"	2	703
840 (1)	=	"	2	558
840 (2)	=	"	2	730
842	=	"	2	800
844	=	"	2	559

62 LAW WEEKLY			M L.J	
1 (P C)			.	..
11 (P.C)	=	(1949)	1	94
14 (P C)	=	"	1	97
17 (P C)	=	"	1	101
21 (P C)	=		.	
25 (P C)	=	"	1	128
30 (P C)	=	"	1	165
35 (P.C)	=	"	1	172
40 (P C)	=	"	1	134
41 (P.C)	=	"	1	135
48 (P C)	=	"	1	149
51 (F.B.)	=	"	1	1
99	=	(1948)	2	641
100	=	(1949)	1	112
103	=	"	1	78
115	=	"	1	50
116	=	"	1	61
117	=	"	1	63
118	=	"	1	147
119	=	"	1	64
120	=	"	1	76
122	=	"	1	66
124	=	"	1	72
125	=	"	1	62
126	=	"	1	56
131	=	"	1	119
140	=	"	1	283
143	=	"	1	191
146	=	"	1	107
147	=	"	1	183
148 (1)	=	"	1	182
148 (2)	=	"	1	189
150	=	"	1	187
151	=	"	1	240
156	=	"	1	116
158	=	"	1	90
161	=	"	1	110
163	=	"	1	248
164	=	"	1	228
165	=	"	1	195
167	=	"	1	200
173	=	"	1	298

62 LAW WEEKLY			M L J.	
189	=	(1949)	1	233
191	=	"	1	280
192	=	"	1	231
195	=	"	1	245
198	=	"	1	282
199	=	"	1	330
200	=	"	1	379
202	=	"	1	291
204	=	"	1	290
205	=	"	1	297
206	=	"	1	331
208	=	"	1	316
210 (F.B.)	=	"	1	333
212	=	"	1	249
220	=	"	1	318
221	=	"	1	295
223	=	"	1	373
226	=	"	1	412
231	=	"	1	382
233	=	"	1	400
245	=	"	1	419
246	=	"	1	395
249	=	"	1	456
251	=	"	1	425
252	=	"	1	420
253	=	"	1	428
256	=	"	1	434
258	=	"	1	387
260	=	"	1	389
264	=	"	1	320
273	=	"	1	480
276	=	"	1	462
279	=	"	1	520
281	=	"	1	467
282	=	"	1	479
283	=	"	1	455
285	=	"	1	471
287	=	"	1	445
288	=	"	1	518
290	=	"	1	503
291	=	"	1	511
293 (F. B.)	=	"	1	488

62 LAW WEEKLY		M.L.J.		
307	=	(1949)	1	528
309	=	,,	1	459
311	=	,,	1	447
313	=	,,	1	515
315	=	,,	1	486
316	=	,,	1	514
317	=	,,	1	468
320	=	,,	1	545
322	=	,,	1	530
328	=	,,	1	523
332	=	,,	1	547
335	=	,,	1	550
336	=	,,	1	537
337 (F.B.)	=	,,	1	593
341	=	,,	1	662
360	=	,,	1	542
363	=	,,	1	581
365	=	,,	1	616
368	=	,,	1	656
370	=	,,	1	508
372	=	,,	1	538
374 (P C)	=	,,	1	505
377	=	,,	1	557
378	=	,,	1	558
379	=	,,	1	556
380	=	,,	1	540
381	=	,,	1	552
383	=	,,	1	583
385	=	,,	1	513
386	=	,,	1	522
387	=	,,	1	602
391	=	,,	1	660
393	=	,,	1	527
394	=	,,	1	554
395 (1)	=	,,	1	536
395 (2)	=	,,	1	623
398	=	,,	1	600
400	=	,,	1	610
402	=	,,	1	608
403 (F C)	=	,,	1	568
413	=	,,	1	648
415	=	,,	1	627
417 (F C)	=	,,	1	628
434	=	,,	1	586
437 (P C)	=	,,	2	124
439 (P C)	=	,,	2	80
444 (P C)	=	,,	2	161
454 (P C)	=	.		.
460	=	,,	2	117
461	=	,,	2	84
464	=	,,	2	74
465	=	,,	2	70
469	=	,,	2	75
473	=	,,	2	61
476	=	,,	2	114
479	=	,,	2	132
484	=	,,	2	66
488	=	,,	2	305
493	=	,,	2	143
495	=	,,	2	268
508 (F B)	=	,,	2	171
530 (P C)	=	,,	2	461
536 (F B.)	=	,,	2	235
539 (F B)	=	,,	2	217
556	=	,,	2	147
560 (P C.)	=	,,	2	447
561 (P C)	=	,,	2	449
563 (P C)	=	,,	2	35
572	=	,,	2	342
573	=	,,	2	337
576	=	,,	2	239

62 LAW WEEKLY		M.L.J.		
579 (P.C.)	=	(1949)	2	1
584	=	,,	2	126
585	=	,,	2	382
588	=	,,	2	300
591	=	,,	2	199
609	=	,,	2	156
611	=	,,	2	263
612	=	,,	2	297
613	=	,,	2	296
614	=	,,	2	428
622	=	,,	2	413
627	=	,,	2	396
630	=	,,	2	390
634	=	,,	2	459
635	=	,,	2	88
647	=	,,	2	422
648	=	,,	2	425
650	=	,,	2	405
651	=	,,	2	388
652	=	,,	2	389
653	=	,,	2	423
655 (1)	=	,,	2	399
655 (2)	=	,,	2	438
660	=	,,	2	454
663	=	,,	2	400
664 (P C)	=	,,	2	194
669	=	,,	2	434
672 (P C)	=	,,	2	488
677 (P.C)	=	,,	2	461
681 (P C)	=	,,	2	484
684 (P C)	=	,,	2	500
700 (P C)	=	,,	2	469
707 (P C)	=	,,	2	30
712	=	,,	2	443
714	=	,,	2	446
715	=	,,	2	466
719 (P C.)		,,		..
722	=	,,	2	568
724 (P C)	=	,,	2	495
728 (P.C)	=	,,	2	571
731	=	,,	2	536
733 (P.C)	=	,,	2	574
741	=	,,	2	406
745	=	,,	2	520
749	=	,,	2	556
750	=	,,	2	555
751	=	,,	2	553
752	=	,,	2	582
759	=	,,	2	524
760 (1)	=	,,	2	559
760 (2)	=	,,	2	557
761	=	,,	2	558
762	=	,,	2	539
766	=	,,	2	534
768	=	,,	2	451
770 (P.C)	=	,,	2	493
773	=	,,	2	525
779	=	,,	2	593
781	=	,,	2	606
783	=	,,	2	591
784	=	,,	2	604
786 (P C.)	=	,,	2	657
792	=	,,	2	601
793	=	,,	2	635
794	=	,,	2	602
795	=	,,	2	645
797	=	,,	2	637
799	=	,,	2	599
801	=	,,	2	629
803	=	,,	2	552
804	=	,,	2	617
810	=	,,	2	639

62 Law Weekly		M.L J		
812	=	(1949)	2	633
813	=	,,	2	632
814	=	,,	2	597
816	=	,,	2	641
819 (P.C)	=	,,	2	688
826	=	,,	2	594
829 (P C.)	=	,,	2	716
835 (P.C)	=	,,	2	722
837	=	,,	2	632
840 (P.C)	=	,,	2	708
843	=	,,	2	684
847	=	,,	2	647
855 (P.C.)	=	,,	2	760
860	=	,,	2	694

62 Law Weekly		M.L J.		
864	=	(1949)	2	703
866	=		.	.
867	=	,,	2	705
871	=	,,	2	725
876	=	,,	2	699
879 (P C)	=	(1948)	2	52
881 (P.C.)	=	,,	2	25
884	=	,,	2	331
905	=	,,	2	223
912 (P.C)	=	,,	2	546
917 (F B)	=	(1949)	1	258
927	=	(1948)	2	653
929	=	,,	2	656
940	=	,,	2	581

L.R (1949) Mad		M L J.		
1 (P.C)	=	(1948)	2	52
8	=	,,	1	157
16	=	,,	1	110
29	=	,,	1	173
41	=	,,	1	303
58	=	,,	1	301
64	=	,,	1	223
72 (P.C)	=		..	.
82 (F.B)	=	,,	1	333
88	=	,,	1	327
94	=	,,	1	315
99	=	,,	1	407
106	=	,,	1	310
111	=	,,	2	317
121	=	,,	2	161
130	=	,,	2	295
137	=	,,	1	341
141 (P.C.)	=	,,	2	22
149 (F.B)	=	,,	2	165
171	=	,,	1	366
194	=	,,	1	322
206	=	,,	1	404
211 (P C)	=	,,	2	25
220 (F B)	=	,,	2	138
229	=	,,	2	331
276	=	,,	2	293
293	=	,,	1	396
300 (P.C.)	=	,,	2	260
316	=	,,	2	188
319	=	,,	[illegible]	191
323	=	,,	2	194
333	=	,,	2	150
343	=	,,	2	277
354	=	,,	2	115
357	=	,,	2	90
371	=	,,	2	649
377 (F B.)	=	(1949)	1	1
487 (P.C)	=	,,	1	97
497	=	(1948)	2	159

I L R (1949) Mad.		M.L.J		
504	=	(1948)	2	215
515	=	,,	2	76
519	=	,,	2	496
529 (P C)	=	,,	2	546
544	=	,,	2	418
550	=	,,	2	442
559	=	,,	2	525
566	=	,,	2	521
569	=	,,	2	515
578	=	,,	2	508
584	=	,,	2	511
589	=	,,	2	372
593	=	,,	2	416
598	=	,,	2	126
601	=	,,	2	358
604 (P C.)	=	,,	2	468
613	=	,,	2	519
617	=	,,	2	439
624	=	,,	2	436
631	=	,,	2	536
644	=	,,	2	430
657	=	,,	2	559
675 (P C)	=	(1949)	1	128
693	=	(1948)	2	656
720	=	,,	2	528
739 (F B)	=	(1949)	1	258
763	=	,,	1	245
770	=	(1948)	2	618
783	=	,,	2	581
804	=	(1949)	1	147
808	=	,,	1	662
840	=	(1948)	2	630
843	=	(1949)	1	387
849	=	,,	1	400
877	=	,,	1	298
904	=	,,	1	249
924	=	,,	1	119
946	=	(1948)	2	653